



# PATENT, TRADEMARK & COPYRIGHT LAW DAILY



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## Copyrights

### **Content Providers, Legal and Government Experts Consider 'Economics of Creativity'**

**T**wo television producers, together with a copyright lawyer and a U.S. Trade Representative official, addressed "Copyright and the Economics of Creativity" at a Dec. 8 briefing by the Copyright Clearance Center, a not-for-profit organization that provides collective copyright licensing services for users of copyrighted materials.

Moderating the discussion was *Newsday* columnist and Fox commentator Ellis Henican. He asked the panelists to describe the challenges they face in reconciling copyright law with technological advances.

Attorney Jon Baumgarten of Proskauer Rose, Washington, D.C., replied that the battles between new technology and copyrights have been around for as long as there have been copyrights. The best way to settle those battles is to "cool the rhetoric" and try find collaborative answers, he said. According to Baumgarten, the solutions must come from the courts, and not Congress or the business sector, which are much slower to react.

Stanford McCoy, assistant U.S. trade representative for Intellectual Property and Innovation, said that his main worry is China. Respect for copyrights there has "a long way to go," McCoy said, noting that the United States is currently losing over \$6 billion a year in software sales alone to the country.

Timothy Shey, whose Next New Networks produces online television programming, said that he and his company are worried that copyright rules cannot keep up with the pace of technological innovation.

Jason Williams—a producer of television programming for the National Geographic, Discovery, PBS and TBS networks—said that about 10 percent of his programming budget is devoted to copyright requirements. When asked by Henican if the process of clearing programming copyrights impedes creativity, Williams said

that the licensing process does "impose a grammar to the creative process that looks pretty antediluvian."

"We are at a great risk of seeing creativity extinguished by an overzealous application of copyright law," he added.

**Fair Use Needs Clarification.** Recounting his experience with fair use claims in copyright infringement litigation, Baumgarten said that the defense has always been "a bit of a conundrum" for lawyers. He said that it critical to the copyright system to keep fair use elastic and adaptable, but that most copyright lawyers, if honest, will say that the question they hate the most from clients is "Is this fair use?" because the answer is almost always "I am not really certain."

For his part, Williams said that he has never invoked fair use over his 25 years in the television industry, adding that he finds it "tragic" that the fair use provisions in the Copyright Act are so "fuzzy." However, all of the panelists agreed that any statute attempting to clarify the fair use doctrine would "take up volumes" and could end up making fair use more complicated than the tax code.

**Government's Role.** Asked by Henican what the public can reasonably expect the government to do to protect innovation, McCoy replied that U.S. creators must be assured that they can get revenue from overseas markets, such as China.

The USTR's office is trying to create an infrastructure of respect for copyright around the globe that allows performers, producers, and creative people to be compensated for their work, McCoy said. Three concerns influence respect for intellectual property in foreign markets, McCoy said: political will, economic development, and the rule of law. People who try to work within copyright law are undermined by the black markets where such rules do not apply, he added.

Asked by an audience member about the copyright implications surrounding the ongoing Wikileaks scandal, Baumgarten noted that most of the leaked documents at issue there are publications of the U.S. govern-

ment thus are not protected by copyright in the United States. Copyright disputes could arise, however, he said, because it is an open question as to whether U.S. government's documents are exempt from copyright

protection in foreign countries, and whether leaked material from foreign governments is protected under U.S. law.

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