

Current Issues in Library Law : Intellectual Freedom & Copyright

Laura Quilter / Simmons College
lquilter @ lquilter.net
<http://teaching.lquilter.net/liblaw2009/>

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Agenda

- Introductions
- Google Book Search settlement
- open access movement
- the executive
- the courts
- legislation
- Copyright Office
- keeping up

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- Introductions
- Google Book Search settlement
 - what is it?
 - what's the current status?
 - what does ALA think?
 - should your library sign up?
- open access movement
- the executive
- the courts
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Google Book Search settlement

- what is it?
- what's the current status?
 - Univ. of Michigan amended agreement; new signatories
 - UMich review pricing
 - distribute small numbers of PD works
 - free institutional subscription for 25 years
 - notify "Partner Libraries" of censored or PD status
 - date for comments & opt-out extended to Sept. 4
- what does ALA / ACRL / ARL think?
 - concentrated control of facility
 - pricing: costs of subscription will exacerbate digital divide
 - privacy & intellectual freedom concerns
 - (antitrust)
- should your library sign up?

Google Book Search settlement: more info

- Inside Google Book Search (blog): <http://booksearch.blogspot.com/>
- Google Book Search agreement (site): <http://books.google.com/googlebooks/agreement/>
- **ALA Washington Office:** <http://wo.ala.org/gbs/>
- EFF Reader's Guide to the GBS Settlement: <http://www.eff.org/deeplinks/2008/10/google-books-settlement-readers-guide>
- James Grimmelman, "How to Fix the GBSS" http://works.bepress.com/cgi/viewcontent.cgi?article=1022&context=james_grimmelman
- Pamela Samuelson,
 - "Reflections on the GBSS" <http://www.slideshare.net/naypinya/reflections-on-the-google-book-search-settlement-by-pamela-samuelson>
 - "The Dead Souls..." <http://radar.oreilly.com/2009/04/legally-speaking-the-dead-soul.html>

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 - Creative Commons / Science Commons news
 - litigation
 - OCLC licensing grab
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open access

- Creative Commons & Science Commons: authors support programs
- open access litigation
 - two new German cases upholding the GPL (+2 previous cases)
 - a Swiss case nullifying state agency purchase of Microsoft products; equal access for open source software statute
 - National Portrait Gallery (UK) threatening to sue a Wikipedia contributor for uploading images of public domain works
- OCLC licensing land grab
 - 2009/6/26 OCLC Review Board recommended scrap & rewrite



**I HAVEN'T
HAD MY
COFFEE YET**

**DON'T
MAKE ME
KILL YOU**

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- the executive
 - "Intellectual Property Czar"
 - other appointments - DOJ, etc.
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the Executive

- Pro IP Act (2008) established an "Intellectual Property Czar" in the White House - not yet appointed but Biden has assured the MPAA that the White House will get the right person
- Julius Genachowski, FCC Chair - pro-network neutrality
- Jon Leibowitz, FTC commissioner - former MPAA lobbyist
- Numerous former partners of Jenner & Block who worked with the RIAA appointed at DOJ: Thomas Perrelli ... Donald Verrilli (plaintiff's attorney in Jammie Thomas case)
- Francis Collins, NIH -- an open access advocate

further reading: (1) Gizmodo, <http://gizmodo.com/5231842/biden-tells-mpaa-obamas-intellectual-property-czar-will-be-right>

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- the courts
 - Sotomayor
 - Harry Potter Lexicon follow-up: Right to Write
 - statutory penalties
 - Georgia State University electronic reserves
 - Salinger (and *The Wind Done Gone*)
- legislation
- Copyright Office
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the courts : Sotomayor nomination

- First Amendment
 - 19 1A opinions written: favoring individual only 5 times (26.3%)
 - *Doninger v. Niehoff* (2008): Part of a unanimous 2d Circuit panel upholding a school's punishment of a teen who wrote in her LiveJournal that school officials were "douchebags" for canceling an event, and urged others to contact the school to protest. Significant inroads on *Tinker* and expansion of *Morse v. Frederick* .
 - *Papas v. Giuliani* : Sotomayor dissented, arguing that a police officer's anonymous mailings of racist and anti-Semitic material ought to be protected speech.
- FOIA:
 - Sotomayor ordered release of Vince Foster suicide note
 - two other FOIA cases went the wrong way: *Tigue v. DOJ* (2d Cir. 2002) & *Wood v. FBI* (2d Cir. 2005)
- government speech: Sotomayor said the gag rule was fine

more information: (1) Jonathan Turley, <http://jonathanturley.org/2008/05/30/> — (2) Sam Batkins, <http://www.humanevents.com/article.php?id=32653> — (3) First Amendment Center, <http://www.firstamendmentcenter.org/news.aspx?id=21626> —

the courts : Sotomayor nomination

- copyright & intellectual property:
 - in private practice was at an IP boutique, Pavia & Harcourt
 - Sotomayor takes content industry position on copyright damages: the more the better
 - Wrote the District Court opinion in *Tasini* finding that the *NYT* etc. could copy freelancers' articles (a case on the same issue, *Reed Elsevier v. Muchnick*, is on the docket this fall)
 - Wrote the original *Castle Rock* opinion (Seinfeld trivia book is copyright infringement)
- set aside an arbitration clause in a click-wrap agreement (*Specht v. Netscape*)

more information: (4) Wired, <http://www.wired.com/threatlevel/2009/06/high-court-nominee-adopts-riaa-stance/> — (5) Wired, <http://www.wired.com/threatlevel/2009/05/sotomayor/> — (6) Copyrights & Campaigns, <http://copyrightsandcampaigns.blogspot.com/2009/05/obama-picks-ip-litigator-for-high-court.html> — (7) Copyrights & Campaigns, <http://copyrightsandcampaigns.blogspot.com/2009/05/judge-sotomayor-on-factexpression.html>

