cyberlaw: the brave new e-world

By Anne F. Downey

A Smorgasbord of Updates

We will kick off the fall with a smorgasbord of updates on matters previously reported.

On Dec. 15, 2014, the Ninth Circuit Court of Appeals heard arguments en banc in the case of *Garcia v. Google, Inc.*, Case Number 12-57302. The case raised fascinating issues regarding whether an actress who appeared for five seconds in a movie trailer could force Google to take down the trailer from YouTube based on the actress' alleged copyright in her performance. You will recall that Cindy Lee Garcia was paid $500 to appear in a film called "Desert Warrior," but the filmmaker turned the film into an Arabic language movie trailer in which the voiceover made it appear that Ms. Garcia insulted Muhammed. The trailer ignited riots in many countries, and Ms. Garcia's life was threatened. In an attempt to shut down the trailer, Garcia brought a copyright infringement lawsuit against Google, the parent of YouTube. She lost at the district court level, but the Ninth Circuit ruled in her favor. The Ninth Circuit ruling was criticized by many.

On May 18, 2015, the Ninth Circuit overturned its earlier panel decision that forced Google to pull the video from YouTube. U.S. Circuit Judge M. Margaret McKeown wrote:

"In this case, a heartfelt plea for personal protection is juxtaposed with the limits of copyright law and fundamental principles of free speech. The appeal teaches a simple lesson: a weak copyright claim cannot justify censorship in the guise of authorship."

Another update involves *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013), the case of the enterprising Thai citizen, Supap Kirtsaeng, who set up a lucrative textbook resale business while studying as an undergraduate student at Cornell University and as a graduate student at the University of Southern California. Kirtsaeng had his family and friends in Thailand purchase the low-priced foreign version of textbooks published by Wiley and mail them to him so that he could resell them to students in the U.S.. Wiley sued Kirtsaeng for copyright infringement, and the Second Circuit ruled in Wiley's favor. Because of a split between the Circuits concerning whether the first sale doctrine applies to works made outside the U.S., the U.S. Supreme Court took up the case. The first sale doctrine holds that a purchaser of a copyrighted work may resell, display or dispose of a work without needing to seek permission from the copyright holder. As reported last year, in 2013 the Supreme Court reversed the Second Circuit ruling and found that the first sale doctrine applies to lawfully-made goods manufactured outside of the United States.

In May 2015, the Second Circuit issued a ruling that Kirtsaeng was not entitled to attorneys' fees under the Copyright Act, finding that the district court had the right to deny attorneys' fees to Kirtsaeng because Wiley had pursued an objectively reasonable litigation position in the suit. Although the Second Circuit affirmed the district court's denial of attorneys' fees, it did not agree with the lower court's evaluation of all the factors. In particular, the Second Circuit stated in a footnote, "[W]e respectfully question the conclusion that considerations of compensation did not favor a fee award because the appellant was represented pro bono at the Supreme Court."

In the area of not-for-profit law, as reported last year, the New York Non-Profit Revitalization Act took effect on July 1, 2014. The law is best known for its sweeping new requirements that all New York not-for-profit corporations, educational corporations and religious corporations adopt a conflict of interest policy, arrange to have at least three independent directors, and in some cases also adopt a whistleblower policy and new audit-related procedures.

In April 2015, the New York Charities Bureau issued three memoranda that provide guidance concerning the Attorney General's views on various issues under the Revitalization Act. The memoranda can be found at www.CharitiesNYS.com, under NonProfit Revitalization Act and then Additional Guidance. The memoranda clarify issues such as whether posting a whistleblower policy at the organization's publicly available website is sufficient to satisfy the Act's mandate that a copy of such policy be distributed to all directors, officers, employees and those volunteers who provide substantial services to the corporation (the answer is yes, unless a person requests a hard copy).

The memoranda acknowledge that not all New York nonprofit corporations have gotten up to speed under the Revitalization Act, but they indicate that steps toward compliance are required:

"The Attorney General's office understands that, in order to comply, organizations may need time to convene meetings of their boards, make changes to their by-laws and committee structure, develop new procedures and engage the appropriate CPA. Organizations that are not yet in compliance with these requirements should have a written plan with a timetable to achieve compliance."

As I have been telling non-profit organizations for over a year now, it really is time to get on board the Revitalization Act train. [B]

Spitler Testifies Before Attorney Discipline Commission

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which disciplinary charges and findings should be publicly revealed; and how to achieve dispositions more quickly in an effort to provide much-needed closure to both clients and attorneys.

Among the issues President Spitler addressed was whether disciplinary charges should be publicly revealed upon filing. He also voiced opposition to the creation of a statewide grievance committee.

"We strongly advocate for the current system of confidentiality," Spitler testified, "and … that there be no public disclosure of any grievance that's been filed until such time as there's been a finding of a preponderance of the evidence."

"On behalf of my members, we also understand that we need to make sure that any attorney grieved is afforded every right that they have, since it's their livelihood," he continued.

A full transcript of the Buffalo hearing can be found at www.eriebar.org.

After evaluating what is working well and what needs improvement, the Commission will offer recommendations to enhance the efficiency and effectiveness of New York's attorney discipline process. [B]