

CPTWG Meeting #134

Litigation/Legislative Update

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Happy 30th Birthday!



The Authors Guild, Inc. v. Google, Inc. (SDNY)



- Last time reported Judge Chin's oral argument
- Found Google's book scanning project to be fair use
- Judge found many benefits
 - Research
 - Essential tool for librarians to find research sources
 - Insights to language studies
 - Helps publishers and authors because of discovery
 - Access to underserved populations such as print disabled
- Four Fair User Factors
 - Found Project "highly transformative"
 - Most books non-fiction – in favor of Google
 - While scan whole book, only provided "snippet" – slight against
 - No effect on the market, Google didn't sell books and scans do not replace books – "reasonable factfinder" only find enhances sales
- Authors Guild files for 2nd Circuit review

Wiley v. Allen (SDNY)



- Wiley repackages first sale *Kirtsaeng* case as trademark violation
- Judge Forrest held Wiley could not sustain trademark action:
 - “a plaintiff must first show, first, that its mark merits protection, and second, that the defendants use of the mark is likely to cause confusion.”
- Noting the copyright case failed:
 - “Trademark law is not intended to allow an owner of a work to prevent distribution when such distribution would otherwise be lawful under the copyright law.”
- Wiley failed to “plausibly allege” consumer confusion, doesn’t constitute trademark confusion
- In *John Wiley & Sons, Inc. v. Kirtsaeng* (S.D. NY). Defendant Kirtsaeng – who’s first sale defense prevailed at the Supreme Court– denied attorneys’ fees by the District Court. Court based on the fact Wiley’s law suit was neither frivolous or unreasonable

- 106 (4): in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, **to perform the copyrighted work publicly**;
- 101 To perform or display a work “publicly” means—
 - (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times

ABC v. Aereo (Supreme Court)



- Many certiorari briefs, importantly weary Aereo says “enough, grant cert” and Court grants
- Schedule
 - Broadcasters brief: February 24
 - Petitioners or Neutral Amicus: March 3
 - Aereo brief: March 26
 - Reply: 7 days before hearing
 - Oral Argument: late April
- Aereo frames issue as whether Aereo:
 - perform[s] publicly,” under Sections 101 and 106 of the Copyright Act, by supplying remote equipment that allows a consumer to tune an individual, remotely located antenna to a publicly accessible, over-the-air broadcast television signal, use a remote digital video recorder to make a personal recording from that signal, and then watch that recording.”

Disney Enterprises., Inc. v. Hotfile Corp., (S.D. Fla.).



- In an interesting, but not very illuminating decision, Judge granted part of defendants motion to Preclude Use of Pejorative Terms:
 - “The parties may not use pejorative terms but may use terms of art.”
 - Thus, plaintiff’s movie studios were barred from using terms such as “piracy,” “theft” and “stealing”
- However, judge’s order will not have much impact as Hotfile agreed to settle with MPAA by paying \$80 million and agreeing to stop further copyright infringement

Experian Information Solutions v. Nationwide Marketing Services (DC AZ).



- Court dismissed plaintiff's complaint alleging copyright infringement
- Plaintiff compiled several information data bases
- Alleged Defendant had:
 - "...taken data elements from other sources and commingled those elements with data from the InSource Database to create a database of children's birth data from the ages of 2 through 17."
- Citing Supreme Court *Feist* decision (no copyright infringement where facts in telephone book copied and book's organization forced by the data, i.e., alpha), court found defendant copied nothing but non-copyrightable information

Patrick Cariou v. Richard Prince (Supreme Court)



- Supreme Court denied certiorari in the *Cariou v. Prince* case, where the lower courts had held Prince's use of Cariou's photographs in his art were fair use – transformative
- This despite the fact Prince's art did not comment on the art or the artist and wasn't intended as parody

Morel v. Agence France-Presse (S.D. NY)



- Jury awarded photographer Morel \$1.2 million damages from Agence France-Presse (AFP) and Getty Images for willfully violating his copyright
- Morel originally posted eight pictures on Twitter (through TwitPic) soon after the Jan. 12, 2010 Haiti earthquake
- Twitter user named Lisandro Suero reposted the pictures, claiming ownership of the photographs
- AFP copied the pictures from TwitPic and distributed them to clients
- Getty Images distributed the pictures in U.S.

Klinger v. Conan Doyle Estate



- Klinger brought Declaratory Judgment action seeking a finding that various characters, their traits, and other story elements from Sherlock Holmes were in the public domain
- Estate licenses IP to third parties, said Klinger needed a license to publish his anthology of new Holmes stories
- Because some Holmes books still in copyright, Estate argues protection should extend back to Holmes character in expired books
- Court held: “Where an author has used the same character in a series of works, some of which are in the public domain, the public is free to copy story elements from the public domain works.”
- Post-1923 elements, however, are still protected by copyright

Legislative -Administrative Developments



House Judiciary Hearing Round Four: “The Rise of Innovative Business Models: Content Delivery Methods in the Digital Age” Age.”



