

Intellectual Property Developments in 2006

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The following summary reviews some recent developments of interest in intellectual property law and points to resources for further study of these cases and issues. I hope that readers will find the material interesting and useful for possible application in courses, lectures and articles.

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1 Law Enforcement, Litigation

1.1 Copyright

1.1.1 Plagiarism

In early 2006, a 19-year-old sophomore from Harvard University, Kaavya Viswanathan, was in the news when her first novel, *How Opal Mehta Got Kissed, Got Wild, and Got a Life*, was withdrawn from bookstores by the publisher, Little, Brown after she admitted that she had unconsciously and unintentionally plagiarized material from novels by Megan McCafferty.[2]

In Vermont in September, 29-year-old political writer Christopher Stewart had to resign from the campaign team of Martha Rainville for using text from other politicians on behalf of his candidate without quotation marks, without attribution and without permission. He eventually called local columnist Peter Freyne, who reported that he said, “I am deeply sorry and embarrassed for my actions. . . . I, and I alone, take full responsibility for any plagiarized material used by the campaign. I was stupid and I was wrong.” In that case, plagiarism cost the enthusiast his job.[3]

1.1.2 Software

In January, 10 British ISPs were ordered by the High Court to divulge the identities of 150 suspects in a massive investigation of software piracy.[4]

In August, one of the millionaire owners of the BUYUSA.COM software-piracy Web site, Danner Ferrer, was sentenced to six years in federal prison as well as being forced to pay \$4.1M in restitution.[5] In September, his fellow criminal Nathan L. Peterson was sentenced to seven years in prison and \$5.4M in restitution.[6]

In September, Joshua Abell was sentenced to 15 months in federal prison, 400 hours of community service and two years of supervised release after pleading guilty to copyright infringement and associated conspiracy. He was one of 35 defendants caught and convicted as a result of Operation Fastlink, an international and nation-wide law-enforcement attack on online software, music and video piracy gangs. The 175 members in Abell’s gang specialized in cracking digital-rights protection measures and then distributing the content to the public via peer-to-peer (P2P) networks and Internet Relay Chat channels.[7]

1.1.3 Music

In January, EDUPAGE reported on trends in legal music sales and in piracy: “Sales of music tracks online surged over the holidays, indicating what might be new baseline levels for the market. During the Christmas week, 9.5 million tracks were downloaded from legal online music services, a new record for single-week sales. The following week, that number jumped to nearly

² Newshour with Jim Lehrer (2006) transcript. Publisher Pulls Harvard Student’s Novel Over Alleged Plagiarism. http://www.pbs.org/newshour/bb/entertainment/jan-june06/viswanathan_05-02.html

³ Freyne, P. (2006). Vermont Politics, Plagiarism and . . . Pornography? <http://www.sevendaysvt.com/nc/columns/inside-track-politics/2006/vermonts-pombo-connection-copy-1.html>

⁴ EDUPAGE Digest 2006-05; Anonymous (2006). UK court to unmask ‘file-sharers’. <http://news.bbc.co.uk/2/hi/technology/4663388.stm>

⁵ DOJ Cybercrime Section Press Release (2006). <http://www.cybercrime.gov/ferrerSent.htm>

⁶ DOJ Cybercrime Section Press Release (2006). <http://www.cybercrime.gov/petersonSent.htm>

⁷ <http://www.cybercrime.gov/abellSent.htm>

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20 million tracks, triple the number sold during the same week a year earlier. Analysts attribute much of the gain to the ballooning number of portable MP3 players in the hands of consumers and to strong sales of gift cards. For the year, legal downloads rose 147 percent to 142.6 million. Although a drop always follows the holiday spike, analysts said the holiday numbers could indicate a market that will grow to perhaps 750 million or 1 billion tracks in 2006. Such numbers still pale compared to downloads on P2P services, which are estimated at 250 million per week, but experts say the upswing in legal downloads signals a changing tide for online music.”[8]

