Litigation/Legislative Update
CPTWG Meeting #141
April 13, 2016
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Thompson Coburn LLP
In Memory of Dr. Alan E. Bell
A Colleague and a Friend
Quiet Political Season

The Boston Globe
Sunday, April 9, 2017

DEPORTATIONS TO BEGIN

President Trump calls for tripling of ICE force; riots continue

Curfews extended in multiple cities

Markets sink as trade war looms

Worldwide stocks plunged amid trade war tensions, completing the worst month on record as trade wars with both China and Mexico were intensified.

Sheriff Brown tells president to ease tensions in Sioux Falls, completing the worst month on record as trade wars with both China and Mexico were intensified.
Litigation

- Simmons v. Stanberry (2d Cir.) (Jan. 15, 2016)
- Kirtsaeng v. John Wiley & Sons. (U.S.) (March 2016)
- Alliance of Artists and Recording Companies v. General Motors (DC DC) (Feb. 22, 2016)
- Paramount v. Axanar (C.D. Cal) (Mar. 21, 2016)
- Update on Monkey Selfie Case (Naruto, a Crested Macaque, v. David John Slater) and PETA (March)
Simmons v. Stanberry (2d Cir.)

- Copyright Act: three-year statute of limitations
- Simmons (writer and performer of hip-hop music) appealed copyright-infringement dismissal
- Suit against hip-hop producer William C. Stanberry, Jr., 50 Cent, and others re: 2007 song “I Get Money,”; Simmons claimed exclusive license to song
- The Second Circuit affirmed dismissal:
  - More than three years prior to filing, Stanberry rejected Simmons’ asserted copyright
  - Stanberry then exploited work, Simmons on notice
  - Thus, Simmons’ claim time-barred
(SCOTUS)

- Supreme Court granted cert in *Kirtsaeng v. John Wiley & Sons*
- Kirtsaeng won first sale case against Wiley
- Wiley lost claim of copyright infringement for distribution of “grey market” textbook
- 2nd Circuit rejected Kirtsaeng’s request for attorneys’ fees
- Supreme Court argument set for April 25, 2016
Audio Home Recording Act decision (AHRA)
  - AARC (AHRA collecting entity) sued auto manufacturers and suppliers
  - “Infotainment systems” also ripped CDs; thus, allegedly covered by the AHRA as a Digital Audio Recording Device (DARD)

Bad news for manufacturers? Not so fast…
  - Judge agreed with defendants’ interpretation of the statute
    - DARDs must make a Digital Audio Copied Recording (DACR), which must also be a Digital Musical Recording (DMR)
      - a reproduction in a digital recording format of a [DMR], whether that reproduction is made directly from another [DMR] ….
    - Because it can’t be a DMR if it is recorded to a hard drive with programs other than music or to playback music
    - Computer industry effectively exempted from AHRA

Judge, however, denied the manufacturers’ motions
  - But the devices’ exact nature at issue question of fact for next stage
Paramount v. Axanar (C.D. Cal)

- Paramount sued crowd-funded effort to produce a Star Trek prequel, claiming infringement
- Amended complaint details alleged infringing elements, including:
  - Made up Klingon language
  - Warp Drive
  - Klingon High Council
  - A uniform with Gold Shirt
Could interviews about experiences fleeing genocide be a joint work?

Defendants file motion to dismiss:
• P failed to register their copyright
• No intent to form a joint venture

Registration: P argued defendants should be equitably estopped
• Couldn’t file for © because defendants wouldn’t handover material
• Court sympathetic but not swayed: no precedent for equitable estoppel
• But injunction still possible

Other grounds for dismissal discarded:
• Not fixed? “Plausible allegation” interviews were taped and thus fixed
• Original work of authorship? Interviews were a creative act
• “Joint work” intent? Relevant ‘intent’ is that parties’ contribution be merged. Citing the pleadings, merger could have occurred

- General Motors complex case against Autel.US, Gary DeLuca, and others – motion to dismiss
  - Autel produces vehicle diagnostic and repair tools
- GM alleged Autel (and Chinese parent) accessed, copied & distributed software
  - Customers could recalibrate vehicle controls on GM vehicles
  - GM made claims of personal liability against Autel’s VP for misappropriation
- Court denied procedural motions to dismiss GM’s claims
  - GM adequately established personal jurisdiction, and properly pled its claims
- Court did not entertain Autel’s interoperability arguments
  - Corporate officers not per se liable, but could be with deliberate, culpable intent to infringe
- Court appeared sympathetic to GM
Cambridge Univ. Press v. Becker (N.D. GA)

- Publishers' case against Georgia State University's e-reserve
- In 41 of 48 cases, no copyright infringement took place
- Complicated decision that won't be of much help to universities
- Still, win for proponents of fair use and another loss for the publishers
Update on Monkey Selfie Case

- In *Naruto, a Crested Macaque, v. David John Slater* a federal judge ruled against PETA monkey not capable of being copyright owner
  - No evidence Congress intended to extend copyright protections to animals
- PETA notified Federal District Court it will appeal
Late Breaking News

- 'We Shall Overcome' Copyright Challenged
- Calif. Art Resale Law Preempted By Copyright, Judge Says
Copyright Office 1201, 512 and IoT Hearings

