



IP Mississippi



Intellectual Property News for the
Higher Education Community of Mississippi

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Class Notes and Copyright

In *Faulkner Press, L.L.C. v. Class Notes, L.L.C.* (N.D. Fla.), a publishing company sued a college notes service, alleging that the defendant, Class Notes, LLC, infringed on their copyrights. Class Notes acquires and sells class notes, lecture summaries, and study materials. The publishing company argued that the class notes and study materials are copyrighted, thus the notes service illegally sold copyrighted materials. The court held that a professor's compilation of study questions were factual compilations that possessed the minimum level of creativity necessary for copyright protection, thus the plaintiff held a valid copyright in the study questions.

Student Invention Raises Questions

The University of Missouri has re-written its intellectual property policies in the wake of a student competition. The University hosted a competition in which teams of students submitted iPhone applications. Initially, the rules of the contest indicated that the University might assert some ownership of inventions submitted into the contest, and University administrators did seek a quarter ownership stake and two-thirds of profits made from the sale of the students' application. The winning team asked the University to waive any potential claim it might have to proceeds from the sale of the invention. After some debate, University administrators ultimately agreed that the students could maintain full ownership of their invention.

The dispute inspired University administrators to re-write the University's intellectual property policy to better address the ownership rights of students. The intellectual property policy now states that student inventors retain full ownership and rights to inventions made as part of a university contest. The University reserves the right, however, to retain some ownership over student inventions generated using university resources or with professorial involvement.

"IP Mississippi" is a publication of the Mississippi Law Research Institute designed to keep lawmakers and educators and administrators at Mississippi universities aware of current happenings in the world of intellectual property.

The Mississippi Law Research Institute is a division of the University of Mississippi School of Law. The IP Group is composed of two attorneys, William T. Wilkins and A. Meaghin Burke. For more information, please visit the website at <http://www.mlri.olemiss.edu>, or feel free to contact the IP Group at (662) 915-7775.

MPAA Sends Warning Letters

The Motion Picture Association of America recently sent warning letters to universities concerning illegal downloading by students. The letters remind universities of the obligations the Higher Education Opportunity Act imposes and suggest ways to combat copyright infringement. The MPAA suggested two websites as valuable resources for information and compliance:

- <http://www.respectcopyrights.org/highered.html>
- <http://www.educause.edu/HEOArmodels>

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IP News of Note

- After receiving a cease-and-desist letter from the University of Florida, Glades Day School, a private high school in Belle Glade, Florida, discontinued its Gator mascot. The University of Florida is just one of several universities that have recently made cease-and-desist demands against high schools. Penn State University requested that a Texas high school change its cougar mascot which looked similar to Penn State's Nittany Lion.
- University of Texas (UT) filed a complaint against Tower Car Wash, alleging that the owner of Tower Car Wash infringed on the university's trademarked UT Tower, a 307-foot clock tower with an observation deck that overlooks the UT campus. The UT tower is depicted in registered marks which UT has used in connection with its educational services, athletics, and other various publicity items. The complaint alleges that Tower Car Wash's 60-foot replica tower and the trademarked UT Tower are similarly designed, have the same color scheme, and both include orange lighting systems.
- The Department of Justice has filed an amicus brief in *Association for Molecular Pathology et al. v. USPTO and Myriad Genetics, Inc.*, which is currently pending appeal in the Court of Appeals for the Federal Circuit. The DOJ is arguing that unmodified DNA is not subject to patent, and mere isolation of the un-modified DNA does not sufficiently transform it into a patentable invention.
- In *National Association of Boards of Pharmacy v. Board of Regents of the University System of Georgia et al.*, the National Association of Boards of Pharmacy sued the University System of Georgia for copyright infringement and sought damages under the Copyright Remedies Clarification Act. The lower court held that the claims for damages were barred by the Eleventh Amendment. The Eleventh Circuit Court of Appeals affirmed in part, asserting that Congress cannot use the Copyright Clause of the United States Amendment as a valid basis for the abrogation of the sovereign immunity of the states.
- *Board of Trustees of Stanford University v. Roche Molecular Systems, Inc. et al.* is currently pending appeal at the United States Supreme Court after the Federal Circuit held that a Stanford researcher had effectively assigned his inventions to a third-party biotechnology company. More than forty universities have signed on to an amicus brief filed in support of Stanford University, the petitioner, arguing that the Bayh-Dole Act prevents inventors from assigning rights to inventions made using federal funds in the university setting .