Students at UMass Amherst demanded that i2hub, a bankrupt P2P music-piracy system, pay their \$157,500 fines from the Recording Industry Association of America (RIAA) because they were tricked into believing that their downloads were authorized by the University. Both the i2hub attorney and the Electronic Frontier Foundation derided the legal basis for the claim, arguing that the students were blaming the provider of a legally-neutral tool for their own illegal actions.[9]

In August, Robert Thomas of Milwaukee, Wisconsin and Jared Chase Bowser of Jacksonville, Florida pleaded guilty to federal copyright law violations for having posted songs from a pirated copy (obtained from a music reviewer) of “Jacksonville City Nights” by Ryan Adams & the Cardinals on their Web site. Sentencing was scheduled for Dec 8, 2006 and could involve up to a year in prison and fines of up to \$100,000.[10]

1.1.4 Movies, video, TV

By August, the FBI’s Operation Copycat had resulted in 32 convictions for IP piracy, including capture and conviction of film critics who systematically sold review copies of DVDs to movie pirates for illegal distribution.[11]

1.1.5 Books, eBooks

In April, a press release from Pearson Education, Inc., and John Wiley & Sons, Inc., “two leading educational publishers, ... announced they have settled pending litigations against individuals engaged in the unauthorized Internet sale of counterfeit copies of their textbook solutions manuals. The publishers’ complaints ... alleged that the defendants, operating either stand-alone websites using the names “Homework Help Site” and “Alternative Book Store” or selling on eBay, were responsible for the unauthorized reproduction, publication and dissemination of counterfeit instructors’ solutions manuals for over 150 textbooks. Instructors’ solutions manuals are provided only to instructors as teaching aids in their courses. The defendants’ attempted widespread distribution of these materials threatened to impair the integrity of the textbooks.”[12]

⁸ EDUPAGE Digest 2006-02; Finfacts Team (2006). Surge in digital music sales in US fails to offset fall in album sales. http://www.finfacts.com/irelandbusinessnews/publish/article_10004404.shtml

⁹ EDUPAGE Digest 2006-03; Bray, H. (2006). UMass users ask file-swap service founder to pay up: At least 42 students facing pirating suits.

http://www.boston.com/business/technology/articles/2006/01/19/umass_users_ask_file_swap_service_founder_to_pay_up/

¹⁰ DOJ Cybercrime Section Press Release (2006). <http://www.cybercrime.gov/thomasPlea.htm>

¹¹ DOJ Cybercrime Section Press Release (2006). <http://www.cybercrime.gov/jacobsonplea.htm>

¹² Pearson Education Press Release (2006). Publishers settle unauthorized copying and selling lawsuits.

http://www.pearsoned.com/pr_2006/041806.htm

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1.1.6 Games

Nicholas Hunter, a 40 year-old man from Bristol, England, was jailed after pleading guilty to 17 counts of violations under the Trade Marks Act for making and selling hundreds of titles of video games and some business software with a street value of over £58,000 (US\$110,000). The BBC reported that investigators “discovered copying equipment capable of producing 16 fake CDs every seven minutes, packaging materials and hundreds of illegally-copied games.”[13]

1.2 Trademarks & counterfeit goods

A federal crime sweep resulted in conviction of four men involved in extensive counterfeiting operations in Washington, DC including movies and music as well as clothing and fashion accessories.[14,15]

1.3 Trade secrets and industrial espionage

Michael and Ruth Haephrati were extradited from Britain for trial in Israel on January 31. They were accused of installing a Trojan horse program that activated a keylogger with remote-reporting capabilities to send trade secrets and other confidential information over the Internet for industrial espionage purposes. The case involves accusations against several of Israel’s most prominent high-tech companies and newspapers.[16] In March, the couple pleaded guilty to the charges and were jailed for four and two years, respectively.[17,18]

In San Diego Federal Court, Benjamin Munoz III was sentenced in October to six months in federal prison for stealing trade secrets (details of a bid for a new contract) from his previous employer on behalf of his current employer.[19]

