

## **Legal Update 2007: Where the lawsuits are**

### **By George H. Pike\***

Lawsuits are a fact of life for most major corporations, organizations, and agencies. Over the course of a typical year, they may be involved in dozens of lawsuits over a wide variety of issues. Customers and users sue over products or services. Employers sue over workplace issues. Suppliers sue—or get sued—over contract issues. Or they initiate lawsuits to protect their products, services, employers or suppliers. Lawsuits are a fairly routine cost of doing business.

However, some lawsuits have an impact that is far beyond the routine. They may start quietly or with a splash of headlines, but the results may impact the life or bottom line of a company, its products, services or practices, or the industry as a whole. Some companies survive such lawsuits, as Microsoft survived after the Justice Department's antitrust lawsuits in the 1990's. Other companies don't, as witnessed by the original Napster.

### **Google**

As one of the largest and most influential information companies, Google has been involved in a number of lawsuits—both routine and potentially industry shaking. This year is no exception, with at least four cases that could have significant impact on the database and search industry.

Earlier this year, an appeals court found that Google's use of thumbnail images was a fair use of the copyrighted images of others, overruling a lower court's finding that those small-scale thumbnail images had commercial value. This decision is largely seen as clarifying the industry practice of using thumbnail images as well as providing some strength to the fair use doctrine.

But a more complex fair use question looms for Google in its ongoing defense of the Google Book Search project. The project scans books and other resources into a huge database. Searchers encounter "snippets" of the book's content in response to a query, and if applicable, links to vendors who sell the book. Some of these materials are in the public domain, and others are scanned with permission of the copyright holder. However, many materials are scanned from libraries without express permission.

### **Book Search case in 2009**

In late 2005, Google was sued by the Authors Guild, McGraw-Hill and other publishers, and individual authors for copyright infringement. The lawsuit attracted extensive media, blogger and commentator attention. As the case started its long process through the courts, some of that attention dissipated, although it did not disappear. After a burst of initial activity, the matter is now in the slow, tedious discovery process of gathering documents, taking depositions, and preparing motions. These events have slowed the case's proposed schedule by nearly a year, and is not expected to be resolved until the first half of 2009 at the earliest.

It is unknown from the court record what, if anything, may be going on behind the scenes. Google does not appear to have added more libraries to its Library project since the suit was filed, although they continue to add materials from the public domain or for which they have

gotten permission. Some commentators have also wondered whether Google's success in the thumbnail case will improve its position through a strengthened fair use doctrine. Or, could its position be weakened by highlighting the differences between thumbnail portions of a work, provided by the third party and of minimal commercial value, and full text books scanned by Google and having significant commercial value.

### **Viacom vs. YouTube**

Google is on the receiving end of another pair of lawsuits attacking the copyright practices of its YouTube subsidiary. In March, the media conglomerate Viacom filed a copyright infringement suit against YouTube. The complaint alleges that the "vast amount" of YouTube content consists of infringing copies of copyrighted works, including music videos, television shows, and movie clips.

Viacom also alleges that YouTube manipulates the notice and takedown provisions of the Digital Millennium Copyright Act by requiring proper notice from the copyright owner, while profiting from the infringing work's presence until the takedown occurs. They also allege that if another user posts the same infringing work, even hours later, they must go through the whole cycle again. Google's defense is largely based on the DMCA safe harbor provisions, fair use, and licenses granted by copyright holders.

A related case that got less publicity but may have greater impact was filed against Google/YouTube by the Football Association Premier League of English soccer clubs. The allegations are similar to Viacom's, but the Football Association case was filed as a class action of all copyright owners who's content has appeared without permission on YouTube. If that class is accepted and the allegations proved, the resulting damages or injunctions could be crippling. Both cases are in the early stages of discovery with trials expected in 2009 at the earliest.

### **VA laptop theft**

Lawsuits involving the loss or theft of personal data continue to plague companies that collect, store and utilize personal information. Last year's theft of a Department of Veterans Affairs (VA) laptop computer containing personal information on over 26 million people resulted in several lawsuits. Those suits have been consolidated into a single proceeding based in Washington DC. Earlier this year the VA moved to dismiss the case on the grounds that the VA did not intentionally or willfully fail to safeguard the information, and that because the laptop's hard drive showed no signs of being accessed, there was no actual harm. The plaintiffs have responded that the VA was intentionally and willfully negligent, and that the victims did suffer harm, either through emotional distress, time and money spent on credit monitoring, or both.

The court could rule on the VA's motion to dismiss at any time. If the motion is granted, an appeal is very likely. If the motion is denied, the discovery process will begin.

### **Mixed results**

Lawsuits over databreaches have had mixed results in the courts. TJX, Inc., a retailer that owns T.J. Maxx and other chains, was sued in April for a data breach that exposed 46 million credit card records. The suits were settled five months later, with TJX agreeing to provide credit monitoring as well as reimbursement for any direct costs for replacing identity cards. By contrast, a suit filed by students at Ohio University over the exposure of 173,000 records was dismissed when the victims were not able to show that they had suffered actual damages. A third suit involving a databreach at Fidelity National Information Services is pending in a California federal court.

The consolidation of the information industry has led to occasional lawsuits for unfair or monopolistic behavior in violation of federal anti-trust laws. Microsoft, in particular, has been on the receiving end of many such cases. Most of them were settled with Microsoft agreeing to pay damages and/or change its business practices. In early October, Microsoft's long-time rival Apple, Inc. was sued for violating both federal and state anti-trust laws in its handling of the highly anticipated iPhone.

### **iPhone lawsuits**

The suits charge that Apple and AT&T, the exclusive cellular provider for the iPhone, have engaged in illegal practices by using hardware and software built in to the iPhone to prevent consumer choice in selecting cell phone service. When third parties began providing solutions for consumers to "unlock" their iPhones—legal under a recent interpretation of the DMCA—Apple issued a press release indicating that these solutions may result in the iPhone being damaged, inoperable or disabled, and would void the iPhone warranty. The suit alleges that Apple illegally created barriers to consumer's lawful use of their iPhones.

As of this writing, Apple has not yet filed its response to these complaints. Interestingly, the federal court claim was assigned to a special Alternative Dispute Resolution procedure. This procedure is designed to encourage the prompt resolution of disputes through non-judicial procedures such as mediation, arbitration, or the appointment of a neutral third party to evaluate the case and recommend a fair resolution.

### **NSLs, RIAA and others**

There are other cases pending that may affect the information industry. In September, a federal court declared provisions of the PATRIOT Act's National Security Letter procedures unconstitutional (See Newsbreak: Federal Judge Overturns PATRIOT Act NSL Provisions, URL <http://newsbreaks.infotoday.com/nbReader.asp?ArticleId=39555>). An appeal has not been filed as of this writing, but is likely. Later that same month, a separate federal court invalidated some of the Act's warrantless search provisions. That case has also been appealed. The RIAA continues to press lawsuits against peer-to-peer downloaders. A court victory and quarter-million dollar damages award in October gave them fresh ammunition. However, statistics show that peer-to-peer downloading is as strong as ever.

Each year many cases begin, many end, and many continue their meandering ways through the courts. With the information industry still in a great deal of flux, even the wealth of impact lawsuits seems to be a bit routine.

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