IV. COPYRIGHTS

A. CASE LAW

1. U.S. Supreme Court

a. *Harper v. Maverick*
81 BNA's PTCJ 140

The U.S. Supreme Court on November 29, 2010 declines review of a case in which a defendant accused of infringing copyrights in sound recordings by making unauthorized copies through online downloading is denied the opportunity to pursue an innocent infringer defense.

2. U.S. Courts of Appeal

a. *United States v. American Society of Composers, Authors and Publishers*
80 BNA's PTCJ 717

The U.S. Court of Appeals for the Second Circuit ruled on September 28, 2010 that the downloading of a copy of a copyrighted musical work implicates the copyright holder's right of reproduction but does not implicate the copyright holder's public performance right under section 106 of the Copyright Act. Affirming a district court's ruling on the public performance issue, the court, however, vacates the lower courts assessment of licensing fees against internet music operations and remands the question of establishing reasonable fee for further consideration.

b. *Vernor v. Autodesk Inc.*
96 USPQ2d 1201

The U.S. Court of Appeals for the Ninth Circuit ruled on September 10, 2010 that a software user is licensee, rather than owner of copy, if copyright owner specifies that the user is granted licenses, significantly restricts user's ability to transfer software, and imposes notable use restrictions; direct customer of software developer in present case was licensee, rather than owner of copies of software, and thus was not entitled to invoke first-sale doctrine.

c. *Airframe Systems Inc. v. Raytheon Co.*
95 USPQ2d 1082

The U.S. Court of Appeals for the First Circuit ruled on March 21, 2010 that claim alleging infringing use of plaintiff's copyrighted source code for its aircraft maintenance and engineering software is sufficiently related to claim of infringing "possession" of source code, asserted in prior action, that doctrine of claim preclusion bars present suit; there is also sufficiently close relationship between defendant named in present infringement action and

defendant in prior action that "new" defendant may assert claim preclusion as defense to later suit.

d. ***UMG Recordings Inc. v. Augusto***
81 BNA's PTCJ 309

The U.S. Court of Appeals for the Ninth Circuit ruled on January 4, 2011 that the distribution of promotional copies of music CDs by a record company resulted in transfer of title of those CDs, and thus sale of those discs at online auctions was protected under the first sale doctrine.

e. ***Hyperquest Inc. v. N'Site Solutions***
81 BNA's PTCJ 373

The U.S. Court of Appeals for the Seventh Circuit ruled on January 19, 2011 that a licensee of insurance software did not hold any of the exclusive rights enumerated under the Copyright Act and thus did not have standing to bring an infringement claim against another licensee that had allegedly exceeded the scope of its license.

3. **U.S. District Courts**

a. ***Sony BMG Music Entertainment v. Tenenbaum***
80 BNA's PTCJ 330

The U.S. District Court for the District of Massachusetts ruled on July 9, 2010 that a jury's $675,000 statutory damages award in the Joel Tenenbaum file sharing infringement case is unconstitutionally excessive because it is far greater than necessary to serve the government's legitimate interest in compensating copyright owners and deterring infringement.

b. ***Miller v Facebook Inc.***
95 USPQ2d 1822

The U.S. District Court for the Northern District of California ruled on May 28 , 2010 that amended complaint sufficiently states claim for contributory infringement against defendant social networking website operator, stemming from alleged publishing of infringing video game on defendant's website, since complaint clearly alleges that defendant had actual knowledge that infringing game was available using its system, and that defendant nevertheless continued to allow users to search for and access accused game.

c. ***Woods v. Resnick***
80 BNA's PTCJ 382

The U.S. District Court for the Western District of Wisconsin ruled on July 16, 2010 that the equal owner of a software company did not show that he made a copyrightable contribution to a software program or that the other owner who wrote the code executed a written assignment to the company.

d. ***Peermusic III Ltd. v. Live Universe Inc.***
80 BNA's PTCJ 542

The U.S. District Court for the Central District of California on August 9, 2010 sanctioned lyrics websites for failure to remove infringing content in violation of an earlier injunction.

e. ***Mackie v. Hipple***
80 BNA's PTCJ 575

The U.S. District Court for the Western District of Washington ruled on August 9, 2010 that the "discovery rule" under federal copyright law did not require a sculptor to scan the Internet for possible photographic infringers of his works.

f. ***1-800Contacts Inc. v. Memorial Eye PA***
95 USPQ2d 1226

The U.S. District Court for the District of Utah ruled on March 15, 2010 that plaintiff has not brought "sham" lawsuit by alleging that defendant engaged in trademark infringement, unfair competition, false designation of origin, false advertising, and passing off by purchasing sponsored advertising on search engines that is triggered by plaintiff's "1-800Contacts" trademarks, since plaintiff's allegations that defendant purchased keywords related to plaintiff's website and/or trademarks are sufficient to plead use of plaintiff's marks "in commerce," and since purchase of another's trademark, through search engine, for purpose of diverting Internet traffic violates Lanham Act.