2 Jurisprudence

2.1 Copyright infringement, piracy

2.1.1 Text, Fair Use Doctrine

International Stamp Art v. US Postal Serv.: Summary judgment in favor of defendant, regarding the assertion of fair use in response to plaintiff’s allegations of trademark infringement, is affirmed where there is no evidence supporting the allegation that defendant, in producing cards depicting images of its stamps, intended to benefit from the good will associated with plaintiff’s perforated border trademark.[20]

Ross, Brovins & Oehmke, P.C. v. Lexis Nexis Group: Plaintiff lost claim that defendant’s form templates were infringement of plaintiff’s copyright. Court ruled that “1) while plaintiff had a

¹³ Anonymous (2006). Games pirate jailed for 18 months.

http://news.bbc.co.uk/2/hi/uk_news/england/bristol/somerset/4795633.stm?ls

¹⁴ DOJ Cybercrime Section Press Release (2006). <http://www.cybercrime.gov/zhuangPlea.htm>

¹⁵ DOJ Cybercrime Section Press Release (2006). <http://www.cybercrime.gov/yuanSent.htm>

¹⁶ DHS IAIP Daily 2006-02-02; Izenberg, D. (2006). Trojan horse masterminds being extradited to Israel.

<http://www.jpost.com/servlet/Satellite?cid=1136361099387&pagename=Jpost%2FJPArticle%2FShowFull>

¹⁷ Leyden, J. (2006). Spyware-for-hire couple plead guilty: Israeli prison looms for Haephratis.

http://www.theregister.co.uk/2006/03/15/spyware_trojan_guilty_plea/

¹⁸ Anonymous (2006). Industrial espionage couple gets jail time. http://www.newsfactor.com/news/Industrial-Espionage-Couple-Jailed/story.xhtml?story_id=13000CNVSOHU

¹⁹ DOJ Cybercrime Section Press Release (2006). <http://www.cybercrime.gov/munozSent.htm>

²⁰ U.S. 11th Circuit Court of Appeals (07/18/06 - No. 05-13492) <http://caselaw.lp.findlaw.com/data2/circs/11th/0513492p.pdf>

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valid copyright in the selection and organization of forms in its compilation, the copyrighted work was not substantially similar to the allegedly infringing product; and 2) plaintiff's selection and placement of input items for its form templates involves too little creativity to warrant copyright protection.[21]

Bill Graham Archives, LLC. v. Dorling Kindersley Ltd.: Defendants placed images along a timeline; plaintiff charged copyright infringement. Appeals court ruled in favor of defendant, writing that "1) as the publication is biographical in nature, the district court erred by failing to examine defendants' justification for its use of copyrighted images in it; and 2) merely placing the images along a timeline in the publication is not a transformative use." [22]

2.1.2 Creative Commons licenses

In March 2006, a Dutch court upheld the validity of a Creative Commons license and ruled that a commercial gossip magazine should have obtained the permission of television personality Adam Curry before publishing pictures he had posted on a photo-sharing Web site. The magazine's attorneys argued that the limitations on use of the photos were not clearly stated; the Court rejected this defense, stating that the magazine should have investigated the terms of the license before using the material. The Creative Commons license [23] is similar to the GNU General Public License [24] and allows authors to grant general permission to their materials for non-commercial use while restricting use for commercial applications. [25]

2.1.3 Software

US v. Vampire Nation: "Defendant's conviction and sentence for mail fraud, criminal copyright infringement, and related charges stemming from his sales of pirated software is affirmed where: 1) there was no error in the district court's actions before, during, or after defendant's trial or at his sentencing; 2) the district court had statutory authority to issue an in personam forfeiture judgment; and 3) was not obligated to provide advance notice of its intent to vary from defendant's guidelines sentencing range." [26]

Action Tapes, Inc. v. Mattson: "Summary judgment for defendant in a copyright infringement action, alleging that defendant repeatedly violated the Computer Software Rental Amendments Act by renting plaintiff's memory cards for computer-run sewing machines to customers without permission, is affirmed on the ground that plaintiff failed to prove the Act applied for registration of the computer program copyrights before commencing the infringement suit." [27]

2.1.4 Music

The British High Court ruled in favor of the British Phonographic Industry in fining several defendants thousands of pounds in penalties for having posted over 9,000 songs illegally on the

