

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AGENCE FRANCE PRESSE)
Plaintiff)
vs.) CIVIL ACTION NO.: 1:05CV00546 (GK)
GOOGLE INC.,)
Defendant.)

EXPERT REPORT OF MARSHALL A. LEAFFER

Submitted by:

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1. I am currently Distinguished Scholar in Intellectual Property Law and University Fellow at Indiana University School of Law. I first acquired my expertise in copyright law as Attorney-Advisor on the staff of the general counsel of the Copyright Office. After government service, I entered the teaching profession in 1978. During my almost 30 years of law school teaching, I have focused on comparative and international issues concerning copyright and intellectual property. In addition to my law school teaching in United States, I have taught and given lectures on comparative copyright law in French at French law schools. I have written scholarly articles in both French and English on comparative and transnational issues on copyright law. I am the author of three books: *International Treaties on Intellectual Property* (2d ed. BNA 1997); *Copyright Law Cases and Materials* (7ed 2006); and *Understanding Copyright Law* (4th ed. 2005). In each of these books, I have analyzed copyright law from an international and comparative standpoint.

2. In this report I provide my opinion concerning the ownership rights in copyrighted works created by French authors that are the subject of the above-referenced lawsuit. It is my understanding that Agence France Presse is claiming ownership rights in three categories of works that it asserts were infringed by Google News. These include photographs, headlines, and story leads. Based on my knowledge of French law and the review of Agence France Presse's Amended Complaint and Google's Answer and Counterclaims, and to the extent that French law applies to the works at issue, it is my opinion that Agence France Presse has no valid claim to copyright ownership in such works. My conclusion, as I will elaborate on below, is founded on the principles of

French law as embodied in the *Code de la Propriété Intellectuelle* that governs French copyright law.

3. French law is applicable to questions relating to the ownership of copyright for many of the works at issue. Under the appropriate conflicts rules, ownership rights are to be construed by the law of country with the most significant relationship to the property. Here, France is the country with the most significant relationship to many of these copyrighted works. Without knowing all the details, it is my understanding that a significant number of the works involved in this case have multiple significant contacts with France, including having been published in France, created in France, and authored by French citizens. In addition, the content involved is available and distributed from servers located in France. Accordingly, France, being the country with most significant relationship to the copyrighted works, French law should be applied in determining the ownership of these works.

4. I will first discuss the relevant legal principles under French law and then turn to the question of copyright ownership relating to the photographs, headlines, and story leads. Below, I have referred the appropriate provisions of *Code de la Propriété Intellectuelle* governing French copyright law.

5. The fundamental principle in French copyright law is that only a natural person may be an author. This principle categorically precludes the existence, under French law, of the works made for hire doctrine as found in the United States that allows, in certain circumstances, the initial ownership of copyright and the status of the author in the employer.

6. The general rule in French copyright law is that copyright vests initially in an employed author even if the work was created on the instructions of the employer. Article L. 111-1 of the IP Code specifically provides that the existence of a “service contract shall imply no exception to the enjoyment of the right recognized in the first paragraph. The first paragraph bestows on [t]he author of a work of the mind...the exclusive and incorporeal property right in that work as against all persons.” In construing this central provision of the IP Code, French courts have universally held that absent proof by the employer of a transfer, the employed author retains copyright in the work.

7. Under French law, an author may transfer his or her economic rights in whole or in part. *See Article L 122-7.* The requirements for a valid transfer of copyright are rigorous and are set forth in the IP Code. The transfer must be express, evidenced in a writing, and specifically mention the rights to be transferred. *See Article L. 131-3(1).*

8. Based on the legal principles embodied in French law, I will now address the copyright ownership status regarding the photographs, the headlines, and the story leads claimed by AFP to have been infringed in this case, to the extent French law applies. In each instance, the individual authors would own the copyright in their work absent a written agreement to the contrary specifically mentioning the rights to be transferred.

