

Intellectual Property Litigation

A publication of the American Bar Association's Section of Litigation, Committee on Intellectual Property Litigation
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MESSAGE FROM THE CHAIRS

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We hope this Newsletter finds you enjoying the summer, striking that ever-elusive balance between fun, relaxation, and work! Many thanks to all of you for your dedication to the success of our Committee, in the middle of all the demands you each have in your lives.

It has been a busy spring, with the highlight being our Committee's 3-hour program at the April annual Litigation Section Meeting in Seattle. We express special gratitude to Linda Stevens, co-chair of the Trade Secrets subcommittee, for her tireless efforts in spearheading the panel presentation on the Inevitable Disclosure Doctrine. It was the most highly attended program of the meeting and received wonderful accolades from the attendees. Congratulations to Linda and everyone involved in this major success.

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YOU DON'T SAY

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NOT A NAPSTER PARADISE . . .

Of all that has been written since the MP3 summary judgments were decided in early May, my favorite is Holman Jenkins' piece in the May 10 Wall Street Journal, *Let's Give It Up for Metallica*.

To say that Jenkins is not sympathetic to the recording industry's concern about the free-sharing of MP3 files is an understatement:

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Intellectual Property Litigation is published four times a year on a quarterly basis in spring, summer, winter and fall by the Intellectual Property Litigation Committee, Litigation Section of the American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611.

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Looking ahead, we are co-sponsoring another 3-hour session on July 9 in New York at the annual ABA Meeting entitled "Legal Practice in a .com World" which will address the changing landscape of our practices in light of the e-commerce revolution. In addition, we are very excited to announce that our Committee breakfast meeting will be held jointly with the Intellectual Property Section's Antitrust subcommittee at the July ABA Meeting. Our own Antitrust subcommittee has worked with the IP Section to put together a program covering the new antitrust Collaboration Guidelines. Susan DeSanti, the chief drafter of the Guidelines, will be speaking. It's not too late to make plans to attend the annual meeting and join us for this terrific slate of events.

And, speaking of programs, the deadline for submitting proposals for next year's annual ABA meeting to be held in Chicago on August 4-6, 2001 is August 1 of this year. We encourage you to be aggressive and creative in developing program ideas for our Committee to sponsor. We have earned a high profile in the Section for our high-quality work and would like to see that momentum carry forward. Let us know your thoughts and we will help you put the proposals together for submission.

On a personal note, congratulations to Dale Cendali are in order for the birth of her twin daughters in January. No doubt Dale could present a program on the professional/personal "balancing act" with authority! Have a great summer, everyone.

Dale M. Cendali

Cherry Hearn Neuman

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"Once it was technology that let them warble a few tunes into a microphone and then resell that single performance to thousands or millions of fans. Or rather, it was the clunkiness of the distribution system (trucks, record stores) that multiplied the number of transactions so the record companies could assess a tax on each one.

Now the technological worm is turning. Music fans can download Napster, a free piece of software from a website, and instantly scour the web for downloadable music files, known as MP3 files, on the hard drives of million of other fans. . . .

This is wrong, terribly wrong, and yet it's hard to think of anything to say but tough luck buster. A quirk of technology giveth and a quirk of technology taketh away."

That's cold, but insightful. The recording industry's immediate crisis is Napster. And it is a genuine crisis. Anyone with web access can download Napster's MusicShare software free. With the software, anyone can log on to the Napster website, click through a directory of popular recordings and locate other Napster users who have desirable recordings saved on their hard drives in MP3 files and who are willing to share the files with other Napster users. The Napster server and MusicShare software facilitate a connection between the requester and the host user automatically without any further action on either user's part. And the file is transferred to the requesting user.

Napster posts notices on its site that users are responsible for using the site's services in a manner that complies with copyright laws. But the recording industry claims that Napster's copyright compliance policy is cosmetic. The recording industry accuses that, with a wink and a smile, Napster expects and encourages its users to trade bootleg recordings. Apparently, the encouragement has worked. If we can believe the popular press, massive numbers of popular copyrighted recordings are exchanged via Napster everyday depriving recording artists and companies their fair share of the spoils. This spring the anarchy reached such heights as to cause industry luminaries Dr. Dre and Metallica to go to court to stop the copying.

And so far, they have succeeded. It all came to a screeching halt on May 5 when Chief Judge Marilyn Hall

Patel of the Northern District of California put an end to the fun. She denied Napster's motion for summary judgment ruling that the safe harbor provision of the Digital Millennium Copyright Act does not apply to Napster. That provision applies to Internet Service Providers with copyright compliance policies shielding them from liability for money damages for copyright infringement committed by their users and limiting the availability of injunctive relief. Napster argued that it is an ISP within the meaning of the Act, but Judge Patel wasn't buying it.

The day before in New York City, Judge Jed Rakoff rejected MP3.com's fair use defense. MP3.com had purchased thousands of copyrighted recordings and copied them onto their servers. Users can access the recordings by either proving that they already own the CD version of the recording or by purchasing the CD from a retailer cooperating with MP3.com. Essentially, argued MP3.com, its service enables people who own a CD version of a recording to convert that version to an MP3 version which then is accessible to the user via the Internet. Judge Rakoff saw things differently: "although defendant seeks to portray its service as the "functional equivalent" of storing its subscribers' CDs, in actuality defendant is re-playing . . . converted versions of the recordings it copied, without authorization, from plaintiff's copyrighted CDs. On its face, this makes out a presumptive case of infringement. . . ."

All in all, Jenkin's take on the whole business was not shared by the judges before whom these cases were brought. So why should we care about Jenkin's vision? Because he correctly foresees that MP3.com and Napster are just a short rest stop on the continuing road toward total copyright anarchy (freedom?) on the net.

The next looming disaster for the music industry is the technology called *Gnutella* which allows users to share MP3 files without a central server to act as broker as Napster does. With *Gnutella* "there is nobody to sue" observes Mr. Jenkins. Except the users, of course; but there are too many of them and the economics of separately suing millions of individuals for copying individual recordings with a retail value of no more than \$20 per copy does not make any sense.

What likely will happen is that new legislation will be written requiring ISPs to pay royalties to the recording

companies just like VCR manufacturers pay royalties to the motion picture industry. As Jenkins knows: "Each day the future can be held off is another day the old economics can be milked."

SUMMER SUBCOMMITTEE REPORTS

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The Experts Subcommittee proposed an IP Litigation *Daubert* topic for the regional roundtables to the Roundtable sub-committee. The proposal was accepted and these programs are scheduled around the country for September. In addition, the subcommittee is preparing an article for publication on expert witnesses in IP Litigation based on decisions to date. Lastly, the subcommittee is awaiting approval to finalize and release its expert witness directory.

If you would like more information about the Experts Subcommittee or its projects, please contact one of the subcommittee's co-chairs: Robert O. Lesley at blesley@stinson.com or 816-842-8600 and Alan Ratliff at alan.ratliff@ey.com or 713-750-1568.