Seminar: Practical Lawyering and Internet-Related Issues - 2005

Harvard Law School

Fall Term, Thursdays, 2:50 - 4:50 p.m., Hauser 101

Jeffrey Cunard, Bruce Keller, Phillip Malone and Timothy Armstrong

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COURSE SYLLABUS

Full Syllabus as HTML

WEEK ONE: SEPTEMBER 8, 2005

Counseling Clients: Litigation and Pre-Litigation Considerations

- Fact gathering
- The pros and cons of litigation
- Sending and responding to cease and desist letters
- Drafting the complaint

Readings:

Download readings 1-3 as a set by clicking the following link:

Readings 1

WEEK TWO: SEPTEMBER 15, 2005
Developing a Core Theory of the Case

• Shaping the case
• The power of analogies
• Anticipating answers
• Anticipating media coverage

Readings:

1) New York Times Co. v. Tasini: Short excerpts from briefs and decisions at the District Court, Second Circuit and Supreme Court. Skim just enough of the briefs or decisions to get a basic understanding of the issues in the case. Please read the following specific pages, however, with an eye toward how on-line activities can be analogized to the physical world:

District Court:

• Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment, pp. 1-2 and 25-26
• Defendants' Memorandum of Law in Support Defendants' Motion for Summary Judgment, pp. 10-11 and 20-21
• Defendants' Memorandum of Law in Further Support of Defendants' Motion for Summary Judgment, pp. 2-3, 17-19 and n. 19
• Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, pp. 1-3, 6-10 and 29-30

Second Circuit:

• Brief for Plaintiffs-Appellants Garson and Robbins, pp. 16-19 [Part 1][Part 2]
• Brief for Defendants-Appellees, pp. 49-61 [Part 1][Part 2]
• Decision: 206 F.3d 161 (2d Cir. 1999), pp. 167-69 and n. 4

Supreme Court:

• Brief for Petitioners, pp. 3 n.2 and 44-46
• Brief for Respondents, pp. 1-2, 7 n.6 and 34-36
• Decision: 538 U.S. 483 (2001), pp. 501-04

2) Egilman v. Keller and Heckman, LLP:
Defendants' Memorandum in Support of Motion for Judgment on the Pleadings, pp.17-19 and n.15

3) MGM, et al., v. Grokster Ltd., et al.:

- Brief for Motion Picture Petitioners, pp. 1, 9-14, 46-47
- Brief Amici Curiae of Innovation Scholars and Economists, pp. 8-12, 16-18
- Transcript of Supreme Court Oral Argument, pp. 10-17, 37-38

For this week's issues, please consider:

- How the drafters of the various readings used analogies to the physical world or other online activities;
- What were the core theories of these cases, and how effective did you find these analogies to be in shaping and supporting those theories; and
- What other analogies might you have used had you been counsel in these cases?

Download designated page excerpts from Tasini and Egilman

WEEK THREE: SEPTEMBER 22, 2005

Discovery: Documents and Depositions

- Discovery strategies: Requesting and producing
- Document preservation: Letters, requirements, consequences for spoliation (including Sarbanes-Oxley)
- Document requests
- Interrogatories
- Electronic discovery and production
- Preparing witnesses for deposition
- Using documents in advance of, and at, depositions

Readings:

1) Weiss v. National Football League, Properties, Inc.: Skim the following sufficiently to understand the issues in the case and to get a sense of what the various discovery requests and response look like:

- Complaint
- Counterclaims and Answer
- Defendants Document Request
- Defendants First Set of Interrogatories
- Plaintiffs Response to First Set of Interrogatories

2) Electronic discovery materials
• Skim quickly “Why Discover Electronic Data?” California Civil Law Discovery website.  


  Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003), read all.

  Zubulake v. UBS Warburg LLC, ___ F.R.D. ___ (S.D.N.Y. 2004), read 1-9, 13-18, pay particular attention to the “Postscript” on p. 18.

  U.S. District Court of Delaware, "Default Standard for Discovery of Electronic Documents".

  Klein-Becker order

3) SBC v. Global Crossing, Ltd., document preservation letter

4) Review website at www.archive.org (especially FAQ on The Wayback Machine)

WEEK FOUR: SEPTEMBER 29, 2005

Dispositive Motions and Brief Writing

• General strategies for motions
• Motions to dismiss: Personal jurisdiction
• Motions for judgment on the pleadings
• Motions for summary judgment
• Writing persuasive briefs

Readings:

1) Sherwood 48 Associates v. Sony Pictures Entertainment, Inc.:

   • Complaint
   • Memorandum Of Law In Support Of Defendants’ Motion For Judgment On the Pleadings, skim entire brief, read pp. 1-6
   • Plaintiffs’ Memorandum Of Law In Opposition To Defendants’ Motion For Judgment On the Pleadings, skim entire brief, read pp. 11-12, 16-19
   • Exhibits in Support of Plaintiffs’ Memorandum -- skim all, read Rosenberg and Zoukis declarations
   • Reply Memorandum of Law In Further Support of Defendants’ Motion For Judgment On the Pleadings, skim entire brief, read pp. 8-12
   • Decision, 213 F. Supp.2d 376 (S.D.N.Y. 2002)