9. In accord with French law, the copyright in a photograph vests in the author of the photograph, despite any service contract that might have been negotiated between the parties. *See Article L. 111-1.* Absent a contract specifically transferring copyright

ownership to the economic rights over the photograph, the photographer is the owner of copyright. *See Article L. 131-3(1).*

10. The headlines, to the extent that they enjoy copyright protection, are subject to the same rules regarding copyright ownership and the requirement of a transfer of ownership manifested in a writing. *See Article L. 111-1.* Without a written agreement specifically transferring economic rights to the headlines, all the incidents of ownership remain with the author of the headline. *See Article L 131-3(1).*

11. The story leads, to the extent they are copyrightable, are subject to the same rules relating to copyright ownership stated above. *See Article L. 111-1.* Like the headlines and the photographs, the authors of the story leads would own the copyright to his or her work. Absent a written contract specifically conveying economic rights to each story, copyright ownership to a story lead rests with the author. *See Article L. 131-3(1).*

12. In conclusion, based on my knowledge of French law and to the extent that French law applies to works at issue, I conclude that Agence France Presse has no valid claim to copyright ownership copyright ownership in the photographs, headlines, and story leads.

13. I am compensated at the rate of \$350.00 per hour for my work on this case.

14. A copy of my *curriculum vitae* is attached hereto as Exhibit A.

15. The following are the cases that I have participated in as expert witness since 1994:

Advanta U.S.A., Inc., v. Pioneer Hi-Bred International, Inc., Civil Action No 040238 S

Womack+Hampton Architects, L.L.C. v. Metric Holdings et al, Case No. A 01CA 59 1
JN

Loislaw.com, Inc. v. Anderson Publishing Company, Case No. C-1-99-1040

Lee Bernstein v. Daniel Glavin & Beckman, Kelly, & Smith

The Ruben H. Donnelly Corporation v. Twin City Fire Insurance Company et al, Case
No. 1: 93-CV-1976-HTW

/Marshall A. Leaffer/

Dated: January 29, 2007

EXHIBIT A

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EDUCATION

LL.M.	Trade Regulation, New York University Law School, 1977
J.D.	University of Texas School of Law, 1971
M.A.	University of Illinois, 1968
B.A.	University of Texas, 1964

LEGAL EDUCATION EXPERIENCE: PERMANENT POSITIONS

1997 - Date	INDIANA UNIVERSITY SCHOOL OF LAW Distinguished Scholar in Intellectual Property Law and University Fellow Teaching Courses in Intellectual Property Law and Related Areas
1978 to 1997	UNIVERSITY OF TOLEDO COLLEGE OF LAW Anderson-Fornoff Professor of Law and Values

Teaching in the areas of Intellectual Property (Copyright Patent Trademark),
Antitrust, Torts, Regulated Industries, Comparative Law, European Community Law,
International Business Transactions, and Law and Economics

LEGAL EDUCATION EXPERIENCE: VISITING POSITIONS

Summer 2006	Franklin Pierce Law Center Visiting Professor of Law Course on copyright law
2005 to 2006	Brooklyn Law School Visiting Professor of Law Courses on copyright law, international intellectual property, computers and the law
Summer 2003	TULANE UNIVERSITY OF LAW at Amsterdam

	Visiting Professor of Law Course on copyright law
Summer 2002 Aix en	LOUISIANA STATE UNIVERSITY LAW SCHOOL at Provence Course on Copyright Law
Spring 2002	L'UNIVERSITE DE NICE, FACULTE DE DROIT Distinguished Visiting Professor, Institut du Paix et Developpement Courses on comparative copyright Law, international intellectual property
Fall 2001	UNIVERSITY OF TOLEDO, COLLEGE OF LAW Visiting Professor of Law Course on international trademark law
Spring 2001	UNIVERSITY OF HOUSTON, SCHOOL OF LAW Visiting Professor of Law Course on international copyright Law
Summer 2001 Amsterdam	TULANE UNIVERSITY, SCHOOL OF LAW at Visiting Professor of Law Course on Copyright Law
Spring 1996	INDIANA UNIVERSITY, SCHOOL OF LAW Visiting Professor of Law Courses on copyright and trademark law
1990 to 1991	SETON HALL UNIVERSITY SCHOOL OF LAW Visiting Professor of Law Courses on antitrust, intellectual property, torts
Spring 1985	UNIVERSITE DE PARIS (SUD), Paris, France Visiting Professor of Law Courses on introduction to American law; intellectual property

