

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 with some light clouds, and the foreground shows some trees and streetlights. The text is overlaid in a yellow, serif font.

# Litigation/Legislative Update

CPTWG Meeting #140

January 27, 2016

Jim Burger

Thompson Coburn LLP

# Litigation



- *Naruto, a Crested Macaque v. David John Slater*
- *Authors Guild v. Google, Inc.*
- *Keeling v. Hars*
- *Bikram's Yoga College of India v. Evolation Yoga*
- *Tomaydo v. Vozary*
- *Concentro Labs., LLC v. Practice Wealth, Ltd.*
- *ClearCorrect Operating LLC v. International Trade Commission*
- *Fox Television Stations, Inc. v. FilmOn X, LLC*
- *Equals Three v. Jukin Media Inc.*
- *Happy Birthday to You, Good Morning to You Productions Corp. v. Warner/Chappell Music, Inc.*
- *BMG Rights Management (US), LLC v. Cox Communications, Inc*
- *Digital Content Protection v. Legendsky Tech Co..*



# Monkey Selfie



# *Naruto, a Crested Macaque v. David John Slater*



- Ruling: Macaque monkey not capable of copyright ownership
- PETA had filed lawsuit re: Macaque selfie photographs
  - Nature photographer positioned camera
  - But Naruto grabbed camera and took a selfie
- No evidence Congress intended to extend copyright protection to animals

# *Authors Guild v. Google, Inc.* (2<sup>nd</sup> Cir.)



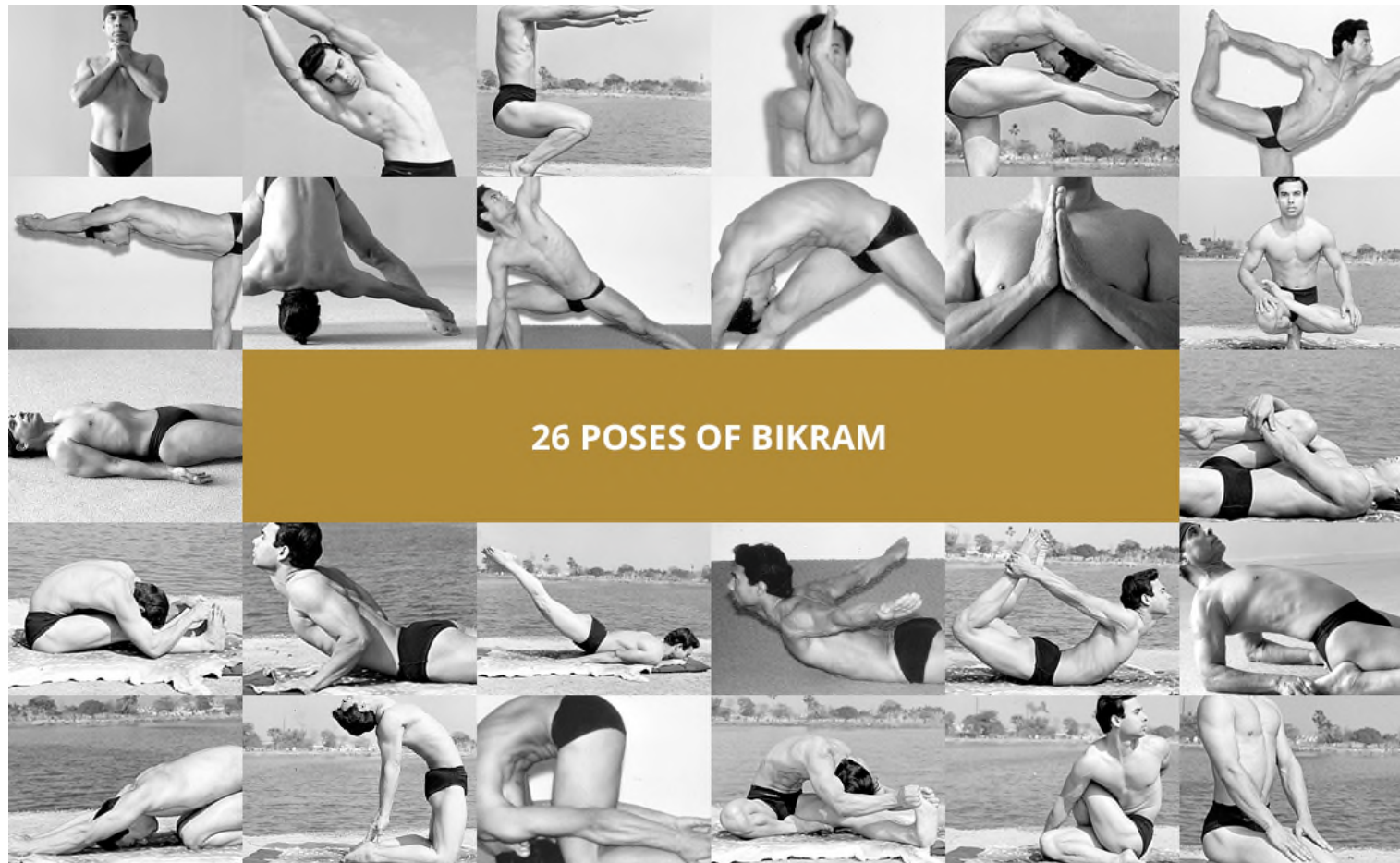
- Google's Library and Google Books digitization projects.
  - Digital copies of books lent by major libraries.
  - Libraries keep digital copy of their works, public can search.
- Fair use?
  - **1<sup>st</sup> Factor:** Highly transformative purpose, “snippet view” contributed value
  - **2<sup>nd</sup> Factor:** Court downplayed impact
  - **3<sup>rd</sup> Factor:** Significant emphasis on Search function enables users to more quickly review, “snippet view” and does not reveal excessive material
  - **4<sup>th</sup> Factor:** Not likely to serve as market substitute
- Thus, court found fair use
- Cert Petition filed

