

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 brightly lit. A single, sharp lightning bolt strikes the dark, cloudy sky to the left of the building. The surrounding city lights and the reflecting pool in the foreground are visible, creating a dramatic and atmospheric scene.

Litigation/Legislative Update

CPTWG Meeting #143

October 19, 2016

Jim Burger

Thompson Coburn LLP

Litigation



- *Green v. Department of Justice* (DC DC) (Sept. 29, 2016)
- *Disney Enterprises, Inc. v. VidAngel, Inc.* (CD CA) (Sept. 16, 2016)
- *AACS v. Feng Tao (DBA DVDFab)* (2d Cir) (Oct. 4, 2016)
- *Oracle v. Google* (ND CA) (Sept. 27, 2016)
- *Cheryl Smith v. BarnesandNoble.com* (2d Cir) (Oct. 6, 2016)
- *Naruto v. David J. Slater* (9th Cir) (July 28, 2016)
- *TCA Television v. Kevin McCollum* (2d Cir) (October 11, 2016)

Green v. Department of Justice (DC DC) (Sept. 29, 2016)



- Electronic Frontier Foundation complaint for declaratory & injunctive relief challenging DMCA anti-circumvention & anti-trafficking provisions
- DOJ Memo supporting Motion to Dismiss
 - No standing as no credible threat of prosecution
 - Failed to credibly assert acts qualify as speech
 - Failure to state claim – DMCA upheld in all previous constitutional challenges
 - DMCA not unconstitutional prior restraint –not a speech “licensing regime” – triennial not based on content
 - As applied challenged – no example of Plaintiffs’ conduct involving speech regulation
 - Finally APA doesn’t apply to the Librarian

Green v. Department of Justice (DC DC) (Continued)



- EFF Memo in Support of Preliminary Injunction
- Focuses on Dr. Green – encryption researcher (Huang & NeTVCR not mentioned)
- Suppression of book
- Circumvention “necessary predicate” to speech
- DMCA prevents Green from collecting information necessary to speech about security flaws
- Direct First Amendment violation from prosecuting Dr. Green from publishing book reproducing circumventing code

Disney Enterprises, Inc. v. VidAngel, Inc. (CD CA) (June 9, 2016)



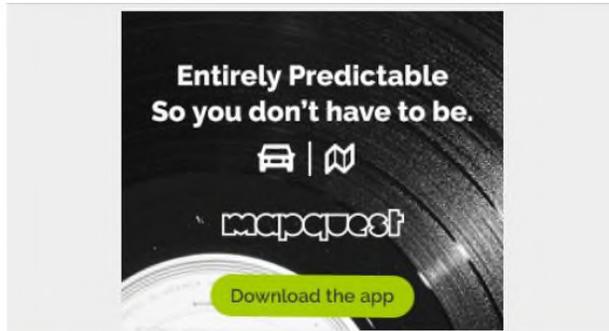
- VidAngel “sales/filtering” model, amended pleading
- Adds Antitrust and CA Unfair Competition
- Claims FMA permits circumvention and copying
- Detailed roadmap of how circumvents, copies and transmits movies to users
- Claims “never makes a copy of the filtered work”
- Pleading claims studios “induced and persuaded” Netflix, Amazon, GooglePlay and Hulu to refuse to support VidAngel’s online filtering service
- Points to 2014 Directors Guild agreement preventing alteration of movie content
- Studios and “conspirators” relied on DGA agreement “to justify their anticompetitive conduct”

YouTubemp3

YouTube mp3

<https://www.youtube.com/watch?v=WB7Lb9amLhM>

Convert Video



What is YouTube mp3?

YouTube-mp3.org is the easiest online service for converting videos to mp3. You do not need an account, the only thing you need is a YouTube URL. We will start to convert the audiotrack of your videofile to mp3 as soon as you have submitted it and you will be able to download it. Different from other services the whole conversion process will be performed by our infrastructure and you only have to download the audio file from our servers. Because of this our software is platform-independent: You can use it with your Mac, a Linux PC or even an iPhone. All our conversions will be performed in high quality mode with a bitrate of at least 128 kBit/s. Do not worry, our service is completely free. We need approximately 3 to 4 minutes per video.