- Office earlier solicited comments on the 1201 process
  - Comments noting problems with three year cycle and comments supporting current process
  - Washington, DC hearing on May 19\textsuperscript{th}/20\textsuperscript{th}, San Francisco hearing on May 25\textsuperscript{th}/26\textsuperscript{th}

- Also comments filed on 512 notice & take-down
  - Similarly comments supporting and comments noting issues with the process

- Office earlier announced Software-Enabled Consumer Products Study:
  - Public roundtables in Washington, DC May 18th and San Francisco, CA on May 24th
  - Requests to participant in the hearings due by April 18th
Internet Policy Task Force White Paper

- Commerce Department’s Internet Policy Task Force released a White Paper on Remixes, First Sale, and Statutory Damages

- The Task Force conclusions:
  1. legal framework for creation of remixes;
  2. relevance and scope of “first sale doctrine”; and,
  3. appropriate calibration of statutory damages, individual file sharers and secondary liability for large-scale infringement

- Task Force mindful of protecting copyrights, promoting innovation on the Internet
Copyright Office Report: “right of making available”

- Covers “the right of making available” under copyright
- Concludes “making available right” exists within:
  - The distribution,
  - Public performance, and
  - Public display rights
- No additional legislation required
- She also says that a digital transmission of bits is a distribution of a copy or phonorecord
US Patent and Trademark Office forwarded to Senate proposed draft legislation to implement Beijing Treaty on Audiovisual Performances

- Without consent of performers, unauthorized to
  - Fix live performance or reproduce from unauthorized fixation;
  - Transmit live performance; or
  - Distributes copies for unauthorized fixation

- §§107 & 108 limitations apply

- Bit of time travel involved:
  - Subsection (c) allows you to record a live performance 95 years after it occurs
  - Substantively, the PTO proposes changing §1101(a)(1)
International
Update on Ancillary Copyright in Germany

- VG Media sues Google again over Google News
- German ancillary copyright implicated
- Would require payment of royalties for showing snippets of news and hyperlinking
GEMA v. YouTube (Higher Regional Court Munich)

- YouTube not liable for infringing videos posted to its website in Germany.
  - Copyright owners must go after the uploaders instead
- GEMA represents the copyright of more than 70,000 members in Germany, more than 2 million copyright owners globally (including composers, lyricists and music publishers)
  - Brought suit against YouTube for piracy on its website
- Court: YouTube not liable for copyright infringement
  - This is despite the commercial nature of YouTube
  - Reverses a lower court decision from last July
Advocate General opinion on businesses offering free Wi-Fi to public
- Cannot (on that basis alone) be held indirectly liable for copyright infringement

Regional Court of Munich case pending

Uncertainty over the application of the EU’s E-Commerce Directive (2000/31/EC)

AG opinion: public Wi-Fi providers not liable for copyright infringements
- Opinion did not bar injunctions to end specific infringements

Germany’s Third-Party Liability Law, Störerhaftung

Advocate General usually followed by the CJEU
Dutch Government Complicity in Breaches?

- Movie distributor group threatening to sue Dutch government for allowing online infringement
- Dutch Film Distributors' Association (NVF)
- Claim losses of more than a billion euros ($1.1 billion) in part due to a lack of legal sanctions
- Feb. 1 letter threatens action.
- “Widespread tolerance of file sharing”, letter claims.
- A shift in cultural attitudes is now “desperately needed,” the NVF says
Shenzhen Shengyin Network Technology Co. v. Wuxi Qiaosheng Entertainment Ltd. (Jiangsu High People’s Court)

- Five collective management societies, designated by National Copyright Administration of China (NCAC), have legitimate authority in China
- Shenzhen Shengyin unlawfully acting as a collecting society
  - Wrongfully collecting license fees from karaoke bars
  - Unlawfully filing lawsuits across China to enforce “rights”
- Also allegations Shenzhen Shengyin fraudulently obtained copyright certificates
- Highlights a larger problem of copyright fraud in China
Criminal Copyright Infringement in the U.K.

• Policy recommendation to increase maximum sentence for online copyright infringement
  • Two years to ten years
• Met with opposition from some advocacy groups
  ▪ Open Rights Group (ORG) campaign against measure
Vladimir Putin and Piracy

- Chief Internet Advisor to Russian President Vladimir Putin owns a Russian torrent site: Torrnado.ru
- Some have criticized this as a conflict of interest
- Mr. Klimenko has publicly advocated against blocking torrent sites in the past
The Czech Pirate Party reportedly opened its own movie download site, Pirateskefilmy.cz,
Carried 20,000 links
The Pirate Party claims attempt to prod Czech authorities to prosecute it
Doing this because of their conviction that linking is not/should not be a crime
It was actually hand-curating the website, not just linking!
New Strong Norwegian Copyright Amendment

- Norway’s Copyright Act may soon toughen up

- Draft law would punish viewers of infringing content
  - Streaming copyrighted movies and music would become punishable
  - “Obviously infringing” content only
  - Burden on infringer (or viewer)

- The law could exacerbate the natural tension between rightsholders, free speech

- Other effects:
  - Strengthening employer’s right to employee-created content

- Public opportunity to comment until August 8, 2016
Copyright Protection in Myanmar

- Myanmar governed under 1914 Copyright Act
- No foreign copyright protection
- Myanmar obligated to provide for such protection under treaty
- New government and parliament set up in March
- Expectation that new government will address issue
Thank You

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