g. ***Waves Audio Ltd. v. Reckless Music LLC***
95 USPQ2d 1330

The U.S. District Court for the Southern District of New York ruled on June 9, 2010 that plaintiffs in action in which defendant recording studio was found liable for vicarious infringement of audio software copyrights are denied award of attorneys' fees, since defendant advanced reasonable defense by arguing that it had no control over sound engineers who acted as independent contractors.

h. ***Righthaven LLC v. Realty One Group Inc.***
80 BNA's PTCJ 842

The U.S. District Court for the District of Nevada ruled on October 19, 2010 that real estate company's blog posting of a newspaper article did not infringe the copyright held by Righthaven LLC, which is engaged in lawsuits challenging the internet posting and aggregation of newspaper content.

i. ***Agence France-Presse v. Morel***
81 BNA's PTCJ 426

The U.S. District Court for the Southern District of New York ruled on January 14, 2011 that Twitter's terms of service, which granted Twitter and affiliated websites a license to use and reproduce uploaded photographs, does not clearly confer a right on other users to reuse copyrighted postings.

j. ***Capitol Records Inc. v. Thomas-Rasset***
80 BNA's PTCJ 54

A jury in the U.S. District Court for the District of Minnesota concluded on November 4, 2010 that Jammie Thomas-Rasset, the first peer-to-peer file sharer to defend infringement litigation all the way to a verdict, should pay $1.5 million in statutory damages for willfully sharing 24 copyrighted music files.

k. ***Patrick Collins Inc. v. Does 1-1219***
97 USPQ2d 1667

The U.S. District Court for the Northern District of California ruled on December 28, 2010 that plaintiff motion picture production company, which claims that anonymous defendants used online peer-to-peer network to reproduce plaintiff's copyrighted movie, has shown good cause for permitting it to engage in early discovery in order to identify anonymous defendants and effect service of process.

l. ***Righthaven LLC v. Major-Wager.com Inc.***
81 BNA's PTCJ 57

The U.S. District Court for the District of Nevada ruled on October 28, 2010 that operators of a Canadian website, on which an anonymous user posted a copyrighted news article, must defend the case in Nevada.

m. ***Exceller Software Corp. v. Pearson Education Inc.***
81 BNA's PTCJ 88

The U.S. District Court for the Southern District of New York ruled on November 9, 2010 that a software developer may be a joint author of a former partner's enhancements.

n. ***Liberty Media Holdings, LLC v. Does 1-59***
81 BNA's PTCJ 89

The U.S. District Court for the Southern District of California on November 3, 2010 approved expedited discovery on ISPs in a lawsuit arising from walled website misuse.

o. ***Harper Collins Publishers LLC v. Gawker Media LLC***
81 BNA's PTCJ 109

The U.S. District Court for the Southern District of New York ruled on November 27, 2010 that Gawker.com's online publication of 21 pages from Sarah Palin's *America By Heart*, days before the book's release, was likely infringing and not fair use.

p. ***Lenz v. Universal Music Corp.***
81 BNA's PTCJ 114

The U.S. District Court of the Northern District of California ruled on November 17, 2010 that dancing kids YouTube poster's email was not protected by attorney-client privilege. Magistrate judge did not clearly err in granting defendant copyright owners' motion to compel further discovery with respect to plaintiff's communications with her attorneys regarding her motives for bringing lawsuit against defendants for alleged misrepresentations in "takedown" notice, issued under 17 U.S.C. § 512(c)(3), which warned against potential infringement and instructed video hosting site to remove plaintiff's home video.

q. ***Amaretto Ranch Breedables v. Ozimals Inc.***
97 USPQ2d 1664

The U.S. District Court for the Northern District of California ruled on December 21, 2010 that plaintiff has raised serious questions going to merits of its Digital Millennium Copyright Act claim alleging that defendant, in DMCA "takedown" notice, materially misrepresented that plaintiff's virtual horse products infringe defendant's copyrights in virtual rabbits, since defendant cannot prevent plaintiff from marketing virtual animals with similar traits, provided defendant's programming was not copied and since plaintiff submitted declarations to that effect.

r. ***Voltage Pictures LLC v. Doe***
81 BNA's PTCJ 145

The U.S. District Court for the District of Columbia on November 22, 2010 was asked by the plaintiff in a copyright infringement action against thousands of users of BitTorrent to sanction a Florida defense attorney who has sold "do-it-yourself" packages to some of the defendants.

s. ***Louis Vuitton Malletier SA v. Akanoc Solutions Inc.***
97 USPQ2d 1178

The U.S. District Court for the Northern District of California ruled on March 19, 2010 that digital image data stored on computer may constitute "copy" under Copyright Act, since image is "fixed in a tangible medium of expression," for purposes of Copyright Act, when it is stored on computer's server, hard disk, or other storage device, and since computer owner shows copy by means of device or process when owner uses computer to fill computer screen

with image stored on that computer, or communicates stored image electronically to another computer.

