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**SPECIAL POINTS
OF INTEREST:**

- The Obama Digital Agenda
- Cert Denied: Book closes on National Geographic CD-RM case
- Pro-IP Act and the Copyright Czar
- DMCA Redux—the triennial review

**2008-2009:
LOOK FORWARD, LOOKING BACK
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As 2008 draws to a close, the perilous economic times lend occasion for reflecting on where we're going and where we've been. In the copyright arena, much will be happening and much has happened, so it's timely to take stock. Here are a few of the important items for the year coming and the year ending:

1. *The Obama Digital Agenda:* Having written the political textbook on use of the Internet, President-elect Barack Obama and his transition team are establishing the main objectives for the digital future. Among the goals are the following:

Net Neutrality: ensuring that Internet providers do not discriminate based on content or applications;

Privacy: ensuring that cyber security protects children and personal privacy;

Infrastructure: deploying the next generation of broadband;

Democracy: developing web-based tools to open government communication and to improve governmental accountability, and establishing a Chief Technology Officer to manage the exchange of information between government and the public and the security of that information;

Technology and public policy: expanding use of digital technology in areas of health care, clean energy, education and public safety;

Competitiveness: improving American competitiveness through investment in scientific research and protection of intellectual property.

Translating these goals into action will be the task of many agencies. And look for Vice President-elect Joe Biden to play a significant role as well in the process.

2. *Cert Denied: Book closes on National Geographic CD-ROM*



case. As we have reported periodically over the past several years, *Greenberg v. National Geographic* is an important copyright case involving the interpretation of the Supreme Court's ruling in *Tasini v. New York Times*. In *Greenberg*, the question is whether the Complete National Geographic (CNG), a CD-ROM collection of 100 Years of the National Geographic Magazine, violated a free lance photographer's right to control republication of his pictures. At stake is the general entitlement of print publications to reissue faithful collections of their works (ads and all) in a searchable, digital format, or as I like to describe it, microfiche for the digital age. After a 10 year battle, two federal appeals courts (2nd and 11th) held that National Geographic could market the CNG, without regard to the free lance photographer's copyright claims. The photographer's last appeal to the U.S. Supreme Court was denied in December. This decision could be a boon to schools and libraries, looking for ways to simplify the archiving of important journals and publications, while publishers reissue historical works in digital versions of the original format.



3. *PRO-IP Act and the Copyright Czar*. Getting copyright legislation through Congress is always a complex task, but in the fall, Congress passed the latest reform, with the bill titled "Prioritizing Resources and Organization for Intellectual Property Act," or PRO-IP for short. Among the far-reaching provisions that we'll be revisiting in the coming years are these:

The main target of the PRO-IP Act is counterfeiting and piracy, with an increase in penalties most prominent. Generally, in cases of infringement, the maximum award for "non-willful" is \$30,000 per work infringed. When a compilation or collections of copyrighted works is infringed, courts have been stuck with the \$30,000 limit. Under Pro-IP, courts will have discretion to make multiple \$30,000 damage awards. Enforcement authorities will also be able to seize and sell off the assets (computers and other equipment) used in the infringing activities.

White House Intellectual Property Enforcement Representative, or WHIPER. Already dubbed the IP Czar, this Ambassadorial position will be within the Executive Office of the President. Its primary functions will be to make IP enforcement a priority, to coordinate IP activities among the Executive Branches and to work in the international sphere to identify countries that do not effectively enforce agreed upon internationally-recognized intellectual property rights.

The Justice Department will also elevate the profile of IP enforcement, with an Intellectual Property Enforcement Division. The IPED will take over computer crimes and will prosecute IP crimes more aggressively.

4. *Orphan Works Bill Gets New Life*. Perhaps the leading piece of copyright reform legislation over the past few years has been Orphan

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Works Bill. The legislation, which would enable the exploitation of works whose ownership is uncertain, was passed by the Senate, but the bill died in the House. However, in a sign that the bill still has life, the Congressional Research Service has authored an updated study that stated the problem of orphan works is real and legislative reform is needed.