PROFESSIONAL EXPERIENCE

1977-1978	THE COPYRIGHT OFFICE, Washington, D.C. Attorney Advisor on General Counsel Staff
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Advised the Register of Copyrights on the implementation of the Copyright Act of 1976, and litigation involving the Copyright Office.

1975-1976	HAZELTINE, LAKE AND WATERS, New York, N.Y. Associate Worked primarily in the field of international industrial property prosecution and licensing.
1975-1976	AMERICAN HOME PRODUCTS CORP., New York, NY Attorney Responsible for both U.S. and foreign trademark matters. Worked with outside counsel on substantial Federal Court cases involving trademark infringement and unfair competition.
1974-1975	UNION DES FABRICANTS (SODEMA), Paris, France Attorney On official leave from the U.S. Patent Office to work for a French association that represented the intellectual property rights of its membership. Consulted on trademark and licensing matters and gave weekly seminars, in French, on U.S. Law.
1972-1974 Virginia	U.S. PATENT AND TRADEMARK OFFICE, Arlington, Attorney Trademark examining and work with Trademark Trial and Appeal Board on interlocutory and final decisions.
1971-1972	AQUARIUS INTERNATIONAL, S.A., Paris, France Attorney Legal consultant for a public relations firm that commercialized tourist ventures in Europe and North Africa.

SELECTED PUBLICATIONS

BOOKS

Copyright Law, Cases and Materials, Co-authored with Craig Joyce, Peter Jaszi, Tyler Ochoa, 7th Ed. (Lexis/Nexis, 2006)

Understanding Copyright Law, 4th ed. (LexisNexis 2005).

Copyright Law, Cases and Materials, Co-authored with Craig Joyce, Peter Jaszi, Tyler Ochoa, 6th Ed. (Lexis/Nexis, 2003)

Copyright Law, Cases and Materials, Co-authored with Craig Joyce, William Patry, Peter Jaszi, 5^h Ed. (Lexis/Nexis, 2000).

Understanding Copyright Law, 3d Ed. (Matthew Bender, 1999).

Copyright Law, Cases and Materials, Co-authored with Craig Joyce, William Patry, Peter Jaszi, 4th Ed. (Matthew Bender, 1998).

International Treaties on Intellectual Property, 2d Ed. (BNA Books, 1997).

Understanding Copyright Law, 2d Ed., (Matthew Bender, 1995).

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Copyright Law, Cases and Materials, 2d Edition, Co-authored with Craig Joyce, William Patry and Peter Jaszi (Matthew Bender, 1991).

International Treaties on Intellectual Property, (BNA Books, 1990).

Understanding Copyright Law, (Matthew Bender, 1989).

ARTICLES AND BOOK CHAPTERS

“Sixty Years of the Lanham Act, the Decline and Demise of Monopoly Phobia” in *Intellectual Law and Policy*, Hansen. Ed., Queen Mary College Studies in Intellectual Property, (Edward Elgar, 2005).

“Life After Eldred: The Supreme Court and the Future of Copyright”, 30 WMLR 1597 (2004).

“Fifty years of the Lanham Act: The Decline and Demise of Monopoly Phobia”, *International Intellectual Property and Policy* Vol. 7, 38-1, (Juris Publishing 2002).

