

In this week's discussion, copyright and its infringement is reviewed. In the appellate case of *Capitol Records vs. Thomas-Rasset* in the Eighth Circuit, the judge upheld a \$222,000 judgment against the defendant for copyright infringement of 24 songs on the KaZaA file sharing network at a price of \$9,250 per song, a middle ground for earlier claims of millions of dollars' worth of recompense at its high end and a \$54,000 total at the low end, while the initial damages were seeking to recompense for 1,702 songs. While the price seems high, The Court stated that a lack of feasibility in calculating actual damages and a deterrence factor upholds the amount declared and in accordance with previous cases' precedence.

In another case involving copyright infringement of *Cambridge University Press vs. Becker*, the publishers sued Georgia State University for storing parts of their copyrighted material in an electronic reserves system maintained by the university, in which individual instructors at the university, at their best judgment, uploaded excerpts and sometimes entire chapters of textbook content to the reserve system. The U.S. District Court declared that in all but five cases, the material stored within the reserve was fair use for the classroom and it did not violate copyright laws, in accordance with the excerpts being less than 10% of the book's entire contents. To support its decision, the Court cited the Fair Use Checklist over the more restrictive Guidelines for Classroom Copying as precedence for later cases.

In such cases like *Capitol Records vs. Thomas-Rasset*, I support proper compensation for content producers, but the monetary restitution declared owed to the plaintiff in this case seems arbitrarily steep, which is frequent in cases like this. The monetary loss that the content producer and recording company endured was substantially less than what was upheld in the judgment, which explains why the plaintiff pursued statutory damages rather than actual damages. Songs

can be purchased from many major online music stores for about a dollar per song, yet the statutory damages claimed were excessively more than this, even considering that the song might have been shared with other illegal downloaders and factoring in lost compensation from those actions. The Court declaring the judgment as a deterrence factor is misguided, as the almost zero percent chance that an individual will be filed suit against is likely not enough to deter someone from downloading a copyrighted song, picture, or video, or will increase the odds that the individual will better cover his or her tracks while still bypassing compensation for the content producer, the core of the issue. While infringement of protected works is wrong, unsubstantiated and overwhelming fines for offenders are not likely to correct the problem.

I also support fair use in cases of reviews and for educational purposes, in line with the judgment in the case of *Cambridge University Press vs. Becker*. Because the material was uploaded and used for educational purposes with a small amount of authorized students and faculty viewing the material, it is difficult to assess an amount of damage created by such actions. The positive effect created by the electronic reserve system outweighs the potential downside and missed compensation, like if a student were to lookup a crucial block of a chapter online when his or her textbook was not around and the chapter excerpt was available online, distills an academic culture of sharing and easy access to knowledge, which is fundamentally important in advancing our societies' knowledge as a whole. *I agree.*

Excellent! Good choice of articles and cases.

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The Top Three Copyright Cases of 2012

Prof. James Gibson, University of Richmond School of Law
January 8, 2013

In my last entry in this series, I examined three important patent law cases from 2012 – one at the Supreme Court level, one at the appellate level, and one at the trial court level. I'll now do the same thing with regard to copyright cases.

My Supreme Court choice is Golan v. Holder, in which the Court upheld a statute that restored U.S. copyright protection to certain foreign works, thus removing them from the public domain. Such works had lost their protection – or had never acquired it in the first place – because of their failure to comply with formalities like registration and notice, or for reasons having to do with U.S. restrictions on the protection of certain foreign works. Having removed those formalities and restrictions from U.S. law, Congress sought to remove their consequences as well, by restoring the copyrights the works otherwise would have enjoyed. In Golan, the Supreme Court held that neither the Patent and Copyright Clause nor the First Amendment prohibited Congress from doing so.

This decision essentially sounds the death knell for any constitutional limitations on Congress's power to shape copyright law. Such limitations had already been on life support since Eldred v. Ashcroft, a 2003 decision in which the Supreme Court upheld a 20-year extension of copyright duration even for works already in existence – i.e., works whose authors had apparently been sufficiently motivated by the shorter term. But at least the works in Eldred had not yet passed into the public domain. In Golan, however, the Court ruled that even works that were once in the public domain can be copyrighted anew. The public domain is now officially a vacuum, an absence of rights, rather than an affirmative source of benefits for the larger public.

At the appellate level, the most significant copyright case was the Eighth Circuit's decision in Capitol Records Inc. v. Thomas-Rasset. Plaintiffs from the recording industry had successfully sued the defendant for file-sharing, and the issue on appeal was the constitutionality of a jury award of \$222,000 for the infringement of 24 songs – \$9,250 per song. Such an amount was permissible under the Copyright Act's statutory damages provision. Indeed, Congress has authorized statutory damages up to \$150,000 per work, so the defendant's exposure was actually \$3.6 million!

In other contexts, however, courts have held that it is a violation of due process to impose a damages award “so severe and oppressive as to be wholly disproportioned to the offense.” Given that the songs at issue were available on iTunes for a dollar each, an award of \$9,250 per song was arguably disproportionate. Not according to the Eighth Circuit, however; citing the need for deterrence and the

difficulty (in some cases) of proving actual damages for copyright infringement, the court upheld the award. Now the defendant has petitioned the Supreme Court to review that holding, and there is a non-negligible chance that the Court will take her up on the invitation.

My choice among trial court cases is Cambridge University Press v. Becker, from the Northern District of Georgia. This one is a real doozy, a 350-page ruling following a bench trial. The plaintiffs were publishers of educational materials, who accused Georgia State University of systematically copying and distributing their works through an electronic reserves system. Of particular significance was that the system instructed individual instructors to make a fair-use determination on a case-by-case basis. It is difficult to summarize such a long opinion, but the case was clearly a huge win for the university. The court found that 95 percent of the e-reserves it considered were fair uses or were otherwise legal. It also rejected reliance on the Guidelines for Classroom Copying, which previous courts had cited, and instead gave its blessing to the more flexible Fair Use Checklist. Perhaps most significant was its holding that

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Outstanding
articles for one
so short!

1.

Bloomberg News

Minnesota Song Downloader Must Pay \$222,000, Court Says

By Don Jeffrey on September 11, 2012

0 Comments

A Minnesota woman accused by the music industry of illegally downloading songs was ordered to pay \$222,000 in damages, after an appeals court overturned a lower-court ruling that had reduced the amount.

The St. Louis-based U.S. Court of Appeals said in an opinion today that the record companies, which appealed the district court's decision to assess \$54,000 in damages against Jammie Thomas-Rasset, were entitled to the larger amount. The case has been tried before three juries.

U.S. District Judge Michael Davis in July 2011 reduced the third jury's \$1.5 million damage award to \$54,000, or \$2,250 for each of 24 recordings infringed. The music labels appealed to reinstate the first jury's award of \$222,000. The U.S. also appealed, to defend the assessment of damage awards under the federal Copyright Act.

"The evidence against Thomas-Rasset demonstrates an aggravated case of willful infringement by an individual consumer who acted to download and distribute copyrighted recordings," the court said. "We conclude that the record companies are entitled to the remedies that they seek on appeal."