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Justin Hughes's Predictions for 2006: Part One

by Cardozo Law Professor Justin Hughes

Part One of a Two Part Series. Look for more predictions from Professor Hughes next week…

Thanks for the invitation to make wildly wrong guesses about Internet trends. You asked for a couple, but once I started, the list grew.

We all know that copyright, patent, and trademark laws have always had to deal with changing technological and market conditions. Back in 1937, the Pennsylvania Supreme Court faced one of those situations and wrote,

"Just as the birth of the printing press made it necessary for equity to inaugurate a protection for literary and intellectual property, so these latter-day inventions make demands upon the creative and ever-evolving energy of equity to extend that protection so as adequately to do justice under current conditions of life."

In 1937, the "latter day invention" was radio broadcasting – an amazing new technology that could reproduce sounds "for practically all the world as simultaneous auditors."

But the important part of the quotation for me is the last line. If you want to understand fully how disputes about technology, markets, and intellectual property law will be shaped, you have to understand the deep mission of law and our courts – "so as adequately to do justice under current conditions of life." A few too many law professors – and unquestionably too many digerati voices - forget that. They prefer to frame their arguments about the future in terms of economic efficiencies and inexorable forces of technology,

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consumers, and markets.

Of course, if the forces were truly inexorable, the digerati wouldn't need to debate all this stuff, would they? WIRED magazine could be thinner and less ranting. (Unless, of course, their own voices in the discourse are just hapless tools of the inexorable forces.)

The debates we'll see in 2006 – and the near term – will look a lot like what we saw in 2003, 2004, and 2005. My guess is that the more interesting stuff vis-à-vis technology and intellectual property is still further around the bend. But here's what's on the road ahead.

1. P2P WILL BE DEPLOYED MORE AND MORE BY COPYRIGHT INDUSTRIES, FURTHER PARSING THE TECHNOLOGY FROM ITS ILLICIT USE

The legal battle over peer-to-peer is an old story in Internet time – and one most copyright professors would like forget. But it's one near and dear to students, so maybe it warrants mention here.

In the near future, cases against individual P2P users will continue and try to move toward a self-sustaining litigation strategy. The RIAA is not there yet – the lawsuits still cost them more than they take in – but the settlements in the UK are substantially higher than in the US and there is no reason the US settlement amount will not go up. As the lawsuits continue, people with money – who are the customers the record companies want to push to legal downloading – will be understandably fearful, while judgment-proof folks (like many students) may be less fearful and continue to download. The result could be, medium-term, a professor's fantasy about utility-maximizing price discrimination: those who can pay, pay and those who can't, get it for free.

For more on this see something I wrote called *On the Logic of Suing One's Customers and the Dilemma of Infrginement-Based Business Models*.

The most curious part of the P2P story in the short term will be France – where courts and some legislators seem determined to fit downloading into the private copyright right/privilege that exists there. In the past, the private copying right was doctrinally limited only to copying *from an authorized copy that the copier already owned*. So it obviously did not apply to P2P. Some French court decisions – and a proposal in the Assemblee Nationale — would expand the private copying privilege to include copies made from works owned by others. That would make *downloading* legal in France, but *uploading* – making the files available – would presumably still trigger liability. Since all the suits in the United States (and most countries as far as I know) have only been against uploaders, even this radical expansion of "permitted uses" might not change the enforcement mechanisms against P2P systems. (There is, however, one recent French case saying that the uploading is OK too.)

I personally would like to see the French continue on this path because the justification for permitting this private copying is that France collects levies on blank digital media and distributes the monies to artists. The problem is that France doesn't like to distribute this money to *American* artists. Historically,

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our artists have been shortchanged by this levy system. If France broadens the right of private copying, the digital media levy system becomes more integral for French law being in compliance with TRIPS – and if Americans are getting nothing from the levy system, that starts to smell like a very good WTO case against France.