# *Keeling v. Hars* (2d Cir)

- Plaintiff, author of “Point Break Live!”
- Can unauthorized work making “fair use” be protected by copyright?
- Under copyright law, one is not entitled to her own copyright if the work is an unauthorized derivative work of another work
  - UNLESS the work is *not* infringing because of fair use
  - Unauthorized work must still add sufficient originality



# *Bikram's Yoga College of India v. Evolution Yoga (9th Cir)*



# *Bikram's Yoga College of India v. Evolution Yoga (9th Cir)*



- Sequence of Bikram Choudhury yoga poses and breathing exercises
- Bikram's Yoga College sued to protect sequence published in a 1979 book
- Court disagreed, finding the sequence not entitled to copyright protection
- Ninth Circuit affirmed, agreeing an unprotectable idea ("healing art") and unprotectable as a compilation/sequence



# *Tomaydo v. Vozary* (6th Cir)



- Food recipes are not entitled to copyright protection.
- Plaintiff claimed Defendants misappropriated recipes from the Tomaydo-Tomahhdo Recipe Book
- Facts not generally copyrightable, creatively assembled compilations are:
  - BUT only so far as new aspects or elements extend
  - Underlying unoriginal elements are *not* protected
- No original or creative elements here
- Similar to the Bikram Yoga case (idea/expression dichotomy)

# *Concentro Labs., LLC v. Practice Wealth, Ltd. (5th Cir)*



- Chiropractic procedures not copyrightable
  - Video outlining a diagnostic procedure
  - Blank forms to be filled out when conducting the procedure
  - In effect, first chiropractor claimed copyright in the procedure
- Procedure clearly *not* copyrightable
  - “Blank forms” conveying no information are excluded from protection
- Much like *Bikram Yoga* and *Tomaydo* above

# *ClearCorrect Operating LLC v. International Trade Commission (Fed. Cir)*



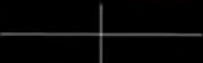
- Does International Trade Commission have authority to prevent importation of infringing digital files?
  - ITC empowered to block “articles” that infringe US IP
- Last year ITC determined had authority to block importation of digital files, not just physical goods
- A divided Fed. Cir. reversed: digital file block counter to Congress’s intent.
  - ITC has no jurisdiction over non-physical goods
  - Implications for copyright infringement litigation at ITC
  - Some wanted ITC as a new forum to fight online infringement



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



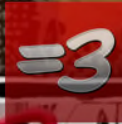
- OTT distributor FilmOn *not* entitled to compulsory license under Copyright Act
- Judge found Section 111(f)(3) says cable systems:
  - Are “physical facilities”
  - “both receive and retransmit broadcast signals”
  - Involve “paying subscribers”
  - Have signals that travel “through wires, cables, microwave, and other types of communication channels”
- FilmOn is not such a facility:
  - Relies on the non-physical and intangible Internet to retransmit broadcast signals
- Directly conflicts with Central District of California holding