²¹ U.S. 6th Circuit Court of Appeals (09/15/06 - No. 05-1513) <http://caselaw.lp.findlaw.com/data2/circs/6th/051513p.pdf>

²² U.S. 2nd Circuit Court of Appeals (05/09/06 - No. 05-2514) <http://caselaw.lp.findlaw.com/data2/circs/2nd/052514p.pdf>

²³ <http://creativecommons.org/>

²⁴ <http://www.gnu.org/copyleft/gpl.html>

²⁵ OUTLAW.COM (2006). Dutch court upholds Creative Commons licence, http://www.theregister.com/2006/03/22/creative_commons_dutch_court_ruling/

²⁶ U.S. 3rd Circuit Court of Appeals (06/20/06 - No. 05-1715) <http://caselaw.lp.findlaw.com/data2/circs/3rd/051715p.pdf>

²⁷ U.S. 8th Circuit Court of Appeals (08/30/06 - No. 05-3309, 05-3520) <http://caselaw.lp.findlaw.com/data2/circs/8th/053309p.pdf>

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Internet. The ruling was hailed by the recording industry as a “massive step forward” in the fight against illegal file exchanges.[28]

WB Music Corp. v. RTV Communication Group, Inc.: “Judgment in favor of plaintiffs, awarding statutory damages for copyright infringement computed based on “compilations” in the form of compact discs, is vacated as a compilation created without authorization from the owners of the separate, infringed copyrights in its constituent parts is not a compilation contemplated by the last sentence of 17 U.S.C. section 504(c)(1).”[29,30]

2.2 Patents

The NTP lawsuit against BlackBerry maker Research in Motion was settled in March for a one-time payment of \$1612.5M. The patent dispute had threatened to shut down BlackBerry service.[31]

Test.com received a patent in 2003 for broad concepts of online testing; the company threatened colleges and universities with lawsuits for patent infringement. However, in April 2006, the Electronic Frontier Foundation demanded that the US Patent and Trademark Office rescind the patent as being overbroad and chilling efforts at distance learning.[32]

Blackboard, the owner of WebCT and other online-learning software platforms, registered a patent on fundamental aspects of online learning and immediately sued Desire2Learn for patent infringement. Academics rose up in rage and protested that many of the patented ideas came from open-source, collaborative contributions that were part of prior art and should therefore never have been accepted by the US Patent and Trademark Office in the first place.[33]

2.3 Trademarks

Australian Gold, Inc. v. Hatfield: “Jury award, injunctive relief, and award of sanctions for plaintiffs, manufacturers and distributors of indoor tanning lotions, on claims of trademark infringement, false advertising, and tortious interference with contract is affirmed in a case involving defendants’ unauthorized sales of plaintiffs’ products via multiple Internet Web sites.”[34]

Sharp Kabushiki Kaisha v. Thinksharp, Inc.: A decision of the US Patent and Trademark Office, Trademark Trial and Appeal Board, dismissing Sharp’s opposition to the registration of the mark “THINKSHARP” is affirmed where the Board properly held that a registrant’s choice to contest only a word mark opposition was not barred by a default judgment in a word-and-design opposition.[35]

²⁸ Anonymous (2006). Court rules against song-swappers: The UK music industry has won a landmark court case in its fight against illegal online music sharing. <http://news.bbc.co.uk/2/hi/entertainment/4653662.stm>

²⁹ U.S. 2nd Circuit Court of Appeals (04/19/06 - No. 04-3890) <http://caselaw.lp.findlaw.com/data2/circs/2nd/043890p.pdf>

³⁰ 17 USC §504 http://www4.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000504----000-.html

³¹ Nobel, C. (2006). RIM, NTP settle case: BlackBerry service is safe. <http://www.eweek.com/article2/0,1895,1933824,00.asp>

³² Schultz, J., J. Goguen, & T. C. McCullough (2006). EFF Challenges Dangerous Patent on Internet Test-Taking: Illegitimate Patent Chills Distance Learning and University Education. http://www.eff.org/news/archives/2006_04.php#004530