3) Felten v RIAA:

   • Amended Complaint, skim paragraphs 23-41, 48-51, 87-94; read paragraphs 1-3, 42-47, Prayer for relief on First and Second Causes of Action
4) Skim the decisions in the following cases that we discussed in Week One sufficiently to understand how motions to dismiss were dealt with in each:

WEEK FIVE: OCTOBER 6, 2005

Provisional Remedies: Temporary Restraining Orders, Preliminary Injunctions; Tailoring Injunctions

- When are provisional remedies appropriate?
- The standard for applying for such relief
- Strategic considerations in applying for/opposing such remedies
- Snatching victory from the jaws of defeat and vice versa

Readings:


4) United States v. Microsoft consent decree proceedings:
- District Court decision, 980 F.Supp. 537, read Section I (pp. 3-4), Section III (pp. 6-7), Section V (pp. 9-11) and Orders (p. 12)
- U.S. Motion for Contempt, 12/17/97, read all
- "Microsoft’s Week In Court Is Adjourned," Techweb, 1/16/98
Issues of Proof: Using and Rebutting Experts

- Experts’ roles in developing and shaping case
- Expert Reports
- Strategies in deposing/defending experts
- Daubert/Kumho motion practice
- Preparing for expert testimony at trial
- Strategies in examining experts at trial


Readings:

1) Pharmacia v. Alcon

- Defendants’ Memorandum In Support Of Motion In Limine, read 1-15, 24-25
- Opinion and Order on Motion In Limine, read 1-23, 30

2) United States v. Microsoft (1998 monopolization case)

- Written Direct Testimony of Edward Felten, skim §§ 38-62; read §§ 1-9, 19-27, 63-74.
- Trial Testimony (Cross and Re-Direct) of Edward Felten:
  - morning session, read pp. 1-3, 8-10, 25-29, 32-34
  - afternoon session, read pp. 11-12, 19-20, 44-45, 57-59
- District Court Findings of Fact, 84 F.Supp.2d 9 (1999), skim §§ 1-17, 158-165; read p. 4 (introduction), §§ 170-191, 241, 410
- D.C. Circuit opinion, 253 F.3d 34 (2001), read pp. 32-35 (253 F.3d 64-67)

3) Eolas v. Microsoft, post Markman hearing claim construction ruling, 2000 WL 1898853 (N.D.Ill. 2000), read pp. 1, 5-6, 17-19

WEEK SEVEN: OCTOBER 20, 2005

Corporate Counseling: Practical Advice from Inside and Outside the Corporation

- Who is the client
- Harmonizing positions within the corporation
- Working with outside counsel
- Developing and harmonizing corporate end user license agreements ("EULAs") -- IP, strategic and corporate issues
- Microsoft's Shared Source licenses (a version of an open source license) and use of
Creative Commons licenses
• Counseling the corporation in the aftermath of the Grokster decision

**Guest lecturer:** Thomas C. Rubin, Associate General Counsel, Microsoft

**Readings:**

• Preliminary Readings:
  - [Microsoft Shared Source Initiative Overview](#)
  - [A Commercial Perspective: Microsoft Shared Source](#)
  - Microsoft Vista [FAQ for RSS Extensions](#)

• Additional readings (*added October 18*):
  - Brand new description of October 19, 2005 changes in Microsoft’s Shared Source Initiative program
  - [Blog entry](#) by Jason Matusow, Director of Microsoft’s Shared Source Initiative program
  - [Microsoft Simplifies Code-Sharing Plan](#), CNET, October 19, 2005

• Two Microsoft End User License Agreements (EULAs) -- Emailed directly to students in class; not posted

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**[OCTOBER 27, 2005: NO CLASS -- FLY OUT WEEK]**

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**WEEK EIGHT: NOVEMBER 3, 2005**

**Trials and Hearings; Examination; Demonstrative Evidence**

• Pre-trial memoranda
• Meeting the burden: Outlines of key issues/evidence, orders of proof
• Preparing testimony and documents
• Anticipating evidentiary issues
• Direct and cross examination
• Technology in the courtroom
• Distilling and effectively communicating complex evidence
• Post-trial issues: Proposed findings of fact & conclusions of law; post-trial briefs

**Readings:**

• David Boies, Courting Justice. Chapter 5: The Trial of Microsoft. Skim all; read pp. 174-211 (pay particular attention to descriptions of the Bill Gates' videotape excerpts and the cross-examinations of Jim Allchin and Dan Rosen).

• District Court's Findings of Fact, 84 F. Supp.2d 9 (D.D.C. 1999): Reread (from Week 6) findings # # 179-185; read 409-412.


• Review a list of the many trial-related filings in U.S. v. Microsoft. You don’t need to read any of the filings, just look through and think about the list to get a sense of the many sorts of procedural, evidentiary and other issues that arise as one approaches and is in trial:
  • DOJ District Court/trial filings
  • Microsoft District Court/trial filings (look in the right-hand column about halfway down the page after the four entries for "Amicus Briefs on Conclusions of Law.")