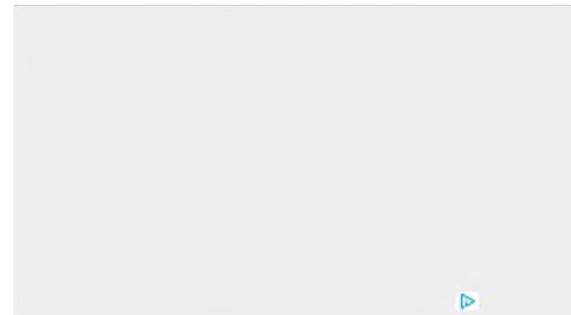
[English](#) · [Deutsch](#) · [Türkçe](#) · [Polski](#) · [Français](#) · [ქართული](#) · [Blog](#) · [Addons](#) · [Privacy](#) · [Impress](#)
[Euskara](#) · [Español](#) · [Ελληνικά](#) · [Nederlands](#) · [繁體中文](#)
[Italiano](#) · [Svenska](#) · [Slovensky](#) · [Српски](#) · [العربية](#)
[Português](#) · [Slovenščina](#) · [українська](#) · [Русский](#)
[Dansk](#) · [suomi](#) · [日本語](#) · [Norsk](#) · [한국어](#)

YouTube mp3

There is some Maintenance going on.
Please try again within the next hour.

<http://www.youtube.com/watch?v=WB7Lb9amLhM>

Convert Video



What is YouTube mp3?

YouTube-mp3.org is the easiest online service for converting videos to mp3. You do not need an account, the only thing you need is a YouTube URL. We will start to convert the audiotrack of your videofile to mp3 as soon as you have submitted it and you will be able to download it. Different from other services the whole conversion process will be performed by our infrastructure and you only have to download the audio file from our servers. Because of this our software is platform-independent: You can use it with your Mac, a Linux PC or even an iPhone. All our conversions will be performed in high quality mode with a bitrate of at least 128 kBit/s. Do not worry, our service is completely free. We need approximately 3 to 4 minutes per video.

[English](#) · [Deutsch](#) · [Türkçe](#) · [Polski](#) · [Français](#) · [ქართული](#) · [Blog](#) · [Addons](#) · [Privacy](#) · [Impress](#)
[Euskara](#) · [Español](#) · [Ελληνικά](#) · [Nederlands](#) · [繁體中文](#)
[Italiano](#) · [Svenska](#) · [Slovensky](#) · [Српски](#) · [العربية](#)
[Português](#) · [Slovenščina](#) · [українська](#) · [Русский](#)
[Dansk](#) · [suomi](#) · [日本語](#) · [Norsk](#) · [한국어](#)

UMG Recordings v. PDM Technologie (DC CD CA) (Sept. 26, 2016)



- Direct, contributory, vicarious, inducement & circumvention alleged
- Against operator of Youtube-mp3.org
- YTMP3 conduct allegedly enables and induces its users to infringe
- Allows users to circumvent YouTube's "rolling cipher technology" to stream rip audio from videos

AACS v. Feng Tao (DBA DVDFab) (2d Cir) (Oct. 4, 2016)



- Feng Tao seeks District Court injunctions vacated
- DVDFab online sale of circumvention software
- DC allowed service by email to Feng Tao in China, judge entered default injunction:
 - Feng Tao not to circumvent via online platforms and disable certain domains
 - Enjoined third parties from providing services
- Request to Appeals Court based on:
 - Email service violates Hague Convention
 - Federal Rules do not permit this type of service
 - English service by mail to China violates due process
 - AACS failed to demonstrate irreparable harm
 - By enjoining 3rd parties judge applied DMCA beyond US territory

Oracle v. Google (ND CA) (June 8, 2016)



- Oracle accused Google of infringing Java APIs
- On remand jury found fair use, judge denied challenge to jury instructions and verdict
- Oracle sought a new trial adding more Android devices
- Accused Google of discovery misconduct
- Judge denied: Oracle free to file future lawsuit covering those devices

Cheryl Smith v. BarnesandNoble.com (2d Cir) (Oct. 6, 2016)



- Ebook sales agreement with Smashwords, B&N didn't take down user's sample from its server after sales agreement terminated
- District Court held conduct not direct or contributory infringement under *Cablevision & Sony-Betamax* rule
- 2nd Circuit ducked controversial issues and decided on contract principles
- Found agreement didn't prohibit permitting access to user who had validly obtained a sample before termination

Naruto v. David J. Slater (9th Cir) (July 28, 2016)



