

US Paperless Copyrights

In July 2008, the US Copyright Office has implemented the next significant phase toward reaching its goal of a paperless office, and has begun accepting online applications for copyright registrations. Inducements to use the online filing system include a lower filing fee (\$35 for a basic claim, as opposed to \$45 for a paper filing), an earlier effective date of registration, and the ability to upload files electronically directly into the US Copyright Office files. Initially, the types of copyright filings are limited to basic claims to copyright for literary-, visual arts-, and performing arts works, including books, motion pictures, sound recordings and single serials. Basic claims are defined as either a single work, multiple unpublished works if they are by the same author(s) and owned by the same claimant, or multiple published works if they are all first published together in the same publication on the same date and owned by the same claimant.

Psystar No Apple

On July 3, 2008, Apple sued Psystar, a Florida corporation, alleging copyright-, trademark- and trade dress infringement, unfair competition and breach of contract. The lawsuit comes after Psystar launched its Open Computer, a PC pre-loaded with Apple's operating system and marketed as a low-cost alternative to Apple's hardware. The complaint charges Psystar with misappropriating Apple's software and damaging Apple's reputation. Apple also claims that Psystar's OpenServ server illegally uses Apple's Mac OS X Server Edition and that it wrongfully gives the impression that Psystar is affiliated with Apple.

While the lawsuit was anticipated immediately after Psystar began selling its products in April, the recourse Apple is requesting was not—among the requests is a total recall on all Open Computer and OpenServ systems.

For eBay a Tale of Two Legal Systems: the Best of Times and the Worst of Times

Two recent trademark decisions regarding eBay's online initiatives to track counterfeit products stand in stark contrast to one another and highlight contradictory views about who should bear the burden of tracking online trademark infringement. A United States federal judge ruled on July 14 that eBay is not responsible for monitoring the sale of counterfeit goods, and that its current procedures for tracking infringement are reasonable. A French Court of Appeals, on the other hand, fined eBay \$61 million in June for selling counterfeit Louis Vuitton and Dior products.

On June 18, 2004, Tiffany and Company ("Tiffany") sued eBay, claiming eBay was liable for trademark infringement, false advertising, unfair competition, and direct and contributory trademark dilution by allowing the sale of counterfeit jewelry on its online auction. Tiffany alleged that it, along with other large designer labels, loses \$30 billion annually to online sales of knockoff products. Both Plaintiff and Defendant attempted to prove the inadequacy of other's anti-counterfeiting measures. Tiffany claimed that eBay's \$20 million annual anti-counterfeiting budget is insufficient, while eBay claimed that the \$14 million Tiffany spends annually to prevent trademark infringement (0.1 percent of its annual revenue) is also insufficient. eBay also pointed out that it maintains a staff of 250 full-time employees responsible solely for tracking trademark infringement, and that through its VeRO (Verified Rights Owner) Program, owners can point out listings selling counterfeit goods which eBay then removes.

A New York judge ruled in favor of eBay on every single count, asserting that trademark owners, not websites, are primarily responsible for protecting their

rights. In its June decision, which Tiffany requested the New York Federal Court to recognize before issuing its decision, the French Court of Appeals ruled differently. The Tribunal de Commerce in Paris awarded Louis Vuitton and Christian Dior Couture €38.6 million in damages (\$61 million), for eBay's sales of counterfeit products and urged eBay to institute a global solution to the problem of counterfeit products.

A possible explanation for the different outcomes is that the ultra fashion-conscious French culture might simply be more sympathetic to designer labels combating online trademark infringement. France and the United States are both attempting to police internet activity and protect intellectual property, but they fundamentally disagree as to what is realistic and who can effectively achieve these goals.

Ignorantia Excusat

In an unanticipated development for the music industry, a Texas Court recently overruled a motion for summary judgment filed by the Recording Industry Association for America ("RIAA"). Representing five well-known recording companies, including Sony BMG Music Entertainment, the RIAA filed a complaint in January, 2007 against a college-aged defendant, seeking damages for 39 claims of copyright infringement. The infringed material included files downloaded from Kazaa, a popular website used to download and share music files.

The defendant admitted to downloading copyrighted material, but claimed to be unaware that downloading the files was illegal. The Copyright Act's minimum statutory damage award per claim is \$750, but if a defendant is unaware or has no reason to believe that a certain activity constitutes illegal file sharing or downloading, she may claim an

continued on page 2

Ignorantia Excusat (continued from page 1)

'innocent infringement' defense under 17 USC 504(c)(2), which could reduce the statutory damages to \$200 per claim. The defendant then has the burden of proving lack of knowledge at trial. While notice of copyrights on the cover of a CD bars use of the defense when the copied material is the CD itself, the question remains whether the defense applies when the material in question is only portions of the CD downloaded online.

China To Overhaul Its Patent Laws

The Chinese Patent Office, formally known as the State Intellectual Property office (SIPO) has announced the expected implementation of its patent law amendment sometime in early 2009. The amendment was approved by the State Council and is being sent to the Standing Committee of the National People's Congress for final approval.

The Amendment to Patent Law (in its present draft) is intended to increase

The defendant signed an affidavit stating that she did not know file sharing on Kazaa was illegal because Kazaa did not inform her that its files were stolen copyrighted materials. She also pointed to her age at the time of the offense, sixteen, and lack of technical knowledge as proof of innocent infringement. RIAA argued that she could have easily found out the music was stolen, as the defendant admitted to owning CDs with notices of copyrights, and referenced a Seventh Circuit decision

the threshold of patent grant, thereby raising the bar as to what is considered patentable, to add new provisions encouraging the promotion and utilization of patented technologies, to strengthen the protection of patent rights, and to prevent rights abuse by patent owners by balancing the patent owner's and public interests.

Some proposed changes have been fought by foreign companies doing business in China. For example, the amended law

holding that the innocent infringer defense does not apply if a defendant could have easily found out the work in question was copyrighted.

Construing all evidence in a light most favorable to the non-moving party, the defendant, the Court denied RIAA's motion for summary judgment. The parties must now advise the Court whether they plan to settle or proceed to trial.

will treat inventions made in China by foreign companies conducting research in China as having been locally invented, thereby requiring a first filing in China for all such inventions, irrespective of the ownership or foreign citizenship of the company or its parent. The United States has similar provisions for US inventions, which require a license before any foreign or PCT counterpart applications can be filed.