CPTWG Meeting #135

Litigation/Legislative Update

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Litigation

- Aereo/FilmOn Update
- *U.S. v. Reichert* and *U.S. v. Silvius*
- *Static Control v. Lexmark*
- Settlements
- *Swatch Group V. Bloomberg*
- *Cindy Lee Garcia v. Google*
- *Alaska Stock v. Houghton Mifflin Harcourt Publishing*
- *Gardner v. CafePress*

Aereo/FilmOn Update

- Supreme Court – FilmOn's Petition to Intervene denied
- *Community Television of Utah, LLC v. Aereo, Inc.* (D. Utah).
  - District court enjoined Aereo's services throughout the 10th Circuit

U.S. v. Reichert and *U.S. v. Silvius* (6th Circuit)

- 6th Circuit affirmed two convictions under DMCA § § 1201(a)(2)(A) and 1204(a) for trafficking/ selling video game system "mod chips" to circumvent copyright access/control restrictions
- In *Silvius*, the 6th Circuit rejected a "void-for-vagueness" claim
- In *Reichert*, the Court over a dissent upheld verdict that the violation of §1201 was "willful" or "with knowledge" of its unlawfulness under a deliberate indifference theory – even though the jury verdict was technically not correct

Static Control v. Lexmark (Supreme Court)

- Long running Static Control/Lexmark battle
  - Static attempting to sell compatible laser cartridges
  - Lexmark sued for DMCA violations
  - Static reverse engineering chip preventing compatible cartridges from working in Lexmark printers.
- Lexmark wrote Static's customers saying illegal to use Static's chip
- Static countersued for false advertising under Lanham Act
- District Court dismissed the claim
- 6th Circuit reversed, held Static Control may have suffered harm as a result of Lexmark's advertising
- Supreme Court affirmed
  - Static Control had right to a jury trial to decide whether it suffered business harm as a result of Lexmark's statements

Settlements (Supreme Court)

- *Viacom v. YouTube*
  - Last left case – on remand from 2nd Circuit, District Judge held for Google
  - Viacom and Google settle
- *Patrick Cariou v. Richard Prince*
  - Supreme Court denied certiorari in *Cariou v. Prince*, where the lower courts had held Prince's use of Cariou's photographs in his art were fair use – transformative
  - Prince and Cariou settle

The Swatch Group Management Services LTD. V. Bloomberg L.P., (2nd Circuit)

- Bloomberg obtained Swatch earnings call tape
  - Made available to Bloomberg subscribers
  - Swatch sued for infringement
  - Bloomberg claimed fair use
- Judge found fair use & 2nd Circuit Affirms
  - Negative factors: for profit, not transformative, and alleged lack of good faith
  - Found first factor for defendant: use advance public interest
  - Nature: very little of call could was original expression – factual statements not protected & greater need to disseminate facts
  - Although all copied public interest served by disseminating all
  - Since little protected under copyright no demonstration of negative market effect from dissemination

Cindy Lee Garcia v. Google Inc., et al. (9th Circuit)

- On March 6th, Copyright Office, in contradiction to the 9th Circuit's opinion, formally denied Garcia's application to register her performance.
  - Copyright Office cited that "longstanding practices do not allow a copyright claim by an individual actor or actress in his or her performance contained within a motion picture."
- 9th Circuit judge made a *sua sponte* request for a vote on whether to rehear *en banc* panel's order denying a stay pending *en banc* review
- However, majority non-recused judges voted against a rehearing
- Google also filed a motion for rehearing *en banc* of the original order on March 12th (not just the order denying stay)
- Additionally, on March 25th, Garcia moved for contempt finding and sanctions, arguing Google was requiring Garcia to provide the URL of each video
- Google vigorously opposed her motion

Alaska Stock, LLC v. Houghton Mifflin Harcourt Publishing Co., et al. (9th Circuit)

- Reversing district court's dismissal of a copyright infringement action
- Panel held collective work copyright registration registers the component works within it
- Panel held: Register of Copyrights had authority to grant certificates extending registration to individual stock photographs within a collection where the names of each photographer, and titles for each photograph, were not provided on the registration applications
- Agreeing with other Circuits, and deferring to the Copyright Office's interpretation of the Copyright Act, panel held: where photographers assigned their ownership of their copyrights in their images to the stock agency, and stock agency had registered the collection, both collection as a whole and individual images registered

Gardner v. CafePress (DC SD CA)

- Court denied summary judgment motion brought by CafePress, a website that allows its users to upload images which then can be printed on products others can purchase, based on the §512 safe-harbor defense
- Court found CafePress might not be a 512(c) service provider because it sells products rather than facilitating the user's sale of products
- Also, CafePress may not satisfy §512(i) requirements that it accommodate, and not interfere, with standard technical measures because it strips metadata from photos
- Court also found activities went beyond mere storage, and could not conclude CafePress received zero financial benefit from the infringing activities
- Finally, because CafePress was involved in listing and selling of products, court could not conclude CafePress likely did not have the ability and right to control allegedly infringing acts

Legislative -Administrative Developments

H.R. 1123, Unlocking Consumer Choice and Wireless Competition Act

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- Bill passed in the House on February 25th
- Would reverse 2012 Library of Congress decision not to issue a DMCA exemption against consumer phone unlocking
- Replaced it with LOC 2010 determination that had granted the exemption
- It, however, does not permit the unlocking of cell phones for bulk resale
- Bill also directs LOC to issue recommendations regarding unlocking of other cellular devices (*e.g.*, tablets).

