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