

# **Intellectual Property Developments in 2007**

**M. E. Kabay, PhD, CISSP-ISSMP  
Assoc Prof Information Assurance  
School of Business & Management  
Norwich University**

# Intellectual Property Developments in 2007[1]

M. E. Kabay, PhD, CISSP-ISSMP[2]

*The following summary reviews some recent developments of interest in intellectual property (IP) 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.*

## Contents

1	Copyright infringement, piracy.....	2
1.1	Fair Use Doctrine.....	2
1.2	Creative Commons Licenses .....	2
1.3	Software .....	3
1.4	Music.....	3
1.5	Enforcement .....	4
2	Patents .....	4
3	Trademarks.....	5
4	Trade Secrets & Industrial Espionage .....	5
5	Digital Rights Management.....	6
6	International Developments .....	6
6.1	China .....	6
6.2	India .....	6
6.3	Russia .....	7
6.4	Europe .....	7
6.5	South America .....	7

---

<sup>1</sup> This review covers the period from November 2006 through October 2007.

<sup>2</sup> Former Program Director, MSIA & CTO, School of Graduate Studies; Norwich University, Northfield, Vermont.

<http://www.mekabay.com>

# Intellectual Property Developments in 2007

---

## 1 Copyright infringement, piracy

Makers of “novelty fart dolls” fought it out in court over “copyright violations, trademark infringement and unfair competition.” Breath-taking details available in ruling from the US 7th Circuit Court of Appeals for the plaintiff.[3]

In June 2007, the US 6th Circuit Court of Appeals upheld a ruling in which Zomba Enterprises, a maker of karaoke disks was fined \$806,000 in statutory damages and attorney’s fees for violating the plaintiff’s copyrights.[4] Crime doesn’t always pay after all.

### 1.1 Fair Use Doctrine

Attorneys Jennifer Stisa Granick, Lawrence Lessig, and Christopher Sprigman of the Center for Internet and Society, Stanford, California, argued for the Internet Archive and Prelinger Associates against the Copyright Term Extension Act of 1998 and associated laws that changed renewal of copyrights from “opt-in” to “opt-out.” That is, copyright extensions became automatic unless the copyright holders explicitly repudiated them. The consequences, according to the plaintiffs, included a drastic reduction in the number of works available for archiving in free Internet-based libraries. The plaintiffs lost their case and the US 9th Circuit Court of Appeals dismissed their appeal.[5]

Author Veronica Vincent wrote and copyrighted a book called *Smart Foreclosure Buying* which was used extensively by the Chicago Association of Realtors and later, in a course she taught at the City Colleges of Chicago. In 2001, Ms Vincent stopped teaching the class and in 2001 she ordered the Association to stop publishing her book. The Association stopped paying her royalties but continued publishing and selling the book. She “also asked the City Colleges to stop offering any course using her book, or at least to cease using the book’s title as the name of the course.” Interestingly, the US Court of Appeals for the 7th Circuit affirmed that (1) the Association did indeed violate her copyright; but (2) her copyright has no influence on how the copies of her work are used. “An author has the exclusive right to control *copying*, but once a given copy has been sold its owner may do with it as he pleases (provided that he does not create another copy or a derivative work).”[6]

### 1.2 Creative Commons Licenses

In November 2006, a lawsuit attacking distributors of Linux under the GNU General Public License (GPL) was dismissed by the US 7th Circuit Court of Appeals. Major conclusions summarized by FindLaw editors: “1) the distribution of free software does not constitute predatory pricing since prices would will never reach a monopoly stage; 2) individuals and organizations who accept the GPL are not ‘conspirators’ involved in ‘restraint of trade’; and 3)

---

<sup>3</sup> JCW Invs. v. Novelty. <http://caselaw.lp.findlaw.com/data2/circs/7th/052498p.pdf>

<sup>4</sup> Zomba Enters. v. Panorama Records. <http://caselaw.lp.findlaw.com/data2/circs/6th/065013p.pdf>

<sup>5</sup> Kahle v. Gonzales <http://caselaw.lp.findlaw.com/data2/circs/9th/0417434p.pdf>

<sup>6</sup> Vincent v. City Colls. of Chicago. <http://caselaw.lp.findlaw.com/data2/circs/7th/063082p.pdf>

# Intellectual Property Developments in 2007

---

the ‘fixing’ of the price for software at zero benefits consumers, and thus survives scrutiny under the Rule of Reason.”[7]

Richard Silver claims to have invented a popular dance called “The Electric Slide.” He intimidated YouTube into removing a video by Kyle Machulis that included a 10-second clip of the audience at a concert doing that dance, claiming that Machulis and YouTube were violating the Digital Millennium Copyright Act (DMCA). Once the Electronic Frontier Foundation (EFF) got involved and filed a lawsuit in March 2007 alleging misrepresentation of copyright claims, Silver backed down and settled, agreeing to file a Creative Commons License allowing for non-commercial display of the dance.[8]