Google Book Settlement Rejected

The proposed Google Book Settlement has been rejected by a United States District Court judge. The proposed settlement flowed out of litigation between Google, which intends to create a digital library of thousands of out-of-print books and has already digitized fifteen million books, and a class of authors and publishers who initially decried Google's actions as impermissible infringements of copyright. Google maintained that the digital archives would create an invaluable repository of hard-to-find books and allow millions of authors to earn royalties from digital versions of their books. Critics, such as the American Society of Journalists and Authors and Microsoft, argued that Google would be establishing an impermissible monopoly of information.

Judge Denny Chin agreed with the critics of the settlement, particularly with respect to orphan works. An orphan work is material under copyright whose owner can either not be identified or contacted with due diligence. Under the terms of the settlement, Google would have been permitted to digitize and sell orphan works without the copyright owner's consent. The proposed settlement would have granted Google (but no other entity) immunity from copyright violations stemming from these actions. Judge Chin noted that Congress, not the courtroom, was the appropriate place to decide the fate of orphan works under American copyright law. Chin encouraged the parties to continue negotiating toward a satisfactory settlement. Another hearing has been set for April 25.

AN INTRODUCTION TO THE DMCA

By Angela Kyle Smith

The Mississippi Law Research Institute is pleased to introduce Angela Kyle Smith, a third-year law student who is working with the department through the Public Service Internship Program at the University of Mississippi School of Law. Angela is from Edina, Minnesota, and received her Bachelor of Business Administration in Music Business from Belmont University.

Background

Before the Digital Millennium Copyright Act (“DMCA”), the Copyright Act did not specify its application to Internet Service Providers (“ISPs”), thus exposing them to contributory and vicarious copyright infringement liability and providing no incentive to detect and stop subscribers' infringing activities. “Online service providers (“OSPs”) and Internet service providers (“ISPs”) provide critical infrastructure support to the Internet, allowing millions of people to access on-line content and electronically communicate and interact with each other.” In a university setting, the legal implications arising from users posting and sharing copyrighted materials on their online network would be imputed onto the university.

Title II of the DMCA amends the Copyright Act (17 U.S.C. § 501) to create Section 512, referred to as the Online Copyright Infringement Liability Limitation Act, which provides safe harbors for ISPs limiting their liability for copyright infringement. Title II fixes the previous legal vulnerabilities of service providers and copyright holders on the Internet by “[preserving] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.”

Congress enacted Title II to balance the competing interests of the copyright holders and service providers, addressing both “the liability concerns of service providers that operate the infrastructure of the internet” and the copyright protection concerns of copyright holders. The limitations on liability serve as an incentive for service providers to participate in copyright enforcement, thus increasing the copyright protections available to copyright owners. Simultaneously, Title II grants “greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.”

What is a “service provider” under Title II?

A university must qualify as a “service provider” to receive the limitations on liability under Title II. For entities engaged in transitory digital network communications, Title II defines “service provider” as “an entity offering the transmission, routing, or providing of connections for digital online communications.” For all other purposes of Title II, “service provider” is broadly defined as “a provider of online services or network access, or the operator of facilities therefore.” Universities are entitled to the ISP limitations on liability if they only act as an ISP and not as a content provider.