# EQUALS THREE

HOSTED BY ROBBY MOTZ

CREATED BY RAY WILLIAM JOHNSON



0:37 / 6:01



HD



# *Equals Three v. Jukin Media Inc.*

## (C.D. Cal.)



- Fair use of commenting on humorous videos.
  - Jukin Media--digital media company, tries to spot videos likely to “go viral” and creates YouTube distribution.
  - Equals Three--makes short humor programs, parodies.
- Fair use?
  - **First Factor:**
    - Sufficient commentary and criticism in *most* of the videos
    - Commercial nature generally outweighed by transformation
  - **Second Factor:**
    - Covered more than merely factual information
    - Not particularly important
  - **Third Factor:** Equals Three used no more of the work than necessary to permit commentary
  - **Fourth Factor:** Not enough evidence of market harm
- Most videos were fair use



*Happy Birthday to You, Good Morning to You  
Productions Corp. v. Warner/Chappell Music, Inc.*  
(C.D. Cal)



- Court ruled Warner/Chappell did not own copyright to lyrics of *Happy Birthday To You*
  - But no public domain finding
- Hill Foundation and the Association for Childhood Education intervened claiming ownership
- Heirs to the Hill sisters (composers)
- On December 8<sup>th</sup>, parties and intervenors settled
  - Terms not yet public, song reportedly to enter public domain

*BMG Rights Management (US), LLC v. Cox Communications, Inc. (E.D. Va.)*



- No safe harbor for Cox Communications under the DMCA Section 512
  - Liability for copyright infringement over Cox subscribers' use of BitTorrent
  - Cox defended itself based upon DMCA safe harbor Cox failed to adopt and reasonably implement infringement policy
  - Refused to ban repeat infringers
- Jury found Cox liable for contributory infringement, awarded \$25 million verdict

# *Digital Content Protection v. Legendsky Tech Co.* (S.D.N.Y.) (filed Dec. 31, 2016)



- Lawsuit filed against Chinese manufacturer of TPM-stripping products
- Plaintiff DCP owns HDCP TPM, controlling access to copyrighted works
  - DCP licenses HDCP to >550 customers including Warner Bros. (also a plaintiff)
  - HDCP is an “essential link” in protection
- Defendant LegendSky makes/imports “HDFury” brand - Designed to circumvent HDCP by stripping encryption
- Products affected: set top boxes, computer video cards, DVD and Blu-ray players, etc.
- Plaintiffs allege:
  - LegendSky’s HDFury Devices primarily designed for circumventing HDCP;
  - have little alternate use; and
  - are marketed for use in circumventing HDCP
- Plaintiffs seeking actual damages, LegendSky’s profits, statutory damages, injunctive relief



# Administrative – Legislative Developments



# DMCA Exemptions: Final rule announced



- Section 1201 triennial decision: what classes of works are exempted from prohibition against circumvention of technological protection measures for copyrighted works
- New rule generally provides exemptions for:
  - audiovisual works for educational and derivative uses;
  - literary works distributed electronically for access by the blind, visually impaired and/or print disabled;
  - computer programs that enable devices to connect to a wireless network that offers telecommunications and/or information services;
  - jailbreaking for smartphone and mobile computing devices;
  - jailbreaking for Smart TVs;
  - vehicle software for diagnosis, repair, modification and security research;
  - abandoned video games requiring server communication;
  - 3D printers; and
  - networked medical devices, for accessing patient data.

# Copyright Office DMCA Section 1201 Study



- Copyright Office undertaking public study to assess operation of Section 1201 and triennial rulemaking process
- 40,000 comments received in the last cycle alone!
- Common complaints:
  - Overly burdensome for non-profit exemption seekers
  - Does not keep pace with rapid technological changes
  - TPMs incorporated in many, many more consumer products than ever before
- Desire to add more permanent exemptions, explore presumptive renewal structure
- Public comments: February 25<sup>th</sup>

# Copyright Office Study on DMCA Section 512



- Copyright Office also undertaking public study to assess impact and effectiveness of the Section 512 safe harbor provisions
  - Among other issues, Office will consider costs and burdens of the notice-and-takedown process on large- and small-scale copyright owners, online service providers, and general public
  - Office will also review how successfully §512 addresses online infringement and protects against improper takedown notices
  - Written comments due by March 21, 2016, public meetings will follow



# Copyright Office's Strategic Plan



- Register of Copyrights Maria Pallante released the Copyright Office's Strategic Plan, setting forth the Office's performance objectives for the next five years