## 1.3 Software

The Business Software Alliance (BSA) updated its statistics and charts on software piracy rates around the world. Key findings:

*“2006 Worldwide Software Piracy Figures*

- Total software installed on computers: more than \$100 billion
- Total software paid for: \$65 billion
- Total packaged software loss: nearly \$40 billion
- Global piracy rate: 35%
- Changes from 2005: Total losses up 15% to nearly \$40 billion.” [9]

## 1.4 Music

In April 2007, the Recording Industry Association of America (RIAA) was stung with a countersuit from a victim of its widespread web of lawsuits over alleged copyright infringement. After the RIAA withdrew its claims against Rolando Amurao, he fought back with a countersuit demanding redress.[10]

In May 2007, Universal Music Group (UMG) sued for alleged copyright infringement for reselling promotional CDs. EFF summarized this interesting case as follows: “EFF and the San Francisco law firm of Kecker & Van Nest LLP are representing Troy Augusto, whose online auctions included sales of promotional CDs distributed by Universal. Copyright law’s ‘first sale’ doctrine makes it clear that the owner of a CD is entitled to resell it without the permission of the copyright holder. Nevertheless, Universal claims that CDs marked as ‘promotional use only’

---

<sup>7</sup> Wallace v. Int’l Bus. Mach. Corp. <http://caselaw.lp.findlaw.com/data2/circs/7th/062454p.pdf>

<sup>8</sup> Machulis v. Silver, <http://www.eff.org/cases/electric-slide-litigation>

<sup>9</sup> Fourth Annual BSA and IDC Global Piracy Study, <http://w3.bsa.org/globalstudy/>

<sup>10</sup> Lava v. Amurao, <http://www.eff.org/cases/lava-v-amurao>

# Intellectual Property Developments in 2007

---

remain the property of Universal and thus can never be resold.”[11] Users of sample CD-ROMs and DVDs from training companies may want to watch this case closely, since a ruling *against* the plaintiff may seriously curtail the availability of demonstration disks, almost all of which are marked “NOT FOR RESALE” and “NOT FOR TRAINING.”

In June 2007, the EFF “filed suit ... against Universal Music Publishing Group (UMPG), asking a federal court to protect the fair use and free speech rights of a mother who posted a short video of her toddler son dancing to a Prince song on the Internet.”[12]

In July 2007, the EFF launched a lawsuit for recovery of legal costs incurred by Dawnell Leadbetter starting in January 2005 when she was falsely accused of stealing music by the RIAA. When the RIAA dropped the case in December 2006, the single mother had paid a lot of money to lawyers.[13]

## 1.5 Enforcement

Attorney General Alberto Gonzales addressed the US Chamber of Commerce Coalition Against Counterfeiting and Piracy in May 2007 and offered an overview of increased enforcement efforts against intellectual-property thieves.[14] In addition to increased investigation, prosecution and punishment, he also announced that he was sending a draft bill, the Intellectual Property Protection Act of 2007, to Congress that would criminalize *attempting* to infringe copyright.[15]

## 2 Patents

In November 2006, the US Court of Appeals for the Federal Circuit ruled that a district court should not have granted a preliminary injunction in a patent dispute when the defendant was arguing “a substantial question of the validity of the two patents at issue.”[16]

In February 2007, the US Court of Appeals for the Federal Circuit ruled in favor of the defendants in a patent-infringement suit involving identification and authentication methods for remote access to networks. MyMail claimed to be the holder of a patent relating to “a method of providing network customers with access to a network, such as the internet, when they are away from their normal base of operations.” The patent involved an “[I]nternet service provider access service” or “ASP” that would supply login information for a geographically closer Internet Service Provider (ISP). MyMail sued eight ISPs (including America Online, Earthlink, Southwest Bell and Prodigy) for infringement. The appeals court ruled in favor of the ISPs.[17]

---

<sup>11</sup> UMG v. Augusto, <http://www.eff.org/cases/umg-v-augusto>

<sup>12</sup> Mom sues Universal Music for DMCA abuse, <http://www.eff.org/deeplinks/2007/07/mom-sues-universal-music-dmca-abuse>

<sup>13</sup> RIAA should pay for single mom’s two-year ordeal, <http://www.eff.org/deeplinks/2007/07/riaa-should-pay-single-moms-two-year-ordeal>

