



CPTWG MEETING #125

October 26, 2011

Legislative/Litigation Update

Jim Burger

jburger@dowlohn.com

Litigation

- *EMI v. MP3Tunes*
- *MPAA v. Hotfile Update*
- *John Wiley & Sons, Inc. v. Kirtsaeng*
- *U.S. v. Beshara, et. al.*
- *Viacom v. YouTube Update*

EMI v. MP3Tunes (SD NY)

- ***Facts:*** Record labels filed suit against MP3Tunes in 2007 alleging that MP3Tunes' cloud-based storage system constitutes copyright infringement
- ***Holding:*** Mixed decision
 - MP3Tunes, as a “digital locker,” capable of being protected by DMCA safe harbors, BUT
 - MP3Tunes secondarily liable for failure to remove files had specific knowledge infringing
 - Deduplication permitted.
- ***Reconsideration:*** Yesterday Judge reaffirm his earlier decision

MPAA v. Hotfile (SD FL)

- ***Facts:*** MPAA filed suit earlier this year against Hotfile, a “cyberlocker” service, alleging both direct and secondary copyright infringement
- ***Holding:***
 - Dismissed claim Hotfile committed direct copyright infringement
 - Secondary infringement claims will move forward
- ***Hotfile Counterclaim:*** filed against Warner Brothers alleging DMA abuse and fraud

John Wiley & Sons, Inc. v. Kirtsaeng (2d Cir)

Facts:

- Wiley, textbook publisher, designated certain editions of books, printed in Asia, as for sale only outside of U.S.
- Kirtsaeng's friends and family purchased copies of foreign editions in Thailand shipped them to him in the U.S., where he sold them on eBay. Wiley brought suit alleging copyright infringement. Kirtsaeng cited first sale doctrine in defense.

Holding:

- Trial court: jury found Kirtsaeng liable, judge disallowed first sale defense
- Second Circuit: first sale doctrine applies only to works manufactured in the U.S.

U.S. v. Beshara, et al (ED VA)

- **Ninjavideo.net provided visitors with links to copyrighted movies and TV shows.**
 - **Visitors could download most content free, but users could obtain “premium membership” for a “donation” of at least \$25, allowed users to gain access to additional copyrighted material**
- **June 2010: Domain seized as part of ICE’s “Operation in Our Sites”**
- **September 2011: five Ninjavideo site administrators charged with criminal copyright infringement and conspiracy**
 - **Indictment alleged administrators earned more than \$500,000 over the course of 3 years.**
 - **Several of the five indicted individuals already pled guilty**

Viacom v. YouTube (2d Cir)

- Oral arguments held October 18 before Second Circuit Court of Appeals three-judge panel .
- *Press reports:* that panel
 - appeared skeptical of sending case back to be heard by a jury
 - appeared receptive to YouTube's position it was not YouTube's job to monitor for infringing content
 - did express concerns about YouTube's willful blindness, questioning how company could place contextual ads near infringing clips and yet not recognize the clips were infringing

Legislative Developments

- **PROTECT IP Act Update**
 - Still “held” in the Senate
 - Long-delayed House bill coming soon?



International

- ❑ **ACTA Negotiations Finalized**
 - Partial signing in Tokyo on October 1
- ❑ **Negotiation of TPP Continues**
 - Negotiations expected to be finalized in November
- ❑ **WIPO Broadcasting Treaty Update**
 - Meeting scheduled for November
- ❑ **UK – TVCatchup Ruling**
 - UK High Court issues provisional ruling in case involving digital retransmission of UK broadcasts
 - Questions regarding broadcast retransmission and temporary copies referred to European Court of Justice
- Next



Thank You
Jim Burger