H.R. 4103, American Royalties Too (ART) Act of 2014

- Senators Tammy Baldwin (D-WI) and Ed Markey (D-MA) and Rep. Jerrold Nadler (D-NY) introduced a bill to give visual artists royalties on the resale of their work, or *droit de suite*
- Newest incarnation of Rep. Nadler's Equity for Visual Artists Act, stalled in Congress since 2011
- 2011 bill called for a 7% royalty on works resold for more than $10,000 at auction
- The current ART Act adjusts those numbers, proposing a 5% royalty of the sales price (up to $35,000) on works sold for $5,000 or more at auction.

United States Trade Representative (USTR) Report

- Variety of markets included in the report:
  - SlySoft.com, online market reportedly engaged primarily in copyright infringement
  - Baixedetudo.net, Sweden-based site allegedly offers infringing content to the Brazilian market
  - Ex.ua, a Ukraine-based file-sharing site;
  - Numerous BitTorrent sites;
  - La Salada Buenos Aires, Argentina market , described by the report as South America's largest black market;
  - City of Zengcheng's jeans market, in Guangdong province China, where an estimated one-third of the jeans sold are counterfeit; and,
  - Buynow PC Malls, throughout China and continues to offer for sale infringing movies, games and software.
- Number of websites removed from the list, including IsoHunt.com, GouGou.com, Warez-bb.org and PaiPai.com

Department of Commerce Multi-Industry DMCA 512 Talks

- Multi-Industry process to improve the "notice and takedown system,"
- Two Commerce Dept. agencies, NTIA and the U.S. PTO (PTO) hosting a multi-meeting stakeholder process aimed at improving system.
- DOC officials said their agencies will not be directing a set of talks between tech companies and content creators aimed at improving the country's copyright system
  - "You stakeholders will determine the success and outcome of the process, not the government," Angela Simpson, deputy assistant secretary at NTIA
- Internet companies say they have to pour time and energy into processing and responding to an overwhelming number of takedown requests
- Copyright holders say system puts onus on them to "police the Internet" to find infringement
- Shira Perlmutter, PTO chief policy officer encouraged stakeholders to work through the Commerce Department's process before asking Congress to step in: "I would see urge that we see what we can accomplish here first"

International

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Nils Svensson, et al. v. Retriever Sverige AB (European Court of Justice)

- Decision referred by Sweden to ECJ concerns Software Directive which provides "copyright holders an exclusive right to authorize or prohibit any communication to the public of their works"
- Case brought by reporters at Goeteborgs-Posten (Swedish newspaper) over links posted to their stories by Retriever Sverige website
- Issue: whether Retriever Sverige's linking counted as such a "communication" to the "public" in violation of the reporters' rights
- ECJ ruled websites do not need to seek authorization to link to publicly accessible copyright-protected works.
  - While clickable links are a "communication," did not lead the works in question to be communicated to a "new public" as required because the works were already freely available
  - Court did state the answer would be different if the clickable link circumvented restrictions put in place by the site on which the protected work appears, *e.g.*, to restrict public access to subscribers only
  - Court also held Member States do not have the right to give wider protection to copyright holders by broadening this concept of "communication to the public"

UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH

- Case referred to the ECJ by Austrian Supreme Court.
- Austrian courts prohibited UPC, an ISP, from providing its customers with access to an infringing site (kino.to)
- ECJ found the EU Copyright Directive, which provides for the possibility for rightsholders to apply for an injunction against intermediaries whose services are used by a third party to infringe their rights, does apply in the ISP context
- Such injunctions are allowed if
  - they don't unnecessarily deprive users of accessing lawful information; and,
  - the measures prevent unauthorized access or at least make it more difficult to achieve and discourage such unlawful access.

Universal Music v. Key-Systems (Regional Court of Saarbrücken, Germany)

- Regional court held a domain name registrar can be held liable for copyright infringing website it registered under certain circumstances
- Key-Systems had registered h33t.com, which was a torrent tracker and used to unlawfully distribute Robin Thicke's album Blurred Lines
- The court held the registrar had
  - a duty to investigate after notification of infringing activity,
  - to take corrective action because it obvious that domain used for infringing activity
- If Key-Systems ignores this ruling it faces a maximum fine of €250,000 (US$339,000)

UK – Personal Copying for Private Use

- Proposed regulations for copyright exceptions
- Would permit personal copying without a levy
- A “provocation” to EU rules
- Circumvention is not permitted
- But if problem, can complain to Secretary of State

Attorney-General v. Dotcom, [2014] NZCA 19 (19 February 2014)

- New Zealand Court of Appeal reversed lower court
  - ruled warrants to search Kim Dotcom's property valid
- New Zealand police raided Kim Dotcom's property at U.S. DOJ request, DOJ is seeking Kim Dotcom's extradition for criminal copyright infringement with respect to MegaUpload.
- Earlier 2012 High Court decision found District Court warrants too vague and did not sufficiently define the parameters of the search and seizure
- This decision reversed that decision, finding defects not sufficient to render warrants invalid
- Additionally, lower court's ruling that prosecutors had not been authorized to send clones of seized electronic evidence to the U.S. was affirmed

Australian Law Reform Commission (ALRC) Report on Reforming Copyright Act

- "Key" recommendation in ALRC's report: Australia should replace current "fair dealing" copyright exception (which is specific and inflexible) with an American-style "fair use" exception.
- Note that this recommendation does not automatically become law.
- In a recent speech, the Attorney-General committed to an overhaul of the Copyright Act, but remains "to be persuaded that [fair use] is the best direction" for Australia.

Thank You

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