Litigation/Legislative Update

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Litigation

- *Star Athletica v. Varsity Brands* (SCOTUS 2017)
- *Capitol Records v. Vimeo (SCOTUS 2017)*
- *Fox Television Stations v. Aereokiller* (9th Cir. 2017)
- *Perfect 10 v Giganews* (9th Cir. 2017)
- *BWP Media USA v. T & S Software Associates* (5th Cir 2017)
- *Great Minds v. FedEx Office and Print Services* (ED NY 2017)
- *ALS Scan v. Cloudflare* (CD CA 2017)
- *American Ed Research Assn v Public.Resource.org* (DC DC 2017)
- *Code Revision Commission v. Public.Resource.org* (ND GA 2017)

Star Athletica v. Varsity Brands (SCOTUS 2017)

Star Athletica v. Varsity Brands (SCOTUS 2017)

- Varsity produces cheerleader outfits, registered outfit's designs
- Sued Star for infringement, DC SJ for Star, 6th Cir. Reverses – cert granted
- 6-2 Opinion Justice Thomas rules features in useful article eligible only if:
  - Can be perceived as two- or three- dimension work of art separate from the article; and,
  - Would qualify as protectable work, either on its own or fixed in another tangible medium imagined separate from the article

Star Athletica v. Varsity Brands (SCOTUS 2017)

- Thomas quickly finds tests passed
  - Decorations have pictorial, graphic, or sculptural qualities, meets statutory test and precedent; and
  - Can be taken from outfits and applied to other mediums
- But garments can’t be copyrighted (i.e., shape, cut, and dimensions)
- Ginsburg concurrence – not apply separability test – not designs on useful article, designs themselves are copyrightable pictorial or graphic works *reproduced on* useful articles
- Breyer/Kennedy dissent: do not separately perceive the designs from the outfits

Capitol Records v. Vimeo (SCOTUS 2017)

- Status of pre-1972 sound recordings, covered by state law, ‘76 Act pre-empted sound recordings created after the beginning of 1972
- Issue: whether §512 safe harbor applies to pre-72 songs on ISP website
- 2nd Cir: §512 applies, and
  - Mere fact employee viewed in some fashion a video with all or most of recognizable song not knowledge or red flag knowledge
  - Rejected willful blindness
- Supreme Court denied cert, leaves 2nd Cir Court ruling stand

Fox Television Stations v. Aereokiller (9th Cir. 2017)

- DC found defendant's service qualified as a §111 "Cable System"
- While finding §111 "ambiguous," 9th Cir. reverses
- Notes Congress' interest in crafting cable system rules – reverse old CATV cases, local service vs. Internet, investment in infrastructure
- Acknowledging values in FilmOn's position, but array of competing interests "does not unambiguously counsel for or against a broad reading of §111"
- Because statute ambiguous, looks to Copyright Office
- Panel disagreed whether give Copyright Office *Chevron* or *Skidmore* deference; latter less deferential examine reasoning, persuasiveness
- On four occasions, Copyright Office opined not a Cable System
- Finds opinions persuasive under either *Chevron* or *Skidmore* and defers to Copyright Office

Perfect 10 v Giganews (9th Cir. 2017)

- Perfect 10 sued Giganews for direct and secondary infringement based on Usenet users posting its pictures
- Court rejected Perfect 10's argument: *Aereo* eliminated volitional-conduct requirement, narrowly interpreted
- Found Giganews volitional conduct lacking for direct – passively storing Users' posts, did honor §512 TDNs
- No contributory as Perfect 10 failed to raise a triable issue of fact showing a material contribution or inducement
- Vicarious – no showing of a causal link between infringing conduct and Giganews financial benefit
- May be last Perfect 10 case, after decision Perfect 10 assets put into receivership

BWP Media USA v. T & S Software Associates (5th Cir 2017)

