

A nighttime photograph of the United States Capitol building in Washington, D.C. The building is illuminated with warm yellow lights, and its iconic dome is the central focus. The sky is dark blue with some light clouds. The text is overlaid in a yellow, serif font.

Litigation/Legislative Update

CPTWG Meeting #139

October 14, 2015

Jim Burger

Thompson Coburn LLP

Litigation

- *Naruto, a Crested Macaque v. David John Slater*
- *Ford Motor Co. v. Autel US Inc.*
- *Fox Television Stations, Inc. v. FilmOn X, LLC*
- *Fox News Network, LLC v. TVEyes, Inc*
- *City of Inglewood v. Teixeira*
- *Katz v. Google, Inc.*
- *Lenz v. Universal Music Corp*
- *Varsity Brands, Inc. v. Star Athletica, LLC*
- *Rupa Marya v. Warner/Chappell Music, Inc.*
- *DC Comics v. Towle*



Monkey Selfie

Naruto, a Crested Macaque v. David John Slater



- People for the Ethical Treatment of Animals (“PETA”) filed lawsuit re: macaque selfie photographs
- PETA wants him declared copyright owner of photos, rather than nature photographer who positioned camera
 - Photographer published book called “Wildlife Personalities” includes the “monkey selfie” photos
- Copyright Office previously said to qualify as “authorship” human must create the work
- PETA would administer all proceeds for benefit of Naruto and other crested macaques in Sulawesi, Indonesia

Ford Motor Co. v. Autel US Inc., (E.D. Mich.)



- Ford recently obtained copyright for Integrated Diagnostic System vehicle data
- Claimed Autel infringed and circumvented encryption security measures (“TPM”) meant to protect data
 - Ford failed to allege data duplicated was entitled to copyright protection when Autel accessed it
 - Ford also did not allege Autel’s circumvention occurred *after* Ford had valid copyright
- Complaint failed to plead circumvention pursuant to the DMCA
 - 6th Circuit interpretation (*Lexmark Int’l*): Circumvention must be for infringing motive
 - Ford did not allege this in complaint

Fox Television Stations, Inc. v. FilmOn X, LLC (C.D. Cal.)



- Internet over-the-top (OTT) distributor FilmOn entitled to compulsory license if it meets statutory requirements
- Contrary to other decisions, interlocutory appeal to the 9th Circuit followed
- 2nd Circuit rejected prior bid by TV streamer Ivy
 - Court acknowledged prior “analogous *Ivy* case” but disagreed with conclusions
- Would give OTT distributors same rights as cable companies
- Could potentially disrupt broadcast and cable businesses

Fox News Network, LLC v. TVEyes, Inc (S.D.N.Y)



- TVEyes records all content of over 1,400 television and radio stations, transforms content into searchable database.
- Previously District Court held TVEyes' core index-and-search functions protected as fair use
- Now court rules on legality of features allowing subscribers to (1) archive, (2) email, (3) download clips, and (4) to search for content by date, rather than keyword
- Some uses protected by fair use, but others not
 - (1) TVEyes' archiving is fair use: Serves to save users time/necessary to tell story over time
 - (2) Fair use is possible with emailing function provided certain safeguards observed
 - (3) Downloading and sharing not fair use: No DRM software to limit access
 - (4) Date-time search feature essentially content delivery tool: Non-essential for core functionality

City of Inglewood v. Teixeira (C.D. Cal.)



- Blogger critical of small town mayor
- Used portions of city council meeting videos, city claimed copyright
- Fair use doctrine prevents a city from using copyright to censor criticism of the city government
 - “Purpose and character of use:” criticism on a matter of public concern is highly transformative
 - “Nature of work” also indicated fair use, given straightforward recordings of public meetings
 - “Amount and substantiality of the portion used” also indicated fair use, as Teixeira only used 15 minutes out of 4-hour meeting
 - Use had no “effect on the market,” there is no market
- Subsequently, court ordered city to pay attorneys’ fees: “City’s claims were objectively unreasonable”



Raanan Katz

Katz v. Google Inc. (11th Cir.)