2) United States v. Oracle Corp.: 

• Plaintiffs’ Proposed Findings of Fact (Redacted Version). Skim entire table of contents, Sections 8.1, 8.2 & 8.3 (portions of entry/repositioning); read Section 11.2 (Kutnick).

Note: Detailed outline of assigned advice memorandum due by 4:00 p.m. on November 2

Note: Teams meet individually with instructors to discuss outlines of advice memorandum on November 3 and 4

WEEK NINE: NOVEMBER 10, 2005

Government Inquiries: Prosecution and Defense

Guest lecturer: John Grossman, Chief, Corruption, Fraud and Computer Crimes Division, Massachusetts Attorney General’s Office

• The role of the Internet prosecutor
• Relationships between defense counsel and prosecutors
• Issues in online investigations
• Administrative and Grand Jury subpoenas
• Special considerations in search warrants and searches for electronic data
NOTE: The foundation for this week’s seminar discussion will be this hypothetical problem involving investigations of computer hacking and online child pornography, subpoenas and search warrants and related issues. Please read and consider the entire hypothetical. Focus particularly on the specific portions to which you have been individually assigned (you will receive an email with your assignment). You will be expected to discuss those portions during our seminar discussion. The hypothetical is based on, and requires careful review of, the following materials:

Readings:

- Washington v. Townsend, 147 Wash.2d 666, 57 P.3d 255 (Wash. 2002). Read pp. 3-9 (Sections I & II), 10-13 (Bridge concurrence).
- Commonwealth v. Ellis, 1999 WL 815818 (Mass.Super.). Skim 1-6; read 8-11 (focus on timing of search issues)

- The chart at the end of the ECPA disclosure excerpt from the U.S. DOJ Manual for Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations.

- Relevant Massachusetts statutes:
  o M.G.L. c. 159, § 12
  o M.G.L. c. 276, § 3A
- Relevant Federal statutes:
WEEK TEN: NOVEMBER 17, 2005

The Circular Relationship Between Litigation and Legislation

- Problem solving: The intersection of litigation and legislation

Readings:

- MGM v. Grokster:

  o Ninth Circuit decision, 380 F.3d 1154 (9th Cir. 2004). Read pp. 5, 8-16
  o Brief of Respondents. Read pp. 46-50.

- Legislative action before the Supreme Court Decision:

  o July 13, 2004 Letter from Mitch Bainwol of the RIAA, to Senators. Read
  o The "Don't Induce" Act, a legislative counter-proposal of user/technology interests. Read
  o Two "discussion drafts" and an explanatory memorandum prepared by the Copyright Office, along with a letter from the user/tech community to Sens. Hatch and Leahy regarding the last of the two Copyright Office drafts. Skim
  o Note that these drafts are only a few of the various proposals that were floating around during the period between the Ninth Circuit and Supreme Court Decisions.

- Post Grokster legislative discussions:

  o EFF release, "Interpreting MGM v. Grokster: What is the Practical Impact and What is Left for Congress to Do?"
  o Senate Judiciary Committee testimony of Marybeth Peters, Register of Copyright. Read "A Need for Legislation?" (last six paragraphs) (Peters' testimony is part of a September 28, 2005 Judiciary Committee hearing on "Protecting Copyright and Innovation in a Post-Grokster World"

  o If you have time, one other very quick (and very short) skim: a CNET commentary describing some of the countervailing forces at play in the INDUCE Act and other recent legislative battles. It's superficial but does give a bit of useful context to the various players and their machinations.

For this set of issues, please consider: 1) to what extent the Grokster decisions (at the district, court of appeals and Supreme Court levels) left or created a "gap" in the law and the approach each of the proposals took/takes to addressing it; 2) the
differences among the approaches; 3) if you were representing content companies, Internet providers, technology providers or users, which, if any, of these legislative approaches and provisions would you now think would be agreeable or necessary in light of the Supreme Court's decision, and why (some issues on which you might want to focus are the legislatively proposed elements of the new action for "inducement" and how those compare/contrast with the Supreme Court's inducement standard; what standards would have applied in an action for "inducement" under the legislative proposals and, under which proposals might such an action survive a motion for summary judgment; should the "Betamax" standard be written into the law; to what extent should the legislation be technology-specific (i.e., focused on peer-to-peer); and should there be specific exemptions from liability); and 4) again, to what extent politics and political affiliation might be relevant in legislative proposals to address peer-to-peer or other technologies.

WEEK ELEVEN: DECEMBER 1, 2005

Tying it All Together: The Daily Practice of Advising Internet Clients – Part I

On the last two sessions of the class, students will, in teams, provide “advice” to clients on issues previously assigned in the hypothetical. Designated teams of two other students will act as counsel for the client and will ask questions, raise concerns, and carefully explore the advice.

WEEK TWELVE: DECEMBER 2, 2005

Special Meeting Time: 10:30 a.m. - 12:30 p.m. -- Lewis 202

Tying it All Together: The Daily Practice of Advising Internet Clients – Part II

On the last two sessions of the class, students will, in teams, provide “advice” to clients on issues previously assigned in the hypothetical. Designated teams of two other students will act as counsel for the client and will ask questions, raise concerns, and carefully explore the advice.