“The Uncertain Future of Fair Use in a Global Information Marketplace”, 62 Ohio St. L. J. 849 (2001).

« Les journalistes pigistes a l’ère numérique: réflexions sur l’affaire Tasini c. New York Times », 12 Les Cahiers De Propriété Intellectuelle 449 (2000).

“Domain Names, Globalization, and Internet Governance, 6 Indiana Journal of Global Legal Studies”, 139 (1999).

“The Extraterritorial Application of U.S. Trademark and Copyright Law”, International Intellectual Property and Policy Vol. 3 (Juris Publishing, Sweet and Maxwell, 1998).

“The New World of International Trademark Law”, 2 Marq. Intell. Prop. L. Rev. 1 (1998).

“Appellations of Origin and Indications of Source, Intellectual Property and Policy” Vol. 2 (Juris Publishing, Sweet and Maxwell, 1998).

“Protecting Author’s Rights in a Digital Age”, 27 U. Toledo L.R. 1 (1996).

“The Gray Market in International Intellectual Property Law”, International Intellectual Property and Policy, Vol I (Juris Publishing, Sweet and Maxwell, 1996).

“Character Merchandising in the UK: A Nostalgic Look”, 11 Miami Ent. & Sports L.J. 1 (1995).

“Engineering Copyright Misuse, and Competitive Policy”, 19 U. Dayton L.R. 1087 (1994).

“Protecting American Intellectual Property Abroad: Toward a New Multilateralism”, 76 Iowa L. R. 273 (1991).

“International Copyright From An American Perspective”, 43 Ark. L. R. 373 (1990).

“Of Moral Rights and Resale Royalties”: The Kennedy Bill, 7 Cardozo Law and Entertainment Journal 234 (1989).

“Copyright and the Art Museum”, 8 Columbia Journal of Art and the Law 249 (1984), (co-authored), reprinted in F. Feldman and S. Weil, Art Law 1986).

“The Betamax Case: Another Compulsory License in Copyright Law”, 13 U. Tol. L. Rev. 651 (1982).

“Consumer Actions Against Unfair or Deceptive Acts or Practices, The Private Uses of Federal Trade Commission Jurisprudence, 48 Geo. Wash. L. Rev. 521 (1980), (co-authored).

“Private Enforcement of Federal Trade Commission Jurisprudence under State Little F.T.C. Acts” in FTC Consumer Protection Law Institute (Practicing Law Institute, 1980).

“Automatic Fuel Adjustment Clauses: Time for a Hearing”, 30 Case W. Res. L. Rev. 228 (1980).

« Quelques remarques sur le droit Américain des marques », Revue Internationale de la Propriété Industrielle et Artistique, Décembre (1974).

BOOK REVIEWS

Inventing the Industrial Revolution, by Christine MacLeod, 34 Am. J. of Legal History 422 (1990).

Copyright for the Eighties: Cases and Materials, by A. Latman, R. Gorman and J. Ginsberg, 14 Rutgers Computer and Technology Law Journal 285 (1988).

Copyright Law: Cases and Materials, by Craig Joyce, 40 Van. L. R. 1433 (1987).

GRANTS AND AWARDS

Doermann Distinguished Lecturer, 1995-1996

Outstanding Faculty Research Award, University of Toledo, 1992

Canadian Government Faculty Enrichment Award, 1985-1986

SELECTED PRESENTATIONS AND SEMINARS

“Database Protection in the United States: Alive and ‘Flourishing’”, Case University Law School, November 10, 2007.

“The Right of Publicity: A Comparative Perspective”, Colloquium on International Intellectual Property, Albany Law School, New York, N.Y. October 15-16 (2006).

“The Americanization of Publicity Rights in the U.K.”, Fordham Corporate Law Institute, Symposium on International Intellectual Law and Policy, New York, N.Y. April 15, 2005.

“The Essential Facilities Doctrine in U. S Intellectual Property Law, Association Littéraire et Artistique Internationale (ALAI, France), Paris, France September 19, 2005.