the courts : Sotomayor nomination

- privacy:
 - joined a unanimous opinion limiting USA PATRIOT Act gag orders on national security letters
 - upheld a warrantless search of a NYS employee's computer

more information: (8) ExclusiveRights.net, <http://www.exclusiverights.net/2009/05/judge-sotomayor-on-copyright-and-a-smattering-of-other-soft-ip/> — (9) SCOTUS blog, <http://www.scotusblog.com/wp/judge-sotomayors-appellate-opinions-in-civil-cases/>

the courts : Harry Potter Lexicon & the Right to Write

- Sotomayor in *Castle Rock* (D.Ct., aff'd by 2d Cir.) held that Seinfeld trivia book infringed copyright
- *Warner Bros. & J. K. Rowling v. RDR Books* (J. Patterson, SDNY) held that while the *Harry Potter Lexicon* included too much direct quotation, the creation of a reference about a fictional topic was a fair use:
 - "[R]eference works that share the Lexicon's purpose of aiding readers of literature generally should be encouraged rather than stifled ..."
- Roger Rappaport has begun a new organization, the **Right to Write**, aimed at working on these issues

the courts : Georgia State Univ.

- 2008 3 academic publishers sued Georgia State Univ. for its e-reserves / "electronic course packs".
 - GSU had a liberal approach to "fair use" and provided electronic copies of papers / chapters to students
 - Susan Crawford: "Publishers have created a market for course materials that is very similar to the market for luxury goods. ... There is only one version available, and at a very high price."
 - Interesting legal maneuver! GSU relied on its 11th Amendment sovereign immunity to get old versions of the policy out of the record.
- See *Basic Books v. Kinko's* and *Princeton Univ. Pr. v. Mich. Document Services* both found unauthorized inclusion of materials in course packs to be copyright infringement

further reading: (1) NUL Scholarly Communication blog, http://www.library.northwestern.edu/blog/nulcopyright/2008/04/what_does_the_lawsuit_against.html — (2) NYT, <http://www.nytimes.com/2008/04/16/technology/16school.html> — (3) NUL, http://www.library.northwestern.edu/blog/nulcopyright/2008/04/what_does_the_lawsuit_against.html — (4) Duke, <http://library.duke.edu/blogs/scholcomm/2009/07/01/interesting-development-in-georgia-state-case/>

the courts : statutory penalties & the RIAA

- *Capitol v. Thomas* -
 - Jammie Thomas : 24 songs on KaZaa
 - \$222,000 jury award set aside ("making available" on its own may not constitute distribution)
 - retrial led to \$1.9M+ jury award
 - she has filed suit claiming that the statutory damages award is so disproportionate to actual damages that it is unconstitutional

the courts : and an assortment of others

- *Health Grades v. Robert Wood Johnson Univ. Hospital* (D. Colo. June 19, 2009) - numerical grades can be copyrighted
- *Salinger* : J. Batts (SDNY) issued a TRO against *Coming Through the Rye* by Fredric Colting, holding that "Holden Caulfield" is copyrighted
- *AP v. Shepard Fairey* : Photographer Manuel Garcia has moved to intervene.
- *Golan v. Gonzalez* -- Tenth Circuit upheld, and on remand the Dist. Ct. upheld a First Amendment challenge to the URAA (Uruguay Round Agreements Act, a 1994 act which "restored" copyright to public domain materials)

the courts : and an assortment of others

- *In re Bergstrom* - public records request for Washington State University - Elsevier contract terms; Elsevier motion to quash denied.
- Kindle - amazon.com v. AAP

Coffee!



*You can
sleep when you're dead!*

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 - orphan works legislation
 - open access: Conyers vs. FRPAA
 - \$\$\$ for rural wireless & distance education
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legislation

- orphan works legislation
- H.R. 801: Conyers' attempt to repeal NIH open access
 - referred to House Judiciary > Courts & Comp. Policy
- FRPAA: Federal Research Public Access Act, S.1373 (Lieberman & Cornyn)
 - referred to Sen. Comm. on Homeland Sec. & Govt Affrs
- \$\$\$: stimulus money funding:
 - NIH reagent sharing database;
 - rural Internet access;
 - US Dept. of Ed. online job training programs
 - library funding

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Copyright Office: Section 108

- study group report issued 2008
- recommended 4 key reforms
 - include museums
 - preservation copies section
 - preservation copies of websites
 - change from "3" to "a limited number" of copies to maintain a preservation copy
- status: gone nowhere
- outlook: not good this term
- <http://section108.gov/>

Copyright Office: DMCA triennial exemptions rulemaking

- how the process works
- what we got last time: media studies, obsolete sw, obsolete sw dongles, blind access to ebooks, cell phone portability, Sony Rootkit problems
- what library associations & civil libertarians are asking for
 - extend the media studies professor exemption : not just departmental libraries, and not just media studies
 - extraction for fair use commentary
 - cell phone interoperability
 - continuation of exemption for blind
- when we find out: Nov. 2009 (likely)
- <http://www.copyright.gov/1201/>

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- Eric Goldman's blog: <http://blog.ericgoldman.org/>
- List of copyright blogs, <http://teaching.lquilter.net/liblaw2009/>
- Peter Suber, Open Access News, <http://www.earlham.edu/~peters/fos/>
- SPARC Open Access Letter
- LibraryLaw blog (Mary Minow + guests)

Evaluations

Simmons URL : <http://tinyurl.com/au883p>