# Miscellaneous IP Bills & Issues



- **Bill to Extend Term for Librarian of Congress**
  - Bill establishes 10-year term for Librarian of Congress
  - Became Public Law 114-86 on November 5, 2015
- **House Judiciary Committee**
  - House Judiciary Committee will continue listening tour
  - Part of comprehensive copyright review
- **Study Request**
  - Senate Judiciary asks Register asked to conduct comprehensive study on role of copyright and software controlling operation of everyday things
  - Copyright Office responds with Request for Public Comments: whether application of copyright law to software in such products enables or frustrates innovation and creativity in product design, distribution, and legitimate use
- **YouTube and Improper Takedown Notices.**
  - YouTube providing financial support to some YouTube content creators
  - Supporting those unfairly targeted by improper takedown demands.
  - YouTube also has amusing Muppet-style video explaining copyright and YouTube: <https://www.youtube.com/yt/copyright/>

# Copyright Office for the Digital Economy Act (“CODE Act”)



- The CODE Act would modernize Copyright Office and establish as independent agency.
  - Modernize registration process and other aspects of tech
  - Director for one 10 year term
  - Transfers administrative functions from LOC
  - Deliver communications directly to the legislative branch
  - Allows Copyright Office to physically move out of the LOC

# International





# *GEMA v. Deutsche Telekom* (Bundesgerichtshof)



- Held Internet service providers can be required to block access to infringing websites in certain circumstances
  - Court held that ISPs can be ordered to block website that contain primarily infringing information
  - Where legal material is insubstantial compared to illegal material
- Copyright holder must first explore other avenues, which GEMA did not

# *Universal Music Aktiebolag v. B2 Bredband AB (Stockholms tingsrätt)*



- Stockholm District Court in Sweden reached the opposite conclusion
- Court refused to issue a blocking order to prevent access to torrent sites
  - The Pirate Bay, Swefilmer
- Contributors to infringement targeted in Sweden
- May be issue under EU law for appeals court to clarify

# Kim Dotcom Update



- Founder Kim Dotcom eligible to be extradited to the United States in 300-page opinion
- Faces criminal charges over alleged massive copyright infringement on Megaupload
- Plans to appeal – will be some time before final decision

# China “Gets Serious” about IP Enforcement and Infringement



- *Crackdown in China on Cinema Copying*
  - China’s State Administration of Press, Publication, Radio, Film, and Television (SAPPRFT) announced several measures to tackle illegal copying and recording of films in cinemas
- *China and Copyright Enforcement*
  - SAPPRFT also to step up efforts to combat online infringement
- *Chinese IP Enforcement in the Cloud*
  - China’s National Copyright Administration announced strengthened law enforcement effort against infringing cloud-storage services



# European Commission and Copyright Reform



- Andrus Ansip, EC VP for Digital Single Market project, on November 24, discussed EC's "copyright regime fit for the digital age" proposal
  - Leaked draft sets forth a three-stage approach to copyright reform – very short, medium (spring of 2016), and long term
- Legislative proposals will be issued Spring of 2016.
  - data-and-text mining;
  - educational uses of copyright material;
  - development of some "mandatory" copyright exceptions; and
  - uniform copyright royalty levy systems, etc.
- December 9<sup>th</sup>: EC proposed regulation for cross-border portability of online content services
  - No single digital market, yet
- The EC also launched a public consultation

# Hyperlinking and the European Commission

- Hyperlinking subject to copyright? European Commission considering it
- After leak, MEP Julia Reda quickly denounced plan as absurd
- In addition, some language in the European Commission's Communication hinted that it might desire to overrule the *Svensson*
- Over 80 Members of the European Parliament from six political groups signed letter in protest

# Private Copying in the United Kingdom



- The UK Intellectual Property Office abandoning the UK's private-copying exception
- Introduced in October 2014, effectively declared illegal by High Court in July

# WIPO Standing Committee on Copyright and Related Rights (“SCCR”)



- 31<sup>st</sup> session took place from December 7<sup>th</sup> – 11<sup>th</sup>
- Update of copyrights related to digital environment
- Session ended without anything definite
- Speakers underlined importance of copyright for authors, warned about ill-defined fair use



# Australian Copyright Reform



- Proposed changes to Australia’s copyright laws released for comment
- Designed to modernize and improve workability
  - Streamline educational statutory license provisions;
  - Provide clear rules for libraries and archives;
  - Align terms; and
  - Provide search engines with “safe harbor”

A nighttime long-exposure photograph of the United States 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. Traffic lights and streetlights are also visible, adding to the urban scene.

# Thank You

Jim Burger  
Thompson Coburn LLP  
2025856909  
[jburger@thompsoncoburn.com](mailto:jburger@thompsoncoburn.com)