³³ Cox, J. (2006). Software patent ignites firestorm in higher education: A firestorm of controversy about software vendor Blackboard’s patent claims. <http://www.computerworld.com.au/index.php/id:96811954:fp:4194304:fpid:1>

³⁴ U.S. 10th Circuit Court of Appeals (02/08/06 - No. 03-6218) <http://laws.lp.findlaw.com/10th/036218.html>

³⁵ U.S. Court of Appeals for the Federal Circuit (05/30/06 - No. 05-1220) <http://caselaw.lp.findlaw.com/data2/circs/fed/051220p.pdf>

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2.4 Misappropriation

Laws v. Sony Music Entm't: Summary judgment for defendant-music company in a suit brought by a professional vocalist and recording artist for misappropriating her voice and name in a song is affirmed where the district court properly found that the Copyright Act preempted plaintiff's claims for violation of her common law right to privacy and her statutory right of publicity.[36]

2.5 Trade Secrets & industrial espionage

Hicklin Eng LC v. Bartell, R.J.: "Summary judgment for the plaintiff in a trade secret case is reversed after a finding that a reasonable jury could have determined that the defendant, an independent contractor, knew that the plaintiff company treated at least some of the data it provided him as trade secrets." [37]

Automation by Design, Inc. v. Raybestos Prods. Co. "Summary and declaratory judgment in favor of defendants in a copyright infringement and breach of contract suit is affirmed where: 1) the contract was unambiguous and not terminable at-will; and 2) the alleged violator was free to share design information with its agent and duplicate machines as part of the contracted project." [38]

3 International Developments

3.1 China

The Congressional International Anti-Piracy Caucus released its "2006 Country Watch List" which accuses China of being "awash in pirated versions of American copyrighted products and ... a source of pirated product to markets around the world despite the commitments the Chinese authorities have made over the past 10 years to significantly reduce copyright piracy levels." The lawmakers accused the Chinese government of ineffectual small fines that are considered a cost of doing business by law-breakers there. They said that Internet-mediated copyright piracy is growing rapidly there.[39]

In April, the Chinese government forced its personal-computer manufacturers to load only licensed operating system software on computers leaving their factories. The move was seen as an attempt to meet international pressures on China to begin protecting intellectual-property rights.[40]

Concerned about intellectual-property piracy in China, a 19-person Chinese delegation visited the United States in October for 20 days to study US intellectual-property laws and enforcement. According to Associated Press writer Juliana Barbassa, "A report issued by the European Commission earlier this month named China as the world's top producer of faked goods. Intellectual property attorneys say Chinese companies are increasingly being hauled into U.S. courts for patent infringement. Despite its bad reputation, China has ratcheted up efforts to

³⁶ U.S. 9th Circuit Court of Appeals (05/24/06 - No. 03-57102) <http://caselaw.lp.findlaw.com/data2/circs/9th/0357102p.pdf>

³⁷ U.S. 7th Circuit Court of Appeals (02/22/06 - No. 05-2282) <http://caselaw.lp.findlaw.com/data2/circs/7th/052282p.pdf> [PDF File]

³⁸ U.S. 7th Circuit Court of Appeals (09/15/06 - No. 05-1172) <http://caselaw.lp.findlaw.com/data2/circs/7th/051172p.pdf>

³⁹ Smith, G. H., B. Goodlatte, J. R. Biden, & A. B. Schiff (2006). 2006 Country Watch List. http://www.riaa.com/News/newsletter/pdf/IAPC_2006_watch_list_final.pdf

⁴⁰ Anonymous (2006). China to tackle software piracy: The Chinese government has made a fresh attempt to crack down on software piracy. <http://news.bbc.co.uk/1/hi/technology/4902976.stm>

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reduce rampant intellectual property theft. Over the past two years, authorities have increased the number of intellectual property-related arrests, destroyed millions of counterfeit CDs and shuttered thousands of shops, publishing companies and Web sites involved in their distribution.”[41]

