

An aerial photograph of the United States Capitol building in Washington, D.C., taken at dusk. The building's iconic dome is illuminated from below, and the surrounding city lights are visible in the background. The text is overlaid in a yellow, serif font.

Litigation/Legislative Update

CPTWG Meeting #144

January 25, 2017

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Litigation



- *Disney Enterprises, Inc. v. VidAngel, Inc.* (CD CA) (Sept. 16, 2016)
- *Warner Bros. Entertainment, Inc. v. X One X Productions* (8th Cir. 2016)
- *Spanski Enterprises, Inc. v. Telewizja Polska, SA* (DC DC 2016)
- *John Wiley & Sons, Inc. v. Supap Kirtsraeng* (DC SDNY 2016)
- *Prenda Law Principles Indicted for Porn Trolling*
- *1395804 Ontario Ltd., Operating as Blacklock's Reporter v. Canada (Attorney General)* (Federal Court of Canada)

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



- VidAngel “sales & stream” model
- DMCA Circumvention – space-shifting
- Reproduction Right – not “copies”
- Public Performance – not public because users created filtered versions (but “lawful” copy)
- Family Movie Act – expressly permit 3rd party to filter and transmit
- Fair Use Defense
- Preliminary Injunction issued

Warner Bros. Entertainment, Inc. v. X One X Productions (8th Cir. 2016)



- Second time before 8th Circuit, began in 2006
- *Gone with the Wind*, *Wizard of Oz*, and *Tom and Jerry* images/text licensed for use on products
- First time court found only use of PD images not infringing
- Defendant appealing no jury trial and \$2.75 Meg Award (\$10K per work) violated due process
- Jury trial not requested below
- Award not so “severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable” Cites *Capitol Records v. Thomas* \$9,500 per work

Spanski Enterprises, Inc. v. Telewizja Polska, SA (DC DC 2016)



- Spanski had exclusive license for 51 TV Shows from TVP for North/South America, registered
- Spanski claimed infringement by TVP showing shows on TVP website accessible from US
- TVP claimed used 98% effective geoblocking
- Judge found TVP employee would have to change default “minus ameryki” setting for it to be accessed by SE in the US

John Wiley & Sons, Inc. v. Supap Kirtsaeng (DC SDNY 2016)



- Kirtsaeng mounted successful First Sale defense against Wiley
- Sued for legal fees lost at DC and 2nd Circuit
- Supreme Court vacated because concern 2nd Circuit opinion suggest objective reasonableness of Defendant raised a presumption against award of fees
 - Supremes: give reasonableness substantial weight, but take into account all relevant factors
- DC found Wiley's position not "objectively unreasonable, "not frivolous," and acted in good faith to defend against what it reasonably considered to be unauthorized importation

Prenda Law Principals Indicted for Porn Trolling



- After several scathing court decisions against Prenda principals, Minnesota US Attorney files 18-count indictment
- Used “deceptive lawsuit and unsuspecting judge to extort millions from vulnerable defendants
- Purchased copyrights to porn films, upload to “lure” victims to download
- Sued ISP to get identity then collected settlements “through extortionate letters and phone calls” netting \$6 million
- Wire fraud (10 counts), mail fraud (five counts), conspiracy to commit both, conspiracy to commit perjury and suborn perjury, and conspiracy to commit money laundering

Blacklock's Reporter v. Canada (Attorney General) (Federal Court of Canada)



- Paywall protected newsletter published scathing review of Department of Finance sugar tariff action
- Charged Department of infringement by obtaining, reading and distributing two articles
- Court analyzed under “fair dealing,” test: for “research” or “study” and is dealing “fair”
- Giving broad interpretation to research, found what Department did was research
- Listed six part “dealing” test and found was fair

Administrative – Legislative Developments



House Judiciary Committee Legislative Proposals



- [Goodlatte-Conyers Video](#)
- Proposals
 - Move Copyright Office out of Library of Congress & establish Copyright Advisory Committee
 - Create small claims copyright court
- Music licensing next and additional proposed reforms over time