Universities providing Internet access through their network thus may be eligible for Title II limitations, protecting them from liability for the copyright infringing activities of students, staff, faculty members, and other individual users on the university's network.

What are the requirements a university must fulfill to receive limitations on liability under Title II?

“Section 512 is not intended to imply that a service provider is or is not liable as an infringer either for conduct that qualifies for a limitation of liability or for conduct that fails to so qualify. Rather, the limitations of liability apply if the provider is found to be liable under existing principles of law.” Essentially, if the university complies with all of the DMCA's requirements, they will qualify for the safe harbor limitations, thus only the infringing user is liable to the copyright owner for monetary damages.

To be eligible for protection under Title II, qualifying universities must comply with two threshold requirements:

1. Universities must “adopt and reasonably implement a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers.”
 - After a user receives one or two complaints, some schools temporarily disable the user's network access and require a fee to reinstate network access. In response to repeat infringers, many schools' policies provide for the permanent termination of network access.
 - To clearly inform users, universities need to post their policies around campus and on the university website. Additionally, universities should provide education about the problems and potential liabilities of copyright infringement.

2. University network systems must accommodate “standard technical measures’ when implemented by copyright owners.”
 - The DMCA defines “standard technical measures” as “technical measures that copyright owners use to identify or to protect copyrighted works.”
 - For example, “a [university] cannot install a firewall that may block access to its internet protocol (“IP”) addresses by copyright owners.”

In addition to the threshold requirements, the DMCA requires universities to comply with notice and takedown procedures. The notice and takedown procedures create a system whereby copyright owners can notify service providers of possible copyright infringement.

To comply with the notice and takedown procedures, universities must:

1. Designate an agent who receives notices of claimed infringements. The university must report the designated individual to the Copyright office as well as post the designated person's contact information on their website.
2. When a service provider receives a notice of claimed infringement, it must respond “expeditiously to remove, or disable access, to the material that is claimed to be infringing or to be the subject of infringing activity” in order to avoid limited liability.
3. The university should notify the individual involved in the allegedly infringing activity of the complaint and allow that person an opportunity to respond.

Once a university complies with the procedural requirements, the inquiry turns to whether a university qualifies for a specific safe harbor to limit their liability. The safe harbors are categorized based on the following four types of ISP activity:

1. Transitory digital networks communications
2. System caching
3. Storage of information on systems or networks at direction of users
4. Information location tools

After receiving a notice of claimed infringement, the university must determine whether its conduct involved one of the four functions in relation to the allegedly infringing activity. To receive limits on liability, the university must meet the guidelines for the four categories of conduct.

When does the university lose eligibility for the limitations under Title II?

Title II does not provide universities absolute immunity from copyright infringement liability.

“Absent an employment relationship with the direct infringer, [a university] may be vicariously liable” if the plaintiff copyright holder proves: (1) the university had the right and ability to control the infringing activity; and (2) the university received a financial benefit from the infringing activity. A university may be liable for contributory infringement if the plaintiff copyright holder proves: (1) the university had actual or constructive knowledge of the copyright infringement; and (2) substantially participated in the infringing activity.

However, Title II is not intended to deter universities from monitoring their services for infringing activities; therefore, “[c]ourts should not conclude that the service provider loses eligibility for limitations . . . solely because it engaged in a monitoring program.”

Are universities liable for faculty and graduate student workers?

Because faculty and graduate student workers may be considered agents of the university, their infringing acts or knowledge of infringing acts would impute liability onto the university. Congress developed Section 512(e), titled limitations on liability for nonprofit educational institutions, to protect educational institutions from the infringing acts of faculty members and graduate student employees, acknowledging that these relationships differ from the typical employer-employee link. “Since independence – freedom of thought, word, action – is at the core of academic freedom, the actions of university faculty and graduate student teachers and researchers warrant special consideration in the context of this legislation.”

Importantly, to qualify for this protection universities have to comply with the specific conditions provided in the text of Section 512(e).