- Defendant website host sued for direct liability (no agent, no safe harbor), DC granted SJ for Defendant
- Like *Perfect 10*, 5th Cir. rejects argument that *Aereo* eliminated volitional-conduct requirement
- Finds *Aereo* based on technology (CATV-like system), citing Scalia's dissent ("who selects the copyrighted content" liable for direct infringement)
- Also, rejects Plaintiff's argument that DMCA eliminated volitional-conduct requirement
  - §512(l) states DMCA not exclusive defense
  - Cannon of Construction – Congress must explicitly state supplanting common law rule

Great Minds v. FedEx Office and Print Services (EDNY 2017)

- Great Minds (GM) publishes *Eureka Math* for U.S. school districts
- Provides material under a "Creative Commons Attribution – Non-Commercial – Share Alike 4.0 International Public License"
- Allows teachers, students and school districts to freely share, reproduce, and use for "non-commercial, educational benefit"
- Two districts had FedEx copy materials at commercial rates for nonprofit district use
- GM sued FedEx for commercial copying
- Granted FedEx Motion to Dismiss finding lack of clear restriction on licensee (district) ability to use 3rd parties in implementing the license, interpreted to allow such assistance
- Distinguished *Princeton* and *Kinko's* holdings of no fair use as students there were not licensees nor was FedEx pleading fair use

ALS Scan v. Cloudflare (CDCA 2017)

- Plaintiff alleges defendant Steadfast "hosts" "pirate" websites on its cloud services (e.g., imagebam.com) despite numerous TDNs alerting of the infringement; Steadfast failed to implement or enforce a repeat infringer policy by removing imagebam.com from its servers
- Accuses Steadfast of contributory infringement and vicarious infringement
- Steadfast asserts plaintiff failed to adequately plead each cause of action and Steadfast entitled to protection under the DMCA safe harbor provisions
- Court dismisses contributory, ALS failed to allege knowledge of imagebam material, material contribution or inducement just presence of material on website
- Dismisses vicarious – no right and ability to supervise imagebam and no direct financial interest
- Did not address DMCA defense as dismissed all copyright claims

American Ed Research Assn v Public.Resource (DCDC 2017)

- Defendant disseminated Plaintiff's standard, which EPA had adopted by reference
- Judge ruled on both general copyrightability of standards and on standards referenced or incorporated into laws
- Copyright not available for U.S. government works, but can hold transferred copyrights (§105)
- Question – status when government incorporates standard by reference or adopts the standard as law?
- Judge held Congress in legislative history left private copyright determinations to the agency and EPA found standards "reasonably available," thus Plaintiff retained copyright
- Only where standard adopted as the law itself, would §105 apply
- Defendant also argued standards not copyrightable in general, citing *Baker v. Selden*, Judge noted standards are entitled to protection
- Found again fair use defense because …

American Ed Research Assn v Public.Resource (DCDC 2017)

- Purpose and Character – Judge found defendant's actions not transformative, little attention to nonprofit since active engagement by distribution to same market bears "commercial" elements
- Nature of Work – even though factual, Judge focused on Constitution IP Clause "Progress of Science" and Plaintiff's "standards vital to advancement"
- Amount – Defendant used all
- Effect on Market – found widespread conduct would be a substantial adverse impact on potential market or value of Plaintiff's work

Code Revision Commission v. PublicResource.org (ND GA 2017)

- Similar to previous decision with same defendant: whether "official" Annotated Georgia Code is entitled to copyright protection
- Commission worked with LexisNexis to create additional material, LexisNexis assigned copyright to Commission
- Legislature votes to amend "the Official Code of Georgia Annotated"
  - Is the Annotated Code protected?
  - Is Defendant's use a fair use?

Code Revision Commission v. PublicResource.org (ND GA 2017)

- Judge held Annotated Code protected, observes annotations historically copyrighted
- While unusual – most official codes not annotated – however, private agreement doesn't change annotations into uncopyrightable material
- Denied fair use defense
  1. Not transformative, says although a nonprofit, Defendant paid (grants, contributions) & "profits" from attention
  2. Finds neutral, although factual, cites "tremendous amount of work" confirms "annotations are original works entitled to broad copyright protection"
  3. Copies all
  4. "When considering Defendant's actions being performed by everyone, it is inevitable that Plaintiffs' markets would be substantially adversely impacted."