Copyright Office DMCA Agent Rule



- Change procedures to require electronic registration and renewal @ three years
- Danger for online companies with any external content – could lose safe harbor if fail to renew
- Paper filing effective through end of 2017
- CO claims needed to weed out expired designations and keep list current

Copyright Office Seeks Additional Section 512 Safe Harbor Study Comments



- Earlier request resulted in 92K comments and held two public forums
- Merits additional request divided into four categories
 - Accounts for diversity: large v. small ISP/content
 - Effectiveness of safe harbor, accounting for those different players
 - Legislative/non-legislative solutions to evolve the regime
 - Other developments: recent cases (*BMG v. Cox*); foreign safe harbor regimes, and additional empirical evidence on operation of US safe harbor regime
- Comments 02/06/17; empirical studies 03/08/17

USTR Notorious Markets Report



- 2016 out-of-cycle report
- Highlights specific online/physical markets engaging/facilitating copyright infringement
- Focus on online distribution of infringing content and on “stream ripping”
 - Estimates 30% of users acquired unauthorized content
 - 21 Website, up from 15

Communications to the President-elect on Copyright



- Three letters made public
 - News Media Alliance – current interpretation of copyright outdated, reverse court decisions to focus on Constitutional purpose of fair use – reward artists, and independent Copyright office
 - Association of American Publishers – notes Trump and family 18 books – fix DMCA to insure ISPs cooperate to protect online content
 - Music Industry – safeguard music, do much more to deter “theft,” online acts follow examples of effectively stopping theft and assure fair payment, and critical of companies using “legal loopholes” to engage in massive “value grab”

International



Soulier v. Ministre de la Culture et de la Communication (EU Court of Justice)



- French law allowing collecting society to license digital reproduction and distribution of out-of-print books, if
 - Published before 01/01/2001
 - No longer commercial distributed or currently published in print or digital
 - No author objection within six month of publishing of public database
 - Author must demonstrate holds all rights
- Referred to ECJ held precluded under EU copyright law
 - Law requires author's prior consent
 - Also objects to need to provide sole ownership

*Vereniging Openbare Bibliotheken v.
Stichting Leenrecht* (EU Court of Justice)



- Issues: right of libraries to lend digital works
- ECJ approved “one copy, one user model”
 - User can download copy accessible for limited time
 - After time expires copy again available for lending

Hamburg Court Implements ECJ *GS Media* Decision



- *GS Media BV v. Sanoma Media Netherlands BV* (ECJ) held website liable for infringement linking to infringing content if knew or should have known
 - If for-profit, knowledge presumed
- Hamburg court first decision under *GS Media*
 - Focused on ambiguity: site or link for-profit
 - Held site, found site guilty as for-profit and didn't rebut presumption

EU Copyright Law Reforms: Theresa Comodini Chachia



- Parliament *rappporteur* (Maltese European People's Party Member) held open meetings for industry and students
- Her website pro-user: “what ... copyright exceptions give to citizens in the analogue level should not be taken away at the digital level.”
- Expects proposals to Legal Affairs Committee in March; Committee approved draft to Parliament by end of June

EU Copyright Law Reforms: US Tech Industry



- CCIA, CTA, ITIC and Internet Assoc wrote to US Officials expressing reservations
- Opposed to infringement monitoring
 - require OSPs to automatically scan for infringing works and allow copyright owner to preemptively takedown
- Newspaper Neighboring Rights
 - Liability for online use even if didn't own copyright – US online subsidizing EU publishers

Australia “Intellectual Property Arrangements” Review



- Review Australia’s IP “arrangements,” including copyright
 - Chapter title: *Copy(not)right – looking at the evidence*
 - Found arrangements to skewed to “favour” copyright owners
- Recommended permitting circumvention for “legitimate uses” of content
- Make contract provisions unenforceable if prevented legal copyright use of content
- Adopt US-like flexible fair use provision to replace “fair dealing”
- Would legalize circumvention of geoblocking but for treaties
- Note life plus 70 “to far in favour of copyright holders”
- Eliminate parallel bock import law
- Books Create Australia Press Release: “Productivity Commission is like a deranged hairdresser insisting their client wears a mullet wig.”

Thank You

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