3.2 Europe

In March, French lawmakers passed a new law similar to the US Digital Millennium Copyright Act. Anyone making or supplying software intended to circumvent copy-protection mechanisms will be subject to up to six months of prison time and fines of up to the equivalent to US\$37,000.[42] They also insisted on forcing digital music distributors to allow interoperation of their equipment. However, in May, the French Senate altered the legislation to put requests for interoperability in the hands of a bureaucratic commission.[43]

In March, the European Commission (EC) announced its support for creation of a European Digital Library containing millions of documents including books. EDUPAGE writers noted, “The commission acknowledged that opinions differ about intellectual property concerns for digitized works, noting that a study it conducted showed wide disagreement between rights holders and institutions such as libraries. . . . The EC said that by 2008, two million books, photographs, and other materials will be available through the European Digital Library and that this total could rise to six million by 2010.”[44]

3.3 South America

According to the annual report of the US National Intellectual Property Law Enforcement Coordination Council, Brazil increased its IP rights enforcement efforts and cooperated with US officials in tracking down Brazilian citizens responsible for software piracy. The government there sponsored public anti-piracy seminars and training for law enforcement. In El Salvador, similar training programs have involved nearly 200 judges, prosecutors and investigators at a time and enforcement of IP laws have been increasing dramatically.[45]

4 Law and Digital Rights Management

4.1 Fair Use Doctrine

In July 2006, the US Copyright Office revised its guidelines on Fair Use Doctrine. The document confirms that there is no bright line dividing fair use from copyright infringement and reaffirms that four factors are paramount in helping to determine whether a particular unauthorized use of copyrighted material:

“1. the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;

⁴¹ Barbassa, J. (2006). Chinese officials study U.S. intellectual property system. Associated Press State & Local Wire. Located via online databases through Norwich University Kreitzberg Library.

⁴² Gamet, J. (2006). French Parliament approves DRM bill. <http://www.macobserver.com/article/2006/03/21.11.shtml>

⁴³ Anderson, N. (2006). French DRM interoperability de-fanged in Senate. <http://arstechnica.com/news.ars/post/20060511-6797.html>

⁴⁴ EDUPAGE Digest 2006-9; Leyden, J. (2006). European Digital Library is go. http://www.theregister.com/2006/03/03/european_digital_library_goes_live/

⁴⁵ Israel, C. S., W. R. Basham, K. K. Bhatia et al. (2006). Report to the President and Congress on Coordination of Intellectual Property Enforcement and Protection (September 2006). http://www.commerce.gov/opa/press/Secretary_Gutierrez/2006_Releases/September/2006%20IP%20report.pdf

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2. the nature of the copyrighted work;
3. amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.”[46]

4.2 EULAs & other licenses

Microsoft avoided a fine from the European Commission by agreeing to license some of its source code to allow competitors to develop applications capable of competing with Microsoft Media Player.[47] It also agreed to provide unlimited technical support to software companies working on products intended to work with its servers.[48]

4.3 Technology

In September, Brian Matthew Dorsett, 27, of Fort Wayne, IN pleaded guilty to conspiracy charges for selling and distributing the “Hu Loader” device designed for decrypting DirecTV satellite transmissions. He was already incarcerated on a 30-month prison term in federal prison for access-device fraud and faced an additional prison term of up to five years with restitution of up to \$800,000.[49]



⁴⁶ US Copyright Office (2006). Fair Use Guidelines. <http://www.copyright.gov/fls/fl102.html>

⁴⁷ Kawamoto, D. (2006). Microsoft offers up source code in EC dispute. http://news.zdnet.com/2100-3513_22-6030879.html

⁴⁸ Anonymous (2006). Microsoft Volunteers Free, Unlimited Technical Support to Licensees of European Commission’s Protocol Program: The company also pledges work on additional technical documentation projects, adds on-site technical assistance. Press Release. <http://www.microsoft.com/presspass/press/2006/mar06/03-21ECTechSupportPR.msp>

⁴⁹ DOJ Cybercrime Section Press Release (2006). <http://www.cybercrime.gov/dorsettPlea.htm>