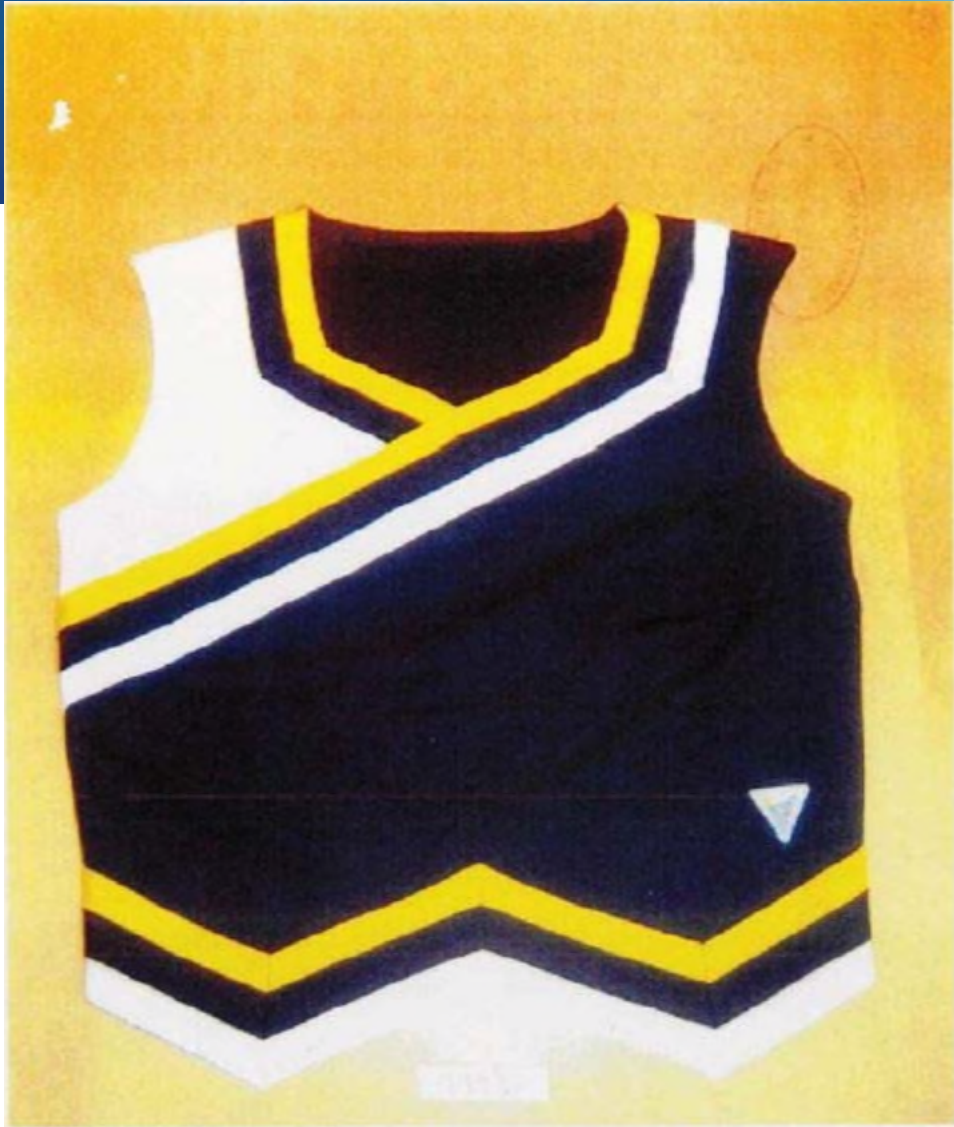


- 11th Circuit concluded bloggers use of unflattering photograph during criticism protected as fair use
 - (1) *Purpose and character*: every use of the photo was of a primarily educational and critical character, rather than commercial
 - (2) *Nature of copyrighted work*: original photo was factual and previously published
 - (3) *Amount of copyrighted work used*: neutral because photo entirely reproduced, but to reproduce less would be pointless
 - (4) *Effect on potential market*: no disruption to the market
- In fact, Katz's decision to copyright appeared driven by desire to ensure there was *no* market for unflattering photo

Lenz v. Universal Music Corp (9th Cir.)



- “Dancing-baby” DMCA case
 - Takedown notice for 29-second home video of dancing baby with portion of Prince recording playing in background
 - Eight years of litigation!
- 9TH Circuit held DMCA (§512(c)(3)(A)) requires copyright holders consider fair use before takedown notice
 - However, copyright owners must only form a subjective, good-faith belief
 - No liability just because they turn out to be wrong
- Failure to consider fair use though can subject to liability under Section 512(f)
- Willful blindness standard could be used



Varsity Brands Registered Designs

Varsity Brands, Inc. v. Star Athletica, LLC (6th Cir.)



- Cheerleading uniform design can be copyrighted where:
 - Design is identifiable separately from, and
 - capable of existing independently of uniform's utilitarian aspects
- Star copied chevrons, stripes, other design elements
 - D claimed designs were uncopyrightable as “useful articles”
- Differing results reached by the majority and dissent highlight “conceptual” separability test's difficult application (majority lists nine tests)
- Didn't address originality
- Interesting discussion of the amount of deference afforded Copyright Office's decision to register (*Skidmore* – limited)
- 6th Cir. turned denied en banc review
- See: [Are patent trolls taking over the fashion industry?](#)

Rupa Marya v. Warner/Chappell Music, Inc. (C.D. Cal.)



- Warner/Chappell long claimed owned copyright to *Happy Birthday To You* lyrics
- Collected about \$2 million in royalties each year!
- Court found Warner/Chappell never acquired copyright in underlying lyrics
- Unless overturned on appeal, no longer will be able to collect, some seeking refunds
- Contrary to many news reports, Court did not say lyrics had entered public domain
 - Both parties agreed melody entered public domain long ago
- No one else has ever claimed to own the copyright

DC Comics v. Towle (9th Cir.)



