

## Q&A With Morgan Lewis' Rob Dickey

*Law360, New York (September 14, 2011, 4:22 PM ET)* -- Robert W. Dickey is a partner in the mergers and acquisitions practice in the New York office of Morgan Lewis & Bockius LLP. He is a leader of the firm's media and information interdisciplinary initiative. His practice consists of representing U.S. and non-U.S. clients in connection with domestic and cross-border mergers and acquisitions, with a particular focus on the media and publishing industries.

He has been involved in a wide range of public and private transactions in a variety of industries and has represented both strategic and financial acquirers, including private equity firms, and sellers and targets. Dickey is active in the American Bar Association's committee on mergers and acquisitions.

### **Q: What is the most challenging case you have worked on and what made it challenging?**

A: Every deal, no matter the size, of course presents its own challenges, but one of the more challenging (and interesting) deals I have worked on was our representation of Interactive Data Corporation in its acquisition by Silver Lake Partners and Warburg Pincus for \$3.4 billion.

The deal presented any number of challenges, including the untangling of the various corporate infrastructure and commercial relationships with the company's majority stockholder, the deal protection mechanisms necessary to allow the directors to discharge their fiduciary duties while at the same time providing the purchasers with a sufficient level of deal certainty, and perhaps most importantly the formulation of the financing-related elements of the deal.

In working on one of the first large leveraged buy-outs after the economic meltdown, there was the sense that we were playing a role in creating some new deal technology, and that sense has been reinforced by friends at other firms telling me that they have looked to these deal documents as precedent for their own deals.

### **Q: What aspects of your practice area are in need of reform and why?**

A: The continuing shift from print-based media to various forms of digital media presents many challenges, and one area most in need of clarity is the question of what constitutes fair use under the Copyright Act. The four-factor test that continues to be applied is derived from a 19th-century case, and is too subjective in its application to modern digital media to provide predictability to both intellectual property owners and to those seeking to assert fair use rights.

The question of whether user-generated content on sites like YouTube and other social networking sites constitutes fair use is an interesting intellectual exercise (and often an amusing one when specific instances are considered; the spoof of the trailer for "The Shining" is a personal favorite), but when the impact of the unpredictability of the current construct is considered in the B2B context, it is clear that there is more at stake. In the publishing world, the issue of aggregation (online or otherwise) is fiercely debated. How much use of third-party content is too much?

J.K. Rowling had to take the "Harry Potter Lexicon" through a full trial. She won. But how many authors/publishers can afford to test their fair use views when the outcome is so hard to predict?

**Q: What is an important case or issue relevant to your practice area and why?**

A: A recent case out of the Ninth Circuit, MDY Industries v. Blizzard Entertainment, has the potential to alter the relationship between copyright owners and non-exclusive licensees. The factual background is fairly extensive, but for these purposes the relevant facts are that MDY created a software program, or "bot," that allowed players of Blizzard's popular "World of Warcraft" online game to advance in the game while they were off seeing the latest "Harry Potter" film or fetching another bag of potato chips from the kitchen. MDY was not authorized by Blizzard to do so, and in fact Blizzard took affirmative steps to prevent players from using the bot.

In the ensuing litigation, one issue addressed by the court was whether users of the bot, who were non-exclusive licensees of Blizzard, committed copyright infringement or merely violated the terms of use that they agreed to in order to play "World of Warcraft." The answer to this question was relevant because a holding that the users committed copyright infringement was necessary in order for Blizzard to state a claim against MDY Industries for contributory copyright infringement.

In its ruling, the court held that, because the provisions of the terms of use prohibiting the use of bots was a "covenant" rather than a "condition," because there wasn't a sufficient nexus between the restricted behavior (no bots) and any exclusive right recognized under the Copyright Act.

Although the decision is only about six months old, and it is therefore too soon to assess its full impact on publishers and software developers, it is generally bad news for copyright owners/licensors because according to this case only some breaches of their license agreements will constitute direct (and serve as a basis for secondary) copyright infringement.

**Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.**

A: Bob Dancy, the general counsel of Pearson PLC. I have worked with Bob for more than a dozen years, and he continues to impress me with his ability to distill complex issues, whether in a transactional or litigation context, down to their essence, and to divine what is and is not important.

**Q: What is a mistake you made early in your career and what did you learn from it?**

A: It was the 1990s, which meant that distributions of deal documents were done using Stone Age methods: overnight courier, messenger or fax, or some combination of the three. (Law firms were somewhat slow to latch onto the idea of distributing documents via this newfangled “electronic mail,” and as an attorney at a firm that chose to assign email addresses consisting of the first four letters of the attorney’s last name followed by his or her telephone extension, I was perhaps more resistant than most.)

Distributions, then, were highly labor-- (and paper-) intensive exercises that consisted of the junior associates and paralegals stacking the copies of the various documents to be sent to all the constituents — opposing counsel, bankers, clients, etc. — before stuffing them into envelopes or loading them into fax machines. It was guaranteed that, regardless of the amount of advance planning, the distribution exercise became a race against the clock so that all of the packages could be ready to go prior to the FedEx deadline.

In one particular instance, another junior associate and I miscommunicated regarding the version of a document to be included in the distribution, and in the rush to make the deadline, I did not confirm my understanding through a follow-up conversation or otherwise. Fortunately, the error was caught before the distribution was sent, but by the time the correct document had been substituted and the packages re-sealed, the FedEx pickup at our office had already occurred. We were able to send the documents, however, due to the availability of a FedEx drop-off location with a slightly later cutoff time that was, in the words of the senior associate, “just a few blocks away.”

I learned two important lessons that night. First, although there will almost always be pressure to be both correct and fast, when forced to choose, it is almost always better to be correct than fast.

Second, sprinting with a stack of documents, even for “just a few blocks,” is no fun in wing tips.

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