Class 23: Google

- Administrative
  - Next Time: Eat Turkey; Sleep.
  - After That: 405-15; Problems 4-6, 4-7, 4-8; 780-89
  - Other Classes for your consideration
    - Patent Law
    - Patent Litigation
    - IP and Technology Contracting
  - Final Exam now posted on website.
  - News
    - Andy Griffiths v. Andy Griffiths
    - New York Times article about artist who paints Alabama Football scenes
    - OJ: "If I did It, Here's How It Happened"
    - Colonel Sanders From Space
- Last Time
  - Grokster v. MGM
    - Basic Facts
      -
      -
      - Over 100 million copies of software distributed
      - Evidence of Intent
        - Streamcast — Targeted Napster's orphans
          - Internal e-mails admitting intent.
          - Press kit about attempt to capture Napster users.
          - "Bridge" application OpenNap
          - Banner Ads for OpenNap
          - Proposed Ads
        - Grokster — "Sparser, but revealing"
          - Snaptor "Bridge"
          - Used metatags
          - Their name
      - Non-Infringing Uses
        - Breyer: 10% noninfringing — Ginsburg contradicts in FN3: The 10% are merely files for which there is "not enough information to form reasonable conclusions"
        - Note: figure is files shared, not files traded.
        - Examples of noninfringing uses
          - Shakespeare (noncopyrighted)
          - Authorization (Wilco, Pearl Jam)
    - Held
    - Reasoning
      - First, attempts to clarify/recast Sony
        - Opinion of the Court
          - Sony is not the only way to establish secondary liability.
          - Sony simply talks about instances where you can presume or impute intent solely from product design.
          - If you have an actual purpose to cause infringing uses, independent of design, no need to go into Sony. — (585): where evidence shows statements or actions directed to promoting infringement, Sony does not preclude liability
        - Battle of Concurrences
          - Ginsburg: If inducement isn't enough on remand, then you can find liability based on Sony on this record.
          - Breyer: Wouldn't have reached Sony, but have to respond to Ginsburg.
      - New way to establish contributory infringement: Inducement of infringement
        - Rule
          - (586) One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement is liable.
          - (586) Liability premised on purposeful, culpable expression and conduct...
        - Is this a test of subjective intent, objective manifestation of intent, or something else?
        - Applied: What evidence of intent to induce?
          - 1. Evidence that companies aimed to satisfy the Napster demand.
          - 2. Neither company attempted to filter copyrighted works.
          - 3. Financial benefit from increased use; increased use mostly from infringement.
    - Advice for next big thing?
- Image Search
  - Arriba Soft
    - Basic Facts
      - Not about Google (False advertising)
      - Defendant has a search engine for Images
        - images.google.com demo (same idea)
        - Collects images with a "crawler" — Downloads full-sized images — Reproduction
        - Thumbnails are created (lower resolution)
          - Derivative Works
          - Reproductions
        - Full-sized images deleted
        - When user searches for a topic, thumbnails are returned; when user clicks on a thumbnail, redirected to original webpage.
          - Distributing
          - Reproduction
      - Plaintiff is an artist who places high-resolution photos on website.
        - Sells ads, books, and travel packages through website.
        - Could sell photos themselves in the future.
        - Defendant's crawler copied these images and they are part of the data returned by defendant's search engine.
      - Facts omitted from casebook
        - Plaintiff complained
        - Def deleted those thumbnails from its database and configured spider to stop crawling plaintiff's site.
    - What are the potential copyright infringements here?
    - Held — Fair use
    - Reasoning
      - Prima Facie infringement?
      - 1. Purpose and Character of Use
        - Commercial
        - Transformative
        - Public Benefit
      - 2. Nature of the copyrighted work.
      - 3. Amount and substantiality of portion used.
      - 4. Effect on the Market — What markets?
  - Perfect 10
    - Basic Facts
      - Similar to Arribasoft
      - Key Differences
        - Defendant — AdSense and AdWords — How do they work?
        - Plaintiff
          - Replace "Western Landscapes" with "high-quality, nude photographs of "natural models"
          - Entered into licensing agreement with Fonestarz to sell photos on cell phones.
    - Held — Not fair use. — Likely
    - Reasoning
      - 1. Purpose and character of use
        - Commercial
        - Transformative
      - 2. Nature of Copyrighted Work
      - 3. Amount and Substantiality of Portion Used
      - 4. Effect on Market
- Google Book Search
  - Basic Facts
    - Two programs
      - Partner Program
        - Google scans books.
        - Google offers sample pages.
        - Redirects readers to links to buy the actual book (not affiliate links; Google doesn't share in the proceeds).
        - Many of the publishers of the 10% of currently-in-print books have signed on as partners.
      - Library Program
        - Targets books that are in-copyright or out-of-copyright, but no longer in print.
        - Readers only get snippets of these books.
    - Various "Views"
      - "Full Book View"
      - "Snippet View"
      - "Limited Preview"
  - Lawsuits
    - 9/05: Author's Guild
    - 10/05: AAP (5 Publishers)
    - 6/06: French publishing group sues in France
    - Another German lawsuit was likely to lose, so it was withdrawn.
  - Fair use?
    - 1. Purpose and Character?
    - 2. Nature of Copyrighted Work?
    - 3. Amount and Substantiality of Portion Used?
    - 4. Effect on Market?
    - Public Interest
  - Fair Use and the funny world of market-creation, market-manipulation.