<sup>14</sup> Prepared Remarks of Attorney General Alberto R. Gonzales to the U.S. Chamber of Commerce Coalition Against Counterfeiting and Piracy, [http://www.usdoj.gov/ag/speeches/2007/ag\\_speech\\_0705141.html](http://www.usdoj.gov/ag/speeches/2007/ag_speech_0705141.html)

<sup>15</sup> McCullagh, D. (2007). Gonzales proposes new crime: ‘Attempted’ copyright infringement, [http://www.news.com/8301-10784\\_3-9719339-7.html](http://www.news.com/8301-10784_3-9719339-7.html)

<sup>16</sup> PHG Techs., LLC v. St. John Cos., Inc. <http://caselaw.lp.findlaw.com/data2/circs/fed/061169p.pdf>

<sup>17</sup> MyMail. v. America Online. <http://caselaw.lp.findlaw.com/data2/circs/fed/061147p.pdf>

# Intellectual Property Developments in 2007

---

In August 2007, the EFF challenged a patent issued to Ideaflood for defining subdomains (e.g., action.eff.org) even though there was evidence that discussions of the idea in open-source groups predated the filing of the patent by more than a year.[18]

In 2007, the EFF, Consumers Union, and Public Knowledge urged the Supreme Court “to prohibit patent owners from using patent infringement suits to enforce ... post-sale use restrictions on the products they sell.” The issue is that an increasing number of manufacturers are adding labels such as “single use only” on reusable products; Lexmark does so on its toner cartridges to interfere with recycling/refilling programs. The EFF stated that “Similarly, ‘not for resale’ labels could interfere with second-hand and refurbished product sales on eBay and Craigslist.” Oral arguments were scheduled for January 16, 2008 and a decision was expected in mid-2008.[19]

### 3 Trademarks

Audi AG won a case against a cybersquatter who used the domain name [www.audisport.com](http://www.audisport.com) and appropriated Audi’s name and trademarks; the ruling was affirmed on appeal.[20]

Wolfe’s Borough Coffee’s “Mr Charbucks” coffee was challenged by Starbucks Corp. for trademark infringement. Although the initial judgement was in favor of the defendant, the US 2nd Court of Appeals ruled that “the amended Federal Trademark Dilution Act, enacted after the district court's order, applies here and requires that the case be remanded.”[21]

Reed Elsevier Inc. lost its right to register the domain LAWYERS.COM COM “for providing an online interactive database featuring information exchange in the fields of law, legal news, and legal services” because the US Federal Circuit Court of Appeals supported an earlier ruling that the mark was too generic.[22]

### 4 Trade Secrets & Industrial Espionage

An industrial espionage case involved employees who formed a competing company by taking trade secrets from their employer (Synergetics) and hiring consultants employed by their employer to establish rival products in the surgical laser field.[23] On February 11, 2004, Synergetics filed suit in Missouri state court and in September 2005 a jury returned a verdict in favor of plaintiffs. Synergetics’ damages were ruled to be \$1,759,165 and the jury awarded \$293,194.16 of punitive each defendant. The 8th US Circuit Court of Appeals rejected the defendants’ appeal.

---

<sup>18</sup> EFF challenges bogus patent on Internet subdomains, <http://www.eff.org/deeplinks/2007/08/eff-challenges-bogus-patent-internet-subdomains>

<sup>19</sup> Quanta v. LG Electronics, <http://www.eff.org/deeplinks/2007/11/you-bought-it-you-own-it-part-iv-quanta-v-lg-electronics>

<sup>20</sup> Audi AG v. D'Amato. <http://caselaw.lp.findlaw.com/data2/circs/6th/052359p.pdf>

<sup>21</sup> Starbucks v. Wolfe’s Borough Coffee. <http://caselaw.lp.findlaw.com/data2/circs/2nd/060435p.pdf>

<sup>22</sup> In re Reed Elsevier Properties. <http://caselaw.lp.findlaw.com/data2/circs/fed/061309p.pdf>

<sup>23</sup> Synergetics v. Hurst & McGawan. <http://caselaw.lp.findlaw.com/data2/circs/8th/061146p.pdf>

# Intellectual Property Developments in 2007

---

## 5 Digital Rights Management

In 2005, the EFF got involved in a case where DirecTV accused a researcher of violating their IP by inserting altered smart cards into the equipment they supply to consumers. In September 2007, the 9th US Circuit Court of Appeals rejected the plaintiff's arguments.[24]

Owners of the new iPhone immediately began testing the system to see if they could circumvent the manufacturer's limitations on functionality, including a tight restriction to using AT&T wireless networks. Attorney Jennifer Granick posted a good commentary explaining the issues in August 2007.[25] Look for possible lawsuits in 2008 over the applicability – or not – of the DMCA to this technology.