“Extraterritoriality and U.S. Trademark Law”, Fordham Corporate Law Institute, Symposium on International Intellectual Law and Policy, New York, N.Y. April 15, 2005.

“Trademark Protection for Celebrities: The Emerging Cause of Action for False Endorsement”, International Association for the Advancement and Teaching and Research in Intellectual Property, Utrecht, Netherlands, July 27, 2004.

“The Supreme Court and Copyright Law” William Mitchell, College of Law, Symposium: The Impact of the Supreme Court on Intellectual Property in this Millennium, St. Paul, Minnesota, April 27, 2004.

“The Madrid Protocol, a Mixed Blessing for the Trademark Bar”, Fordham Corporate Law Institute, Symposium on International Intellectual Law and Policy, New York, N.Y. April 27, 2003.

“Joint Authorship from a Comparative Law Perspective”, History of Book Seminar, Indiana University, Bloomington IN, February 14, 2003.

« Le droit moral et l’Internet, Institut de la paix et du développement », l’université de Nice, Faculté de droit, Nice, France, March 12, 2002

« Le droit d’auteur aux Etats Unies, un aperçu constitutionnelle », l’université de Nantes, Nantes, France, May 2, 2002.

“The Changing Face Intellectual Property on the International Scene: A Ten Year Retrospective”, Fordham Corporate Law Institute, Symposium on International Intellectual Law and Policy, New York, N.Y. April 24, 2002

“Statutory Damages in U.S. Copyright Law: Lessons for Canada”, Association Littéraire et Artistique Internationale (ALAI, Canada), Montréal, Canada, October 16, 2002.

“Fifty Years of the Lanham Act: The Decline and Demise of Monopoly Phobia”, Fordham Corporate Law Institute, Symposium on International Intellectual Law and Policy, New York, N.Y. April 27, 2001.

“Convergence, Multimedia Works and the Licensing Dilemma in a Global Marketplace”, ALAI Study Days: Convergence Stockholm, Sweden, June 20, 2000.

“Of Dotcom’s and Product Shapes: The Cutting Edges of Trademark Law”, Fordham Corporate Law Institute, Symposium on International Intellectual Property Law and Policy, New York, N.Y. April 29, 2000

“Fair Use and the New International Legal Order”, Interdisciplinary Conference on the Impact of Technological Change on the Creation, Dissemination, and Protection of Intellectual Property, The Ohio State University College of Law, Columbus OH, February 10-12, 2000

“The Future of Fair Use in a Global Economic Environment”, Stranahan National Issues Forum Distinguished Lecture, University of Toledo School of Law, Toledo, OH, October 5, 1999.

“Ownership of Copyright in a Digital Age: Reflections on *Tasini v. The New York Times Co.*”, Intellectual Property Institute: Jagiellonian University, Krakow, Poland, May 25, 1999.

“Implementing the TRIPS Agreement A.A.L.S. Workshop on Intellectual Property”, San Francisco, CA, March 13, 1999.

“Developments in Trademark Law”, Fordham Corporate Law Institute, Symposium on International Intellectual Property Law and Policy, New York, N.Y. April 16, 1998.

“International Trademark Law Comes of Age”, The First Annual Helen A. Nies Lecture in Intellectual Property law, Marquette University Law School, April 1, 1998.

“The Legal Protection of Domain Names: A Realist/Institutionalist Approach”, Indiana University, School of Law, Information Law Institute Roundtable on Intellectual Property, Globalization, and Sovereignty, February 19-20, 1998.

“The Lanham Act at Fifty, a Midlife Crisis?”, Fordham Corporate Law Institute, Symposium on International Intellectual Property Law and Policy, New York, N.Y. April 18, 1997.

“Databases in Cyberspace”, ALAI Study Days: Copyright in Cyberspace, Amsterdam, Netherlands, June 8, 1996.’