- On November 19th House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet held a hearing on “The Rise of Innovative Business Models: Content Delivery Methods in the Digital Age.”
- Witnesses from Amazon, the MPAA, Preemptive Solutions, and the Center for Democracy and Technology
- Little call for new legislation
- Rather witnesses emphasized cooperative agreements to reign in online infringement

House Judiciary Hearing Round Five: “The Scope of Copyright Protection”



- January 14th hearing broken down into three sections:
 - Making available right:
 - Professor David Nimmer (UCLA) – for
 - Professor Glynn Lunney (Tulane) – against
 - Broadcaster Copyright Protection:
 - Professor Mark Schultz (Southern IL) – for
 - Jaime Love (Knowledge Ecology International) – against
 - Copyright protection for laws, codes, and standards
 - Patricia Griffin (VP and GC of the American National Standards Institute (ANSI)) – for
 - Carl Malamud (Founder public.resource.org) – against

House Judiciary Hearing Round Six: “The Scope of Fair Use”



- Witness list for yesterday’s 2:00 p.m. hearing on “The Scope of Fair Use:”
 - Professor June Besek, Columbia University
 - Professor Peter Jaszi, American University
 - Kurt Wimmer, General Counsel, Newspaper Association of America
 - Naomi Novik, Author and co-founder of Organization for Transformative Works
 - David Lowery, Musician, Cracker and Camper Van Beethoven

Rockefeller Introduces Video Choice Legislation – S.1680



- Contains “Aereo-FilmOn” section, which makes it clear these services are legal and are exempt from retransmission consent fees

IPEC Office Open



- IPEC still open

Department of Commerce Green Paper



- DoC's Internet Policy Task Force (IPTF) issued green paper on copyright: [Copyright Policy, Creativity, and Innovation in the Digital Economy](#)
 - "...most thorough and comprehensive analysis of digital copyright policy issued by any administration since 1995"
 - Calls for new public input on critical policy issues "central to our nation's economic growth, cultural development and job creation"
- December 12th Conference
 - Access to Rights Information
 - Improving the Operation of the Notice and Takedown System
 - Current Copyright Office Initiatives on Digital Issues
 - Legal Framework for Remixes
 - First Sale Doctrine in the Digital Age
 - Appropriate Statutory Damages Calibration: Individual File Sharers & Secondary Liability
- Comment period extended to tomorrow
- Green Paper Public Hearing video and Public Comments received so far are available at: <http://www.uspto.gov/ip/global/copyrights/index.jsp>

International



- Did reach end of end of year goal
- Secrecy of negotiations broken by WikiLeaks
- 12-country talks toward a TPP Agreement, U.S. proposed far-reaching changes to other countries' copyright enforce methods, patent, trademarks, as well as Internet usage
- This according to a draft chapter released by Julian Assange (WikiLeaks editor), shows various countries' positions
- It would appear countries are still divided on a large number of issues
- Obama Administration pushes deadline to after 2014 mid-term elections

EU – European Court of Justice: *Nintendo*



- Nintendo Mod Chips case
- ECJ issued its opinion returning case to Tribunal of Milan to render judgment under its standards
- ECJ Press Release: “Circumventing a protection system of a games console may, in certain circumstances, be lawful”
- EU Copyright Directive prohibits circumvention of technical measures only when it results in copyright infringement, unlike DMCA

- Swiss law permits circumvention for private copying onto media for which levies have been paid
- Federal Department of Justice and Police appoint a committee to evaluate possible reforms in Swiss copyright law
- Posted its report and does not recommend changing the circumvention provision

European Commission Copyright Consultation



- Focuses on Internet issues, but not comprehensive review of Copyright Directive?
- Circumvention not directly raised as an issue, but implicit in E & L issues
- One issue: should levies be applied were copies of the same content stored on multiple devices? (E.g., UltraViolet)
- Also should there be digital First Sale?

Australia Copyright Reform



- Australian Law Reform Commission (ALRC), has suggested numerous changes to country's Copyright Act to make it “suitable for the digital age.”
- Not public until next month, but Australian AG said recommend changes including fair use like US law
- Government will wait until after TPP adopted to release its decision
- But AG said government unlikely to accept fair use and reject reforms as urged by the Australian content industry

- French High Court orders search firms to block pirate sites
 - Court ordered Google, Microsoft and Yahoo to block 16 video-streaming sites from their search results
 - Case brought by five groups representing film companies, distributors and producers
 - High Court in Paris ruled websites were dedicated to "distribution of works without consent of their creators"

PSA



- Go to USFIRST.ORG

Thank You

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