Litigation/Legislative Update

CPTWG #146

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Litigation

- Packingham v. North Carolina (SCOTUS 2017)
- BWP Media USA, Inc. v. National Photo Group LLC. (5th Cir 2017)
- Design Basics, LLC v. Lexington Homes, Inc. (7th Cir. 2017)
- Mavrix Photographers, LLC v. LiveJournal, Inc. (9th Cir. 2017)
- Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC (11th Cir. 2017)
- Milo & Gabby LLC v. Amazon.com, Inc. (Fed. Cir. 2017)
- Blizzard Entertainment et al v. Lilith Games et al. (ND CA 2017)
- Dr. Seuss Enterprises, L.P. v. Comicmix LLC, (SD CA 2017)
- Estate of James Oscar Smith v. Cash Money Records (SD NY 2017)
North Carolina law – felony for sex offender to access social networking sites

Held violates First Amendment
- Cyberspace most important place to speak and listen
- Unlimited low-cost communications
- State barring access to principle source of news, other information and communications
- Can enact narrower prohibitions

In *BMG v. Cox Communications* 4th Cir. appeal, Cox raises constitutionality of DMCA effective termination policy requirement
BWP Media USA, Inc. v. National Photo Group LLC. (5th Cir 2017)

- No agent, so no safe harbor
- D asserts volitional-conduct defense
- P claims Aereo erased volition defense & safe harbor eliminated common law defenses
- 5th Cir grants D Summary Judgment
  - Like 9th Cir, interprets Aereo narrowly – CATV-like system, plus Scalia dissent
  - Safe Harbor doesn’t eliminate common law defenses – see §512(l)
  - 4th Cir CoStar – codification does not abrogate common law unless Congress explicitly states, didn’t do so; common law “touchstone” for interpretation
Design Basics, LLC v. Lexington Homes, Inc. (7th Cir. 2017)

- P sued for copyright infringement based on its house design
- Court calls P a troll
- Access: no proof of D’s access (independent creation) – P public website insufficient
- No infringement if D used “unprotected elements”
  - Hard to find originality where tightly constrained by functional requirements
  - Scènes à faire – Colonial resembles common home design “throughout suburbs”
Mavrix Photographers, LLC v. LiveJournal, Inc. (9th Cir. 2017)

- D social media website, users supplied photographs infringing P’s copyright
- D claimed Safe harbor; but question whether “posted at users direction”
- D had “moderators” reviewing material before posting
- Reversed DC – were the moderators D’s agents under agency common law and acts attributable to D?
- Remanded to DC: apply agency law
P only filed registration application
Circuits split on whether may file upon copyright application or registration
“no civil action for infringement…shall be instituted until preregistration or registration of the copyright claim....” 17 U.S.C. §411(a)
Like 10th Circuits, 11th chooses registration approach relying on the Act’s text
5th and 9th Circuits – application
Significant issues: 6-8 month wait, statute of limitations
Milo & Gabby LLC v. Amazon.com, Inc. (Fed. Cir. 2017)

- Amazon acts to fulfill third-party vendors sales on its site, sued by P for infringing sales
- Court disagrees that Amazon is the seller of allegedly infringing products
  - Role merely to provide logistical and shipping services
  - Seller retains title until after seller has completed transaction with buyer, Amazon not a seller under the Act
- Also, not a distributor as does not constitute “other transfer of ownership” as Amazon’s acts do not include transfer of title
Blizzard Entertainment et al v. Lilith Games et al. (ND CA 2017)

- In computer programming world complicated issues of what is a work and who is the author
- P’s Popular *Warcraft III: Reign of Chaos* video game published by Blizzard
- Encouraged gamers to make “mods,” *DotA* became popular mod
- P Valve published *Dota 2* based on *DotA*
- Ds release cellphone versions of *Dota 2*
- Were moders (Eul, Guinsoo, and Icefrog) authors of *DotA* and are their versions’ unitary works?
Blizzard Entertainment et al v. Lilith Games et al. (Con’t)

- Moders assigned copyrights to P Valve
- D claims “Valve did not create, and does not independently own, the underlying work from the original DotA that is reused in Dota 2.”
- Under *Aalmuhammed v. Lee*, court finds Eul, Guinsoo, and Icefrog were authors “Master mind”
- D argues no copyright to collective works
- Judge Finds 200 DotA versions each a work (*Star Wars* analogy)
- Valve still have to prove Ds copied protected elements
Dr. Seuss Enterprises, L.P. v. Comicmix LLC (SD CA 2017)

- Allegedly infringed work: “Oh the Places You’ll Go!”
- Mashup “Oh the Places You’ll Boldly Go!” combines Dr. Seuss and Star Trek
- Motion to Dismiss; D claims fair use
- Court examines four fair use factors
  - Not parody, but a transformative mash-up
  - While fictional, published so only slight favor P
  - Reformatted Seuss illustrations from unique Star Trek perspective – not against D
  - Not a substitute, serves different market, but because D Motion to Dismiss, without more evidence weighs for P
- Dominate 1\textsuperscript{st} and 4\textsuperscript{th} factors “in equipoise” denies Motion to Dismiss

- Open source .pdf interpreter
- D incorporated into office suite under GNU GPL, but didn’t distribute source code as required
- Judge held cognizable harm results under open-source license even if no money changed hands (cites Jacobsen v. Katzer Fed. Cir.)
- Korean D files motion to dismiss, argues suit based on extraterritorial acts
- Judge agrees if all predicate acts occur outside US can’t proceed
- But since MTD, give P reasonable inferences, sufficiently plead at least some acts occurred in US
Estate of James Oscar Smith v. Cash Money Records (SD NY 2017)

JSR

Pound Cake/Paris Motion
Past opinions: “get a license or don’t sample”

Court considers fair use

- Drake transformed key phrase from JSR’s “brazen dismissal” of all non-jazz music to only “real music,” sharply different from JSR
- JSR fictional, but because Drake recording transformative, of “limited usefulness”
- