



# IP Mississippi



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## Student Tuition & Music Fees

A few universities, including Cornell and Columbia, are considering a proposal that would incorporate a small music royalty fee into the tuition of their students. In this voluntary collective licensing program, participating universities would collect the fees and then pay the major record labels for a license that would allow unlimited downloading by students at the universities.

If successful, the plan might serve as a useful model for ISP-level music licenses which would be available to the general public. Major record labels, though reluctant to endorse such programs in the past, are now looking for a new business model which would move away from the litigation-based approach that they have used in the past.

“IP Mississippi” is a quarterly publication of the Mississippi Law Research Institute designed to keep educators and administrators at Mississippi universities aware of current happenings in the world of intellectual property.

The Mississippi Law Research Institute is a division of the University of Mississippi School of Law. The IP Group is composed of two attorneys, William T. Wilkins and A. Meaghin Burke. For more information, please visit the website at <http://www.mlri.olemiss.edu>, or feel free to contact the IP Group at (662) 915-7775.

## State Street Eroded

The Federal Circuit Court of Appeals has handed down *In re Bilski*, upholding the denial of a patent that described a method of commodity trading hedging. The same court, in *State Street Bank v. Signature Financial Group*, had previously recognized the patentability of business methods so long as the invention produced a “a useful, concrete and tangible result.” *In re Bilski* overturned that test and declared the correct test for process patentability to be the “machine or transformation test” which asks whether a process transforms an article from one state to another or whether the process is central to a particular machine.

The case has sent shockwaves through the financial industry because many patents previously granted under the *State Street* criteria may now be found invalid. The case will likely be appealed to the United States Supreme Court.

## KU Sues Over Inventorship

The University of Kansas (KU) has sued the government in an attempt to have two of its scientists given inventorship credit for a major pharmaceutical, currently being marketed as Velcade. Velcade sales reached \$190 million in the first half of fiscal year 2008.

KU claims that the researchers played a pivotal role in the development of the drug and were wrongly left off the patent. KU maintains that it attempted to correct the oversight through bureaucratic channels but decided to sue after failing to receive satisfaction.

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## IP News of Note

- Reuters, the owners of EndNote Software, has sued George Mason University for reverse engineering a program which converts EndNote Software files into free and open source files. Reuters maintains that this program violates the EndNote license agreement.
- The Recording Industry Association of America (RIAA) has announced its intentions to halt mass music piracy suits. The RIAA declared late last year that it will explore new options of licensing music which will not require internet service providers to disclose users' names or personal information.
- Tennessee recently enacted Senate Bill 3974 into law. The law requires certain state universities and colleges to put in place mechanisms to prevent illegal downloading to computers connected to campus networks. A state cost review projected the cost of implementation to be approximately \$13 million.
- Carnegie Mellon University is currently analyzing a tremendous amount of data in an attempt to study students' downloading habits on campus networks. The Digital Citizen Project, which is housed at Carnegie Mellon University, funded the study which will hopefully shed light on new approaches to curbing illegal downloading by university students.

## College Colors Can Trigger Trademark Violation

In the recent case *Board of Supervisors of Louisiana State University v. Smack Apparel Co.*, the Fifth Circuit Court of Appeals held that unauthorized use of a university's colors can, in some cases, constitute trademark infringement. The decisions of the Fifth Circuit Court of Appeals apply in the states of Mississippi, Louisiana, and Texas.

Smack Apparel was found liable for trademark infringement for the manufacture and sale of shirts created using highly identifiable school colors with oblique, but not explicit, references to the corresponding school. The Court determined that the universities had established ownership in a protectable trademark and they had demonstrated a likelihood of confusion on the part of consumers as to the source of the goods.

## Librarians Request Expansion of DMCA Exemptions

The Digital Millennium Copyright Act (DMCA) generally prohibits the circumvention of anti-copying technology on copyrighted material. This prohibition makes it difficult to utilize copyrighted material, even for otherwise permissible reasons that are non-infringing fair uses. The DMCA includes, however, a mechanism where every three years the Library of Congress's Copyright Office will consider proposed exemptions to the law. Petitioners for exemptions must demonstrate that the DMCA limitations "substantially and adversely" impact their fair uses of copyrighted materials. The Copyright Office conducts a public comment period and several hearings before deciding to grant or not grant proposed exemptions. Any exemptions that are granted are temporary.

In 2006, the last review year, the Copyright Office granted six exemptions, including a much-sought exception that allowed film studies professors to compile clips of films for classroom use, so long as the film being excerpted was part of the film studies department's library. For the 2009 review year, several groups have proposed expansions of that previously granted exemption. Currently the Copyright Office is considering an exemption that would allow any professor to compile film clips for classroom uses. Another proposal looks to extend the exemption to primary and secondary school teachers as well. The Library of Congress will likely not announce its decisions until late 2009.