- Can't keep a good monkey down!
- PETA appealed decision that Naruto didn't have standing
- Questions DC decision: what about computer created works?
 - Watson created work? Who owns such a work? Is there copyright?
- PETA: Constitution intended broadest possible meaning, neither it nor the Act limited to human authors on its face
 - Act protects “original works of authorship” not works of human authors
 - Argues protection not based on humanity of author but originality of works
 - Notes nonhuman authors – studios, labels, publishers, tech companies
 - Duration clause: §301(c), works for where “no natural person is identified as author”

TCA Television v. Kevin McCollum (2d Cir) (October 11, 2016)



- Play “Hand of God” used more than one minute’s performance of “Who’s on First”
- Heirs sued play’s producer and author
- DC found fair use – transformative use
- 2d Cir. disagreed – DC failed to explain how “purpose and character” transformed
- But dismissed case because Abbott and Costello failed to renew copyright

Administrative – Legislative Developments



IP & the U.S. Economy: 2016 Update (Commerce Dept.)



- Update of 2012 report of impact of IP on US Economy
- Compared to 2010, in 2014 accounted for more jobs & larger share of US GDP
- 81 IP-intensive industries with 27.9 million jobs in 2014
 - Copyright – 5.6 million jobs (vs 5.1 in 2010)
 - But non-IP-intensive great slightly faster
 - Value-add grew substantially \$6.6 bn (up 30%)

International



EU Copyright Proposals (Sept. 21, 2016)



- EU issued a package of proposals to account for the online world, would cover some 31 countries; it would
 - require OSPs to automatically scan for infringing works and allow copyright owner to preemptively takedown
 - give news organizations “neighboring right” for online use even if they didn’t own the copyright
 - attempt to give newspapers right to demand money from Google/Bing for listing

French Digital Republic Act (7 July 2016)

- Compulsory collective system for reproduction/communication for search engine use of photographic works
- US *Google Books* and *Perfect10* cases – fair use
- Unsuccessful French rightsholder cases
 - Paris Court of Appeals: Google didn't exceed “intermediary service” limits, not sufficient auto-indexing likely to infringe not sufficient for liability as a service as it can de-index on notice
 - French Supreme Court, same conclusion
- Becomes law upon decree of Conseil d'Etat or six months after passage

French "YouTube Tax"

- French lower house passes video tax bill
 - Two percent of ad revenue
 - Porn or video inciting violence 10%
 - First €70 million to local artists, rest to government
- Legislators believe video sites not paying enough taxes
- Goes to Senate this quarter

*Danske Dagblades Forening v. Infopaq
International* (Munich's Higher Regional Court
(OLG München))



- Defendant sued for using “snippets” of articles behind Plaintiff’s paywall
- A “neighboring rights” case
 - Copyright-like rights given to non-authors
- Court held unauthorized re-publication of text extracts from a newspaper's website infringes neighboring rights when content originally posted behind a metered paywall
- First interpretation from a regional court

Singapore To Amend Copyright Act



- 2015 Act allows circumvention for purposes of personal data protection when the TPM measures, collects or disseminates personal data
- New amendment would add several provisions permitting circumvention of TPMs, comments due October 24:
 - Preservation of abandoned software/games
 - Education use of film clips by pre-tertiary media studies classes
 - Good faith security research

Voltage Pictures LLC et al v. John Doe #1 (Federal Court of Canada)



- Court: limited amount of information a film company can obtain from ISP in order to commence controversial “reverse” class action suit alleging infringement
- Plaintiff only entitled to subs’ names and addresses in ISP’s records, information to remain confidential, and not given to other parties
- Federal Court: courts need to exercise caution when disclosing PII to ensure least invasion of privacy
- “Notice and notice regime” not a mechanism for copyright owners to enforce rights against alleged infringers
 - Way to send, through ISP, notice of claimed infringement
 - Can obtain identity later as ISP must preserve records

Concerns Over New Zealand's Implementation of TPP IP Provisions



- Would extend term from 50-70 years, provide tougher anticircumvention provisions, and restrict sharing of digital goods on multiple devices
- Google said, imperative stronger protections balanced by exceptions including fair use
- Google also said: law could prevent use of new data mining research or innovative cloud-based technologies
- US IP Alliance said law would “fall well short” of meeting TPP anti-circumvention requirements
 - Prohibitions narrow, and
 - Exceptions swallow the rule

Thank You

Jim Burger

Thompson Coburn LLP

202.585.6909

jburger@thompsoncoburn.com

