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How Hard-Fought Is Copyright Litigation?

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As I mentioned in my last essay, my colleague Chris Cotropia and I have recently completed a data collection project in which we examined pleadings from approximately 1,000 copyright cases filed in federal court over a four-year period. We are still evaluating the data, but our preliminary findings indicate that copyright litigation differs from other federal civil litigation; it takes longer and appears to be contested more – yet ends up in much the same place.

A little background first. During the period we studied (2005-2008), the cases fell into three broad categories. The first comprised those cases in which big media companies sued individuals for illegal file-sharing, a concerted campaign that ended years ago. The second category also involved big media companies as plaintiffs, but the targets were bars and restaurants in which unauthorized musical performances were alleged to have taken place. The third category was a catch-all, containing all other cases.

One of the things we studied was the overall complexity of cases, as measured by a number of factors. The relevant data here came from the second and third categories of cases, as they represent the kind of lawsuits that are filed year-in and year-out. In contrast, the file-sharing campaign was a one-off event (albeit one that lasted several years).

And what do those two categories reveal? When compared to other forms of federal civil litigation, copyright cases tend to get resolved in the same way – a settlement or voluntary dismissal – but take longer to get there, involve more docket activity, and require judges to issue more rulings.

The length of the cases. We observed a median pendency of 294 days from case filing to case termination. By way of comparison, the Administrative Office of the U.S. Courts reported a median pendency of about 226 days for federal civil litigation generally during 2007, one of the years we studied. At the median, then, copyright cases last about 30 percent longer.

The number of docket entries. An earlier study of federal cases found that 61.22 percent had fewer than 15 docket entries. Our finding for copyright cases was considerably lower: 27.01 percent. (Note that this is a crude metric, because different district courts use different docket-numbering protocols.)

The number of substantive judicial decisions. Almost any case will involve rulings on routine, unopposed motions, like when a party wants to extend a deadline or reschedule a hearing. But if a case requires a judge to decide a contested issue (*e.g.*, rule on a summary judgment motion or resolve a discovery dispute), that case can be classified as hard-fought. Our finding here is interesting. Copyright cases are no more likely than other federal cases to be hard-fought; about 50 percent of both copyright and non-copyright cases involve at least one substantive decision on the judge's part. The difference is that in copyright cases, once battle is joined, it keeps getting bloodier: In those copyright cases that involve substantive judicial decisions, the number of such decisions is almost double that observed for other federal civil litigation.

Trial incidence. Finally, copyright litigation produces a higher percentage of cases that go to trial than other federal civil litigation. The overall percentage of copyright cases going to trial

was low (3.79 percent) but the Administrative Office figure for a year in the same period was even lower (only 1.4 percent). The difference is statistically significant.

Yet despite these various differences, at the end of the day copyright litigation tends to end up in the same place as other litigation. Almost eight of every 10 cases were terminated voluntarily, via either settlement, some form of consent judgment, or voluntary dismissal. (Many of the voluntary dismissals were undoubtedly settlements as well, but parties are not required to file settlements with the court, so our study could not differentiate.) Indeed, voluntary termination may be even more common in copyright litigation than in other kinds; one study found a two-thirds settlement rate for federal civil cases generally, although those data resist an apples-to-apples comparison with ours.

All of this suggests that there may be something about copyright litigation that causes litigants and courts to work harder to reach much the same result as other federal litigation. Perhaps it's the complexity or uncertainty in the underlying legal doctrine. Copyright law is infamous for opaque concepts like the idea/expression dichotomy, substantial similarity, and fair use. Or perhaps the possibility of statutory damages causes plaintiffs to fight harder than they would if actual damages were the only available monetary remedy. We hope to find some answers as we continue to crunch the numbers. Stay tuned.