Administrative – Legislative Developments

Register of Copyrights Selection and Accountability Act of 2017 (H.R. 1695)

- Chairman Goodlatte and Ranking Member Conyers, with 29 additional cosponsors, introduced H.R. 1695
- Amendment makes two changes
  - Removes appointment by the Librarian and inserts: "The Register of Copyrights shall be a citizen of the United States with a professional background and experience in copyright law and shall be appointed by the President by and with the advice and consent of the Senate."
  - President may remove the Registrar and notify Congress
- Amendment also adds a 10 year term, parallel with Librarian's term; but, allows the Register to serve until a successor confirmed and takes the oath of office
- Other Copyright Office issues to be resolved later, but since Registrar is vacant, Goodlatte wants to act now
- House markup held last week, Jackson-Lee amendment accepted: Congress recommends three candidate slate to President
- Reported out on 27-1 vote

happy birthday

EU Copyright Act Draft

- 58-page draft dated March 10 with proposed changes and commentary
- Modernize EU copyright rules to adapt to the digital era
- Provide consumers with better access and choice for online content, enhance education, cultural heritage and research, and achieve a proper and well-functioning copyright marketplace
- New provision relevant to copy protection:
  - Member States shall ensure that national law provides users with access to a court or other relevant authority for the purpose of asserting their right of use under an [copyright] exception or limitation
- Can they finish before 2019 – new Parliament (attempt to separate out Marrakesh Treaty)?

Brexit - Department for Exiting the European Union

- Article 50 “Dear Jacques” (Brexit) Notice filed last week, March 2019 deadline
- Until UK leaves all EU rules, regulations and ECJ decisions control
- Grand Repeal Bill to be introduced – enact into UK law all existing EU rules, regulations and ECJ decisions affective day after Brexit
- What changes will they make?

Australia Introduces Copyright Act

- Australian Parliament introduced an amendment to their Copyright Act
- Extensive debate surrounding the efforts to change Australia’s copyright law, a mess – three strikes effort collapsed, fair use doctrine, and ISP safe harbors debate
- Amendment avoids most of these contentious issues
- Instead, would give Australians, especially those with disabilities, given greater access to a range of copyright material
- Also allow libraries and archives more flexibility in preserving copyright material in their collection
- Finally, simplifies the requirements for use of works and broadcasts for educational purposes, including online exams

Canada: *Jeramie Douglas King*

- First Canadian anticircumvention law decision since 2012 enactment, like U.S. prohibits circumventing TPMs and trafficking
- Defendant sold "game copiers," accepted memory cards containing infringing games; when inserted in Nintendo consoles, combined infringing games and "game copiers" allow those games to play, circumventing various Nintendo TPMs
- Defendant also provided "mod keys" that, when inserted into certain Nintendo devices, would also avoid Nintendo's TPMs
- Defendant guilty of circumvention and infringement, applied per-work maximum statutory damages: $11,700,000 for circumvention, $60,000 for infringing three works and $1 million dollars punitive damages; also injunction issued, found "interoperability exception" inapplicable
- Decision represents Canada going from 0-to-60 in employing the anticircumvention amendment, holds law's rules "create legal rights to limit access even without any actual copying"

New Zealand Judge Upholds Kim Dotcom Extradition

- Late last month New Zealand High Court judge upheld earlier court ruling that Kim Dotcom and three colleagues can be extradited to the U.S. to face criminal charges
- Court found extradition couldn't be based on copyright infringement but could be on conspiracy charges
- Decision comes five years after U.S. authorities shut down Dotcom's file-sharing website Megaupload and filed charges of conspiracy, racketeering and money laundering
- If found guilty, DotCom could face decades in U.S. prison

Thank You

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