



# PATENT, TRADEMARK & COPYRIGHT LAW DAILY



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## Conferences

### **Emergence of Cloud Technology Raises Complex Copyright Issues, Lawyers Say**

**N**EW YORK—The emergence of cloud technology as an electronic content infrastructure in the entertainment industry raises complex copyright issues, attorneys said at a Sept. 15 panel discussion.

Increased reliance on cloud-based distribution platforms and business models in the industry “creates novel and inevitably ambiguous copyright issues,” according to Daniel E. Schnapp, who moderated the discussion at a Copyright Society of the U.S.A. luncheon.

At stake is the balance between copyright holders’ exclusive rights to reproduce and publicly perform their works versus the ability of consumers and service providers to make lawful use of the content through emerging technologies without infringement, he suggested.

The growth of centralized, cloud-based services is being driven by “insatiable consumer demand for content anywhere, anytime, and on any device,” continued Schnapp, who chairs the new media, entertainment, and technology practice group at Hughes, Hubbard & Reed, New York. “Everyone wants a piece of content on the go, and the cloud is enabling that to happen.”

In the process of pursuing that ubiquitous content access model, however, “copyrights are being transferred, transmitted, and distributed,” suggested Barry I. Slotnick, chair of the intellectual property and entertainment litigation practice group at Loeb & Loeb, New York.

Slotnick filed an amicus brief for music publishers in *Capitol Records Inc. v. MP3tunes LLC*, No. 1:07-cv-09931-WHP-FM (S.D.N.Y. Aug 22, 2011).

**Owners Face ‘Perilous Times’** Pointing to recent case law, Slotnick said: “We are in a perilous time for copyright owners.”

In addition to a partial summary judgment ruling against the record company in the *MP3tunes* case, Slot-

nick also cited the U.S. Court of Appeals for the Second Circuit’s decision in *Cartoon Network L.P. v. CSC Holdings Inc.*, 536 F.3d 121, 87 USPQ2d 1641 (2d Cir. 2008).

“The decisions are not looking good for owners, to say the least,” he commented. As distinguished from a service like Napster, for instance, the cloud service providers “are legitimate businesses arguably willing to comply with the law,” he said.

Indeed, cloud-based service providers are seeking to deliver the benefits of cloud technology to customers without running afoul of the Digital Millennium Copyright Act, said Vanessa C. Hew of Duane Morris, New York, who represents MP3tunes in its continuing case.

The key distinction, Hew suggested, is determining the intended audience of a transmission.

The *Cartoon Network* case, “stands for the fact that public performance should be analyzed by who is capable of receiving a certain transmission,” she said. “Is the transmission to a public audience or a private person?”

That case has been “misinterpreted in many ways,” she said, but its reasoning can be applied workably to questions raised by such cloud technology as internet-based content “lockers.”

**Neutral Conduit vs. End Run** In a detailed discussion of the case law, Hew maintained in general that cloud-based service providers were serving as passive, neutral conduits, while Slotnick suggested that the electronic storage locker concept was an end-run around public performance rights that lends itself to infringements.

The potential role of service providers in policing copyright infringements raises privacy and other civil rights issues, Slotnick acknowledged. “It is troubling” he said, “but there must be a balance between all the wonderful things technology can do and compensating the people who create the material that makes the technology interesting.”

Hew characterized cloud technology as simply offering consumers a more efficient way to store entertainment content. “People don’t want to carry everything

around in a thumb drive,” she said. “The cloud is a viable business model.”

Asked by Schnapp whether legislative change is needed to set the proper copyright balance for cloud services, Slotnick agreed but warned that it is not a practical possibility.

“The law will always be behind the technology,” he said, commenting that the DMCA “was useful about a year into the millennium.”

He added: “As a practical matter, Congress is not likely to change the law.”

A variety of steps are possible within current law, Slotnick continued, such as compulsory licensing or user fees. “The courts are the most reasonable place to get our law dealt with, but we’re seeing some cases that I find troublesome,” he cautioned.

**Analogy to VCRs?** When videocassette recorders became established, their use did not meet fears that it would cut into entertainment sales but opened up new

marketing avenues, Hew said as the panel sought to sum up a wide-ranging discussion.

“The VCR copied something that was already available for free [on television] in my household, but the new technology allows me to get music from somebody else’s site,” Slotnick countered.

“That’s the way the world is going,” Schnapp interjected. “There will always be legal and illegal uses.”

Slotnick argued, however, that even if the new systems are more sophisticated and “perhaps more legal” than Napster, “the end result is the same: copyright owners are not being compensated the way they were before these technological improvements.”

BY JOHN HERZFELD

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*A blog posting on cloud copyright issues by Schnapp and Matthew Syrkin is available at <http://www.digitalhr.com>*