t. ***KEMA Inc. v. Koperwhats***
96 USPQ2d 1787

The U.S. District Court for the Northern District of California on September 1, 2010 dismissed a counterclaim alleging infringement of copyright in computer software without leave to amend, since counterclaim pleads facts showing that software at issue is different from software described in defendant's registration certificate and supplementary registration, and since defendant's allegations regarding which version of software was deposited with the U.S. Copyright Office are ambiguous and inconsistent.

u. ***Christen v. iParadigms LLC***
96 USPQ2d 1934

The U.S. District Court for the Eastern District of Virginia held on August 4, 2010 that plaintiff's claim for conversion, based on defendant's use of plaintiff's manuscripts in plagiarism detection service database, is preempted by federal copyright law, since works at issue fall within subject matter of copyright protection, since claim seeks to hold defendant liable for encroaching on plaintiff's right to use and reproduce copyrighted work, and since plaintiff does not allege that defendant is retaining physical object that belongs to plaintiff, or claim that she owns digital code in which her work is stored on defendant's system.

v. ***Adobe Systems Inc. v. Kornrumph***
81 BNA's PTCJ 432

The U.S. District Court for the Northern District of California on January 19, 2011 dismissed a misuse counterclaim that *Adobe* had violated the first sale doctrine in a software infringement case. .

w. ***WPIX Inc. v. ivi Inc.***
81 BNA's PTCJ 520

The U.S. District Court for the Southern District of New York on February 22, 2011 enjoined the service of a company that takes broadcast television signals off the air and streams them to subscribers over the internet by stating that the company is not a cable television service provider that is eligible for a statutory license granted to cable services under federal copyright law.

x. ***IO Group Inc. v. Doe***
81 BNA's PTCJ 468

The U.S. District Court for the Northern District of California ruled on February 3, 2011 that neither the use of the same internet service provider and the same peer-to-peer

network, nor the possibility of potential conspirator liability, can form the basis for a joinder of 435 Doe defendants that did not directly exchange copyrighted works with each other.

y. ***United States v. HQ-Streams.com***
81 BNA's PTCJ 469

In the U.S. District Court for the Southern District of New York, on February 2, 2011, federal prosecutors and custom authorities announced that domains were seized for publishing hyperlinks to unauthorized sports video streaming.

z. ***Shropshire v. Canning***
97 USPQ2d 1583

The U.S. District Court for the Northern District of California ruled on January 11, 2011 that it takes jurisdiction over claim alleging that defendant infringed copyright in musical composition by creating video set to copyrighted song and posting it on web, since Copyright Act does not apply to conduct that occurs abroad, and creation of accused video occurred entirely in Canada.

aa. ***Muench Photography, Inc. v. Houghton Mifflin Harcourt Publishing Co.***
712 F.Supp.2d 84

The U.S. District Court for the Southern District of New York on May 4, 2010 found that the plaintiff failed to state a cause of action for copyright infringement of individual photographs that the plaintiff had contributed to an automated database because only the database as a whole was registered. The court held that the individual works at issue were not registered because the registration for the database did not include the authors' names.

bb. ***Elsevier B.V. v. UnitedHealth Group, Inc.***
2010 WL 150167

The U.S. District Court for the Southern District of New York determined on January 14, 2010 that section 412 of the Copyright Act requires a registration in the United States prior to an award of statutory damages for copyright infringement of a foreign work. The court noted that, because the Berne Convention is not self-executing, it cannot be used to support a claim for preemption that would invalidate this requirement.

cc. ***MSC Music America, Inc. v. Yahoo! Inc.***
2010 WL 500430

The U.S. District Court for the Middle District of Tennessee held on February 5, 2010 that a musical composition, even where recorded multiple times by different musicians, constituted one work for determining the amount of copyright damages. MCS claimed copyright ownership in 215 musical compositions and alleged that Yahoo digitally transmitted 308 separate sound recordings embodying those compositions.

dd. ***Liberty Media Holdings LLC v. Swarm of November 16, 2010***
82 BNA's PTCJ 24

The U.S. District Court for the Southern District of California ruled on April 26, 2011 that a film owner was permitted to identify "swarm" of BitTorrent users who downloaded film.

ee. ***Righthaven LLC v. Chondry***
82 BNA's PTCJ 48

The U.S. District Court for the District of Nevada ruled on May 3, 2011 that frequent copyright plaintiff Righthaven survives summary judgment, but court won't seize defendant's domain name.

ff. ***Righthaven LLC v. DiBiase***
81 BNA's PTCJ 827

The U.S. District Court for the District of Nevada on April 15, 2011 dismissed Righthaven's plea to transfer control of an alleged infringer's domain name.

gg. ***Authors Guild v. Google Inc.***
81 BNA's PTCJ 663

The U.S. District Court for the Southern District of New York refused on March 22, 2011 to approve the terms of a proposed $125 million settlement of class action claims brought by groups of authors and publishers against Google Inc. since they were not "fair, adequate, and reasonable" with respect to the rights of members of the relevant class not represented by the parties. The rejection of the proposed pact prompts a whirlwind of reaction in the copyright community, including public interests organizations pushing for increased access to books, particularly orphan works and other difficult-to-access works.