## INTRODUCTION TO THE PRO-IP ACT OF 2007

This summary of the PRO-IP Act of 2007 was written by Kate Lindsay McNeese, a 2008 graduate of the University of Mississippi School of Law. Kate volunteered with the Mississippi Law Research Institute through the Public Service Internship Program. The Public Service Internship Program is offered and maintained by the University of Mississippi School of Law. The Mississippi Law Research Institute is grateful to Kate and the Public Service Internship Program.

### Summary of the Law

The PRO-IP Act of 2007 was introduced as a way to enhance remedies for violations of intellectual property laws. The PRO-IP Act of 2007 was signed into law by President Bush in October 2008.

Title I of the Act addresses enhancements to civil intellectual property laws. Section 101 of Title I amends federal copyright law to provide a safe harbor for copyright registrations that contain inaccurate information. However, if there was prior knowledge of the inaccuracy that would have caused the Register of Copyrights to deny registration, Section 101 does not apply. This section provides that copyright registration requirements apply to civil, rather than criminal, infringement actions. It also requires courts to prevent the disclosure of seized records relating to copyright infringement. Section 104 broadens the trademark infringement situations in which treble damages are allowed. Section 106 prohibits the importing, as well as exporting, of infringing copies of copyrighted works.

Title II of the Act addresses enhancements to criminal intellectual property laws. Section 201 amends the federal criminal code to revise criminal penalties for copyright infringement. These revisions apply to repeat copyright infringers, traffickers in counterfeit labels or packaging and those who cause serious bodily harm or death while trafficking counterfeit materials. This section also revises criminal and civil forfeiture provisions and adds new restitution for forfeiture provisions. Section 203 allows for certain federal sentencing guidelines to be amended to increase the punishment for introducing copyright infringing items into the stream of foreign commerce.

Title III of the Act addresses coordination and public planning of federal effort against counterfeiting and piracy. Section 301 establishes the Office of the US Intellectual Property Enforcement Representative. This office can formulate strategies for combating copyright and piracy of intellectual property and coordinates enforcement efforts to protect property rights. Section 321 requires the formulation of a Joint Strategic Plan for combating copyright infringement and piracy. The plan must include training programs and technical assistance to foreign governments. Section 322 requires an annual report while section 324 provides the funds to carry out the requirements.

Title IV of the Act addresses international enforcement and coordination. Section 401 requires at least ten additional IP attaches to work with foreign countries to combat copyright infringement. Section 404 requires yearly audits to be performed to see how successful the initiatives have been. Section 405 provides the funds to carry out the requirements.

Title V of the Act addresses Department of Justice programs. Section 501 establishes the Intellectual Property Enforcement Division within the DOJ. Functions related to the enforcement of criminal laws regarding IP rights and trade secrets are transferred to this division. Section 511 amends the Computer Crime Enforcement Act. Section 512 directs the Attorney General to provide support and resources to the Computer Hacking and Intellectual Property Units. Section 514 provides the funds to carry out these requirements. Section 521 calls for the deployment of five extra IP Law Enforcement Coordinators in foreign countries. Section 522 increases DOJ training and assistance to foreign governments. Section 531 requires Title V activities to be consistent with the Joint Strategic Plan while section 532 requires the Attorney General to report progress to the House and Senate judiciary committees.

#### **History of the PRO-IP Act**

The Prioritizing Resources and Organization for Intellectual Property (or PRO-IP) Act of 2007 was introduced on December 5, 2007 and was voted on by the House of Representatives on May 8, 2008. The Act passed by a vote of 410 to 11. The Act was introduced by a bipartisan group of Congressmen including many powerful members of the House Judiciary Committee. The Act sought to increase civil and criminal

penalties for copyright and trademark infringement. It proposed to create a task force to coordinate and enforce IP regulations at both the national and international level. The Act also added a unit to the Department of Justice and increased funding in these areas. The Act was aimed to “kick-start” the copyright reform process. Much of the legislation targeted industrial counterfeiting and knock-off drugs, but it also allowed the government to seize property (such as computers) from copyright infringers.

### **Reactions to the PRO-IP Act**

The Motion Picture Association of America (MPAA) applauded the House for passing the Act. The MPAA called it “a comprehensive, bipartisan measure that will strengthen our nation's economy and generate more jobs for American workers by bolstering protections for intellectual property.”

The Electronic Frontier Foundation called the Act's provisions “outrageous.” The EFF found it ridiculous that “new and unnecessary” federal bureaucracies would be created and devoted to intellectual property enforcement. The group also worries that language saying “copyright registration is not required for criminal enforcement of the copyright” might lead to increased prosecution against individuals and innovators.