5. *House Judiciary Committee Reorganizes IP Priority.* For decades, the basic work of managing copyright and other IP laws has been delegated to a standing Subcommittee of the House Judiciary Committee. However, starting in January, 2009, the next Congress will see a revamped approach to IP legislation. The Judiciary Committee, sitting as a body of the whole (just like in the Senate) will debate and consider IP matters. This both elevates the work to the body as a whole, and eliminates one critical step – subcommittee consideration – before any reform legislation is acted upon.

6. *Copyright and the Campaign.* The recent Presidential campaign was not immune to copyright issues. With three weeks remaining in the election, the General Counsel for Republican Presidential Candidate, John McCain, complained to Google's You Tube that "overreaching copyright claims" are chilling free and uninhibited political discourse. It turns out that some of McCain's political ads and web videos, which contained news clips, were the subject of a DMCA "take down" demand by the media. Asserting fair use, the McCain Campaign argued that You Tube should not remove McCain content on the mere say-so of a network or news outlet. While You Tube complies with the DMCA's "counter-notice and put back policy," which allows the online return of content asserted to be fair use, the 10-14 day review period for such "put back" effectively destroys the opportunity for timely political commentary, whose life cycle may be hours or a few days. The McCain Campaign urged that the websites treat complaints associated with political candidacies as a special breed and subject the DMCA take down notice to full legal review (including a fair use analysis) before the challenged ad is pulled. For McCain, the DMCA may have cost some votes; so, will DMCA reform be on the Senator's legislative agenda in 2009?

7. *DMCA Redux – the triennial review.* As we have discussed in the past, the DMCA's anti-circumvention rules allow for the filing of exemptions from the prohibition on bypassing technological measures that limit access to protected works. In December, 2008, the Library of Congress invited the filing of exemption requests – and renewals of existing exemptions. Among the proposed classes of works sought for exemption are these:

a. Audiovisual works included in a library of a college or university, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by professors.



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b. Computer programs in the form of firmware that enable wireless telephone handsets to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network, regardless of commercial motive.

c. Computer programs protected by dongles that prevent access due to malfunction or damage or hardware or software incompatibilities or require obsolete systems or obsolete hardware as a condition of access.

d. Literary works, sound recordings, and audiovisual works accessible on personal computers and protected by technological protection measures that control access to lawfully obtained works and create or exploit security flaws or vulnerabilities that compromise the security of personal computers, when circumvention is accomplished solely for the purpose of good faith testing, investigating, or correcting such security flaws or vulnerabilities.

e. Video games accessible on personal computers and protected by technological protection measures that control access to lawfully obtained works and create or exploit security flaws or vulnerabilities that compromise the security of personal computers, when circumvention is accomplished solely for the purpose of good faith testing, investigating, or correcting such security flaws or vulnerabilities.

f. Motion pictures and other audiovisual works in the form of Digital Versatile Discs (DVDs) that are not generally available commercially to the public in a DVD form not protected by Content Scramble System technology when a documentary filmmaker, who is a member of an organization of filmmakers, or is enrolled in a film program or film production course at a post-secondary educational institution, is accessing material for use in a specific documentary film for which substantial production has commenced, where the material is in the public domain or will be used in compliance with the doctrine of fair use as defined by federal case law and 17 U.S.C. § 107.

g. Computer programs that enable wireless telephone handsets to execute lawfully obtained software applications, where circumvention is accomplished for the sole purpose of enabling interoperability of such applications with computer programs on the telephone handset.

h. Audiovisual works released on DVD, where circumvention is undertaken solely for the purpose of extracting clips for inclusion in noncommercial videos that do not infringe copyright.

The Librarian and the Copyright Office will receive additional comments in February, will hold public hearings in the spring and will issue its fourth Order by October, 2009. It looks to be a busy year. As always, stay tuned.

Arnold Lutzker serves as legal counsel for AIME.



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