



Empirically Assessing Copyright Law

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Transformative Use Study

- 417 opinions spanning 1991-2017
- “Substantive” opinions – court opines whether the use is fair or not
- Decisions on at least 2 of 4 factors (and overall decision)
- Transformative Use concept applied in about 70% of cases (slightly higher for appellate decisions and higher for more recent cases)
- Mere fact court uses transformative use concept does not appear to dictate results – but if party wins the transformative use question, they mostly win the case
- Transformative use has statistically significant relationship to outcomes of other factors.



Substantial Similarity Study

- Not much done on this; recent Daryl Lim study, two MSU law students
- Random sample of 1005 opinions spanning 1978 – 2020 (about 1/3 of opinions available on Westlaw)
- Coded for:
 - Year
 - Appellate v. District
 - Circuit
 - Procedural posture
 - Subject matter
 - Rights invoked
 - Prongs 1 and 2 subtests mentioned and used
 - Expert witness involvement
 - Copyright limitations invoked
 - Sources of authority cited
 - Decisions on prongs one, two, and overall



Results

- Substantial similarity litigation started rising sharply around 2006 and that rise has continued (E-Government Act)
- Second and Ninth Circuits dominate, similar to other areas of copyright litigation
- Courts don't really do prong one beyond assessing access
- Prong two is a mess; no dominant subtest, even within many circuits. Courts frequently rely on multiple conflicting subtests in the same opinion
- Experts are used more frequently under prong two than prong one
- Defendants win SS decisions slightly more frequently than plaintiffs
- Whether a court engages with copyright limitations in its decision appears to make a big difference as to who wins the case



DMCA Section 1201 Study Background

- Broad Westlaw of every Section 1201 subsection (1201(a)-(k)); excludes 1202, 1203
 - 337 initial cases; after excluding false positives, 205 cases with 209 opinions
- Coded for:
 - Year
 - Circuit & court level (appellate v. district)
 - Published?
 - Procedural posture
 - Litigant identities (FPE, NPE, I)
 - Subject matter of plaintiff's work
 - Copyright infringement, fair use, and First Amendment?
 - Section 1201 subsections interpreted and applied?
 - Cited authorities
 - Who won?
 - Remedies



Results

- Not a lot of Section 1201 litigation, at least as far as opinions go (on average less than 10/year)
- Not a lot of appellate guidance (less than 1 opinion per year on average)
- Ninth Circuit dominates in overall volume, citations
- Number of opinions over time seems relatively stable
- Lots of individuals sued
- 1201(a)(1) & (2) the most frequently litigated; 1201(b) much less; statutory exemptions not at all
- Plaintiffs win a lot, particularly in the Ninth Circuit
- Large statutory damages against individuals somewhat common

