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Copyright Law: The Last Five Years of Journal Coverage

Tyler T. Ochoa

COPYRIGHT LAW: THE LAST FIVE YEARS OF JOURNAL COVERAGE

Tyler T. Ochoa†

Five years ago, I was asked to write an essay to celebrate the 20th anniversary of the Santa Clara Computer and High Technology Law Journal. In that essay, I surveyed the major developments in copyright law during the previous twenty years and documented how those developments had been chronicled (or foreshadowed) in the *Journal*.[1] Today, as the *Journal* publishes the first issue of its 25th volume, I take this opportunity to look back at the *Journal's* coverage of copyright law during the past five years.

Articles published in the *Journal* in the past five years both correctly predicted the outcome of,[2] and commented on,[3] the U.S. Supreme Court's ruling in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*[4] The first empirical study of takedown notices under § 512 of the Digital Millennium Copyright Act was published in the *Journal*.[5] Three articles analyzed the controversy over the editing of Hollywood motion pictures to remove or skip over what some viewers believed to be objectionable content.[6] Other articles

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† Professor, Santa Clara University School of Law. A.B. 1983, J.D. 1987, Stanford University.

1. *See* Tyler T. Ochoa, *1984 and Beyond: Two Decades of Copyright Law*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 167 (2003).

2. *See* Karen M. Kramer, *Intent: The Road Not Taken in the Ninth Circuit's Post-*Napster *Analysis of Contributory Copyright Infringement*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 525 (2005).

3. *See* Karen M. Kramer, Metro-Goldwyn-Mayer Studios v. Grokster*: The Supreme Court's Balancing Act Between the Risks of Third-Party Liability for Copyright Infringement and Rewards of Innovation*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 169 (2005); *and* Jay Dratler, Jr., *Common Sense (Federal) Common Law Adrift in a Statutory Sea, or Why* Grokster *was a Unanimous Decision*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 413 (2006).

4. MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

5. *See* Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621 (2006).

6. *See* Nikki D. Pope, *Snipping Private Ryan: The Clean Flicks® Fight to Sanitize Movies*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1045 (2004); Tyler T. Ochoa, *Copyright, Derivative Works and Fixation: Is* Galoob *a* Mirage*, or Does the* Form(Gen) *of the*

commented on the fair use doctrine,[7] the anti-circumvention provisions of the Digital Millennium Copyright Act,[8] and the intersection between them.[9] Articles in the *Journal* have anticipated and discussed the enforcement of open-source software licenses,[10] and the potential application of copyright law to user-created avatars and other forms of user-generated content.[11]

The status and reputation of the *Journal* has grown and developed during the past five years. The number of citations made during the past five years to articles published in the *Journal* was over half as many as were made during the previous twenty years.[12] Court citations to articles published in the *Journal* showed a similar increase in frequency.[13] Finally, an important step was taken last year when all

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Alleged Derivative Work Matter?, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 991, 1033-44 (2004) (analyzing whether scene-skipping software violates the right to prepare derivative works); Aaron Clark, *Not All Edits Are Created Equal: The Edited Movie Industry's Impact on Moral Rights and Derivative Works Doctrine*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 51 (2005).

7. *See* 17 U.S.C. §107 (2000); Lee Ann W. Lockridge, *The Myth of Copyright's Fair Use Doctrine as a Protector of Free Speech*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 31 (2007); Christopher J. Brown, *A Parody of a Distinction: The Ninth Circuit's Conflicted Differentiation Between Parody and Satire*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 721 (2004).

8. *See* Mark H. Lyon, *Technical Protection Measures for Digital Audio and Video: Learning from the Failure of Audio Compact Disc Protection*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 643 (2007); Katherine C. Hall, *Deconstructing a Robotic Toy: Unauthorized Circumvention and Trafficking in Technology*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 411 (2004).

9. *See* Eric Matthew Hinkes, *Access Controls in the Digital Era and the Fair Use / First Sale Doctrines*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 685 (2007); Elizabeth M. N. Morris, *Will Shrinkwrap Suffocate Fair Use?*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 237 (2007).

10. *See* Jason B. Wach, *Taking the Case: Is the GPL Enforceable?*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 451 (2005); Wallace v. IBM Corp., 467 F.3d 1104 (7th Cir. 2006) (providing software under the GPL open-source license does not violate antitrust law); *cf.* Jacobsen v. Katzer, 535 F.3d 1373 (Fed. Cir. 2008) (upholding the open-source "Artistic License").

11. *See* Symposium, *Rules & Borders–Regulating Digital Environments, Panel 3–Ownership in Online Worlds*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 807 (2005); Steven Hetcher, *User-Generated Content and the Future of Copyright, Part Two–Agreements Between Users and Megasites*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 829 (2008).

12. This ratio was discovered through a search, performed on Oct. 30, 2008, for "Santa +1 Clara +5 (computer comp tech)" in the Westlaw JLR database. The number of documents retrieved with this search for the years prior to 2004 was 1,165, and the number of citations for the years after 2003 was 895. No attempt was made to eliminate the few documents where those words appeared by coincidence, rather than because of a citation to the Journal.

13. The same search described *supra* in note 12 was performed in the Westlaw "ALLCASES" database on Oct. 30, 2008. This yielded forty-four documents, of which eleven

of the current and back issues of the *Journal* were made available online for free,[14] utilizing the privilege given to collective work publishers in § 201(c) of the Copyright Act,[15] as interpreted in recent court decisions.[16]

Accordingly, at the dawn of the *Journal's* 25th year, I would like to congratulate and thank all of the editors and staff members of the *Journal*, past and present, for the tremendous job they have done in raising the *Journal* from its modest beginnings to its current position among the premiere law-and-technology and intellectual property journals in the United States. I also would like to give the editors and staff of Volume 25 my best wishes for another productive year. I am confident that, under their leadership, the *Journal* will continue to add to its rich legacy of intellectually stimulating, cutting-edge scholarship.

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were eliminated as not containing a citation to the Journal, and seven more were eliminated as cases not officially reported. That left twenty-six cases, one of which contained citations to two different articles in the Journal, for a total of twenty-seven citations. Thirteen articles were cited ninteen times before 2004 (including one article cited six times), while eight articles have been cited once each after 2003. Including the unreported cases, there were twenty-three citations before 2004, and eleven citations after 2003.

14. *See* SANTA CLARA COMPUTER & HIGH TECH. L.J., *Issue Archive*, http://www.chtlj.org (select "Issue Archive" from the "Print Journal" menu) (last visited Nov. 3, 2008).

15. *See* 17 U.S.C. § 201(c) (2000).

16. *See* New York Times Co. v. Tasini, 533 U.S. 483 (2001) (stating that § 201(c) does not permit publishers to include individual articles in computer databases for individual retrieval; distinguishing microfilm and microfiche in *dicta*); Faulkner v. Nat'l Geographic Enters., Inc., 406 F.3d 26 (2d Cir. 2005) (holding that CD-ROM containing full-page displays of entire archive of National Geographic Magazines falls within § 201(c) privilege under *Tasini*); Greenberg v. Nat'l Geographic Soc'y, 533 F.3d 1244 (11th Cir. 2008) (*en banc*) (agreeing with *Faulkner*).

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