2. THE PRESSURE TO SIMPLIFY AND RATIONALIZE MUSIC LICENSING WILL GROW (and needs to)

This is one place where the law ill-fits "current conditions of life." The separation of musical compositions and sound recordings will continue –- that's a matter of adequately doing justice to the diverse interests of composers and performers. But the diversion of artists' rights to "publishers" looks increasingly anachronistic to me – maybe I'm missing something. Worse still, the division of rights and licensing responsibilities among artists, publishers, collecting societies, the Harry Fox Agency, Sound Exchange, and recording labels is a mess. A particular problem is the separation of licensing of the §106 rights of reproduction and distribution (the Harry Fox Agency) and licensing of the §106 right of public performance (ASCAP, BMI, and SESAC). This is a place where Internet-generated possibilities – with a lot of arguments from reasonably minded policy people – will have to dislodge vested interests from at least some of their fortified positions. Expect to see plenty of legislative proposals this year to amend §114 (on licensing of sound recordings) and §115 (on compulsory licensing of musical composition). As Marybeth Peters, the Register of Copyrights, said last June, "the operative question is not whether to reform section 115, but how to do so."

This is another topic on which we have to watch Europe. The European Commission has a new head of the copyright section – a gentleman who has brought a breath of fresh thinking to the place. The Commission has now floated a proposal that instead of national collecting societies licensing on a national basis (the German collecting society licensing in Germany, the Spanish collecting society licensing in Spain, etc.), each national collecting society should be allowed to grant pan-EU licenses and that an EU artist should have the freedom to designate whatever collecting society to represent her that she wants. In other words, injecting real competition into the system from two directions.

3. PRIVATE PARTIES TRYING TO PROTECT SMALLER AND SMALLER BITS OF EXPRESSION

This is something that Duke Professor Jerry Reichman warned about long ago – and it's a problem that continues today. It's not a trend you will obviously see, not something that will be reported on page one of the business section. But it's quite interesting.

A common subgenre here is claims for copyright control over titles. This problem popped up early in the Internet, when person A would provided a hyperlink to material on person B's websites using person B's titles. Since A is not copying the actual text, B's easiest claim is that the copying of the title constitutes copyright infringement. This sort of claim arose early in the Internet – as early as the 1996 Scottish case of *Shetland Times v. Shetland News*. The

trend continues today with the 2004 case by newspaper Yomiuri Shimbun against an Internet service in Japan and a currently pending case pitting Agence France Press against Google in D.C. federal district court – both cases over whether headlines are copyrightable.

Beyond headlines, this uncoordinated push to protect what I call "microworks" continues in all kinds of ways. In the Netherlands, a 2004 trial court decision recognized independent copyright in the coined word "s1ngle," a decision that was thankfully overturned on appeal. In the US, there is dicta in a wide range of cases concerning non-fiction works suggesting that a single used car or collector coin valuation might be *individually* protectable under copyright law. For more on this, see something I wrote called *Size Matters (or Should) in Copyright Law*.

As Malaysian law professor Ida Madieha wrote about the *Shetland Times* case a few years ago, "[s]urely there are principles of unfair competition or competition policies that can tackle this sort of activity more effectively than through copyright." That IS the sensible answer – in fact, the Japanese court in the Yomiuri Shimbun case found that there was no violation of copyright law, but there was a violation of unfair competition law in Japan.

The problem is that while pre-Internet national copyright laws were very consistent – *no protection of titles* – unfair competition laws are very inconsistent among industrialized economies. What is unfair competition in Germany and Japan is peachy keen, darn ideal competition in America. So, the problem may leave copyright law and just get repackaged as an inconsistency in national unfair competition laws that causes friction in the offering of Internet-based services.

4. THE WIPO BROADCAST TREATY WILL PROBABLY GO NOWHERE – AS WILL THE WIPO DEVELOPMENT AGENDA

The two are related, as the developing countries have no reason to deliver up another treaty that developed countries covet (mainly the EU) until the perceived needs of poorer countries get better attention at the multilateral level. Whatever obligations emerge whenever, we have to make sure that we do not change our way of protecting broadcasts through copyright law (with its Feistian originality requirement).

Readers may notice that none of these predictions center on Google. Google, Yahoo!, and a few other of the big stage presences will figure in some predictions I'll offer next week.

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