## 6 International Developments

In April 2007, “The Office of the U.S. Trade Representative ... released its annual “Special 301” report on the adequacy and effectiveness of intellectual property rights (IPR) protection by U.S. trading partners.”[26]

### 6.1 China

China continued as a hotbed of IP theft in 2006 and 2007. In April, the US filed disputes with the World Trade Organization (WTO) “over deficiencies in China's legal regime for protecting and enforcing copyrights and trademarks on a wide range of products, and ... over China's barriers to trade in books, music, videos and movies.”[27]

In contrast to the usual China-bashing, however, Law Professor Aaron Schwabach argued that if per capita rates of piracy are calculated, “China's rates of intellectual property violation are lower than those of many other countries, including the United States.”[28]

### 6.2 India

The International Intellectual Property Alliance (IIPA) reported on IP violations in 61 countries in 2007.[29] The IIPA dismisses India's anti-piracy efforts: “...[T]here was little significant progress in any of these areas in 2006 though regular meetings are continuing. Piracy rates and

---

<sup>24</sup> DirecTV v. Huynh & Oliver, <http://www.eff.org/deeplinks/2007/09/eff-wins-protection-security-researchers>

<sup>25</sup> Granick, J. (2007). Legal or Not, iPhone Hacks Might Spur Revolution.

[http://www.wired.com/politics/onlinerights/commentary/circuitcourt/2007/08/circuitcourt\\_0829](http://www.wired.com/politics/onlinerights/commentary/circuitcourt/2007/08/circuitcourt_0829)

<sup>26</sup> Special 301 Report, [http://www.ustr.gov/Document\\_Library/Press\\_Releases/2007/April/SPECIAL\\_301\\_Report.html](http://www.ustr.gov/Document_Library/Press_Releases/2007/April/SPECIAL_301_Report.html)

<sup>27</sup> United States Files WTO Cases Against China Over Deficiencies in China's Intellectual Property Rights Laws and Market Access Barriers to Copyright-Based Industries,

[http://www.ustr.gov/Document\\_Library/Press\\_Releases/2007/April/United\\_States\\_Files\\_WTO\\_Cases\\_Against\\_China\\_Over\\_Deficiencies\\_in\\_Chinas\\_Intellectual\\_Property\\_Rights\\_Laws\\_Market\\_Access\\_Barr.html](http://www.ustr.gov/Document_Library/Press_Releases/2007/April/United_States_Files_WTO_Cases_Against_China_Over_Deficiencies_in_Chinas_Intellectual_Property_Rights_Laws_Market_Access_Barr.html)

<sup>28</sup> Schwabach, A. (2007). Intellectual property piracy: Perception and reality in China, the United States, and elsewhere. *J. Intl Media and Entertainment Law* (2007-08), <http://www.chinalawblog.com/ChinaIP.pdf>

<sup>29</sup> IIPA 2007 directory listing, <http://www.iipa.com/rbc/2007/>

# Intellectual Property Developments in 2007

---

losses remained essentially unchanged and progress on the problems that IIPA and its members have raised over at least the last five years has yet to emerge.”[30]

## 6.3 Russia

Russia shared the limelight with China in 2007 in the priority watch list issued by the Office of the US Trade Representative. “USTR cited Russia’s intellectual property problems as related to large-scale production and distribution of optical media and widespread Internet piracy.”[31]

## 6.4 Europe

Controversy swirled as the European Parliament adopted a new Directive in April 2007 ordering members of the European Union to harmonize their criminal laws and penalties governing IP crimes.[32]

## 6.5 South America

In September 2007, a University of Florida report noted that new proposals for compliance with the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA) include changes to “[i]ntellectual property rules ... with the aim of allowing developing countries quicker access to generic drugs.”[33] The authors note on p25 of their report that Guatemala is undertaking improvements to its IP laws but “Despite these reforms, it has one of the most problematic legal environments in Latin America in terms of rule of law and corruption.” Nicaragua also “strengthened intellectual property protection” (p27) as did Peru (p33) and Brazil (p36). Detailed country-by-country reports are available from the IIPA.[29]



---

<sup>30</sup> International Intellectual Property Alliance 2007 Special 301 Report: India, p1, <http://www.iipa.com/rbc/2007/2007SPEC301INDIA.pdf>

<sup>31</sup> Intellectual Property Violations Expanding Globally, U.S. Says: 12 nations lacking adequate copyright, patent protections, <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2007&m=April&x=20070430163947zjsredna0.4883539>

<sup>32</sup> Enforcement of Intellectual Property Rights, <http://www.euractiv.com/en/infosociety/enforcement-intellectual-property-rights/article-117513>

<sup>33</sup> McCoy, T. L. & M. Fensom (2007). 2000 Latin America Business Environment Report, p18, <http://www.latam.ufl.edu/publications/LABER2007.pdf>