“From Guttenberg to Electronic Networks: Protecting Author’s Rights in a Digital Age”, Doermann Distinguished Lecture, Toledo, Ohio, February 8, 1996.

“Lovelier the Second Time Around: Reviving Dead Copyrights Under Section 104A of the Copyright Act”, AALS Annual Convention, Section On Art Law, San Antonio, Texas, January 8, 1996.

“Appellations of Origins and Indications of Source After TRIPS”, Fordham Corporate Law Institute, Symposium on International Intellectual Property Law, New York, N.Y., April 11-13, 1995

« La protection de l’ oeuvre audio-visuelle en droit internationale », Institut National de l’ audiovisuel, Paris, June 15, 1994.

“The Grey Market in U.S. Law”, Fordham Corporate Law Institute, Symposium on International Intellectual Property Law, New York, N.Y., April 7-8, 1994.

“U.S. Trademark Law for Foreign Practitioners”, The Polish Patent Law Society, Krakow, Poland, March 10, 1994.

“Protecting Your Orthopedic Patent”, The Orthopedic Research Society, New Orleans, Louisiana, February 10, 1994.’

“Merchandising the World’s Most Famous Rodent”, American Association of Law Schools Annual Convention Section on Art Law, Orlando, Florida, January 6, 1994.

“Copyright Misuse and the Reverse Engineering of Software”, Symposium on Reverse Engineering of Computer Software, University of Dayton School of Law, November 12-13, 1993.

“Copyright Law Seminar”, Central and East European Law Initiative of the American Bar Association, October 11-17, 1992, Sofia, Bulgaria.

“Intellectual Property and the University”, The Poynter Center, Indiana University, Bloomington, Indiana, March 11, 1991.

“Preemption Revisited: State Law Protection of Intellectual Property”, Symposium Moderator at American Association of Law Schools Annual Convention, Section on Intellectual Property Law, January 8, 1991.

“Living With the Work Made for Hire Doctrine After CCNV”, All Ohio Institute on Intellectual Property, Cleveland, Ohio, June 15, 1990.

“The Current Revolution in Intellectual Property”, Symposium on Global Perspectives for the Nineties: Technology Transfer and Intellectual Property, George Washington University, October 31, 1989.

“Of Moral Rights and Resale Royalties”, American Association of Law Schools Annual Convention, Section on Art Law, January 4, 1988.

“Copyright Law for Journalists and Other Creative Artists”, Association for Education in Journalism and Mass Communication; San Antonio, Texas, August 2, 1987.

“International Copyright and the Visual Arts”, Museum Store Association Annual Convention; Nashville, Tennessee, April 19, 1987.

“Current Issues in Computer Software Protection: A Transnational Perspective”, Symposium on Software Protection; Bowling Green State University, April 9, 1987.

“Visual Arts and the Law: Museums, Galleries and Art Collecting”, Law and the Arts, an Interdisciplinary Conference, Indiana University School of Law; Bloomington, Indiana, September 26-27, 1986.

« La protection des créations ornementales en droit Américain », Université de Paris (Sud), May 12, 1985.

“Who Owns Knowledge?”, Conference on the Humanities for Attorneys, Indiana Council on the Humanities; Nashville, Indiana, September 16, 1984.

“Copyright and the Art Museum”, Store Association Annual Convention; San Antonio, Texas, April 16, 1984.

“U.S. Antitrust Law”, Four day course given for Continuing Legal Education at University of Toledo College of Law; Toledo, Ohio, July 16-19, 1981.

“The Private Uses of Federal Trade Commission Jurisprudence”, Practicing Law Institute; New York City, New York, May 1, 1980.

PROFESSIONAL MEMBERSHIPS AND ACTIVITIES

International Executive Committee, Artistic and Literary Association International (ALAI)

American Intellectual Property Law Association (AIPLA)

International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP)

ADMITTED TO PRACTICE:

State of New York, State of Texas