- 9th Circuit ruled Batmobile is its own comic-book character worthy of copyright protection
- Set forth new three-part test “for determining whether a character in a comic book, television program, or motion picture is entitled to copyright protection.”
- Character must:
 - generally have physical as well as conceptual qualities;
 - be sufficiently delineated to be recognizable as same character where it appears; and,
 - be especially distinctive and contain some unique elements of expression

Administrative – Legislative Developments



Notorious Markets List



- U.S. Trade Representative (“USTR”) Federal Register notice requests comments to identify Internet and physical markets outside U.S. that should be included in 2015 Notorious Markets List
- Since 2010, USTR publishes a Notorious Markets List separately from its annual Special 301 Report
- Part of Special 301 (but out-of-cycle) and recommends sanctions
- Comments were due October 5, 2015

Joint Strategic Plan on IP Enforcement



- IP Enforcement Coordinator Office (IPEC) asking for comments on what should be U.S. IP enforcement priorities over the next several years
- Comments to help shape Administration's 2016-2019 Joint Strategic Plan on IP Enforcement.
- Development of the plan led by IPEC Danny Marti
- Submissions must be submitted to IPEC on or before October 16, 2015

House Judiciary Committee's Review of Copyright Act (Sept. 2015)



- After two years, 20 hearings and 100 witnesses, House Judiciary Committee announced will conduct a listening tour as part of its comprehensive copyright review
- Committee kicked off copyright review listening tour with a roundtable discussion in Nashville, TN on September 21st
 - Digital streaming royalty payments, Songwriters Equity Act, and other issues affecting music industry
- Yesterday, Committee accepted Internet Association ask for a Silicon Valley visit during tour to get a different take on copyright
- July review – invited prior witnesses to meet with staff and provide additional input, as well as any interested parties

Copyright Office Independence



- Register Maria A. Pallante called for independence for her office
- *A 21st Century Copyright Office* (Oman-Tepp)
 - Conservatives: protect against “activist” librarian”
 - “Some partisans seek a Librarian who will insert himself or herself into debates over the proper scope and application of exceptions and limitations to copyright and to the rules against hacking copyrighted works.”
- Representatives Tom Marino (R-Pa.) and Judy Chu (D-CA) discussion draft
 - Would grant independence
 - “Other” reforms
 - No bill dropped

International



Universal Music v. vKontakte (Saint Petersburg
& Leningradsky Region Arbitration Court)



- Russian social network – vKontakte – must use effective technology to prevent infringement going forward
- Site extremely popular in part because provides hundreds of thousands of copyright infringing tracks to more than 70 million users every day
- If decision followed in future for other Russian websites, could be a sign of stronger Russian efforts to fight online infringement

GEMA YouTube (Hamburg, German)



- A Hamburg, Germany court held YouTube does not have to police copyright infringement proactively
- However, if alerted to a clear violation of copyright law, obligated to block objected-to content immediately, and ensure there no further infringement

EU Copyright Reform



- Waiting game continues: European Union Commission plans to issue copyright reform proposal this year
 - EU Parliament would have to approve any changes in EU Copyright Directive
 - Last year Parliament named Julia Reda (German Pirate Party), as *rapporteur* to review 2001 EU Copyright Directive and suggest changes
- MEP Reda earlier released a draft report containing a number of recommendations and comments: Major issues:
 - Geoblocking and portability
 - Single European Copyright Title for uniformity and harmonization
 - Free provision of links to websites (Google News)
 - Circumvention of technological measures, source code availability
- Report adopted by European Parliament (445 votes to 65, with 32 abstentions), only a non-binding recommendation
 - Some amendments made to MEP Reda's original proposal, but proposals to restrict freedom of panorama were defeated

Spain's Ancillary Copyright Law



- On January 1, 2015, Spain passed ancillary copyright law causing Google to shut down Google News service in Spain
- Spanish Association of Publishers of Periodical Publications recently released study on impact of this ancillary copyright:
 - As a result of new law, traffic to newspaper sites in Spain has dropped more than 6% on average and 14% for small publications
- Despite this, there still have been efforts to implement an ancillary copyright for all of Europe

Trans-Pacific Partnership Deal Struck



- Trans-Pacific Partnership (TPP) Agreement reached October 5th years of negotiation, covers 12 countries/40% world's economy
- No official release of details, prompting criticism, WikiLeaks released purported IP section
- Copyright small component of TPP, but will have effects for countries that do not have life-plus-70 copyright term
- Reportedly requires criminal sanctions for commercial scale infringement
- Exceptions and Limitations optional (endeavor to create balance)
- ISP “safe harbors” that cooperate with copyright owners to remove infringing material (similar to DMCA)
- Political football – Warned not final

A nighttime long-exposure photograph of the U.S. Capitol building in Washington, D.C. The building's dome is illuminated and stands prominently against a dark sky. In the foreground, a multi-lane road is filled with light trails from moving vehicles, creating streaks of white, yellow, and red light. Traffic lights and streetlights are also visible, adding to the urban night scene.

Thank You

Jim Burger
Thompson Coburn LLP
2025856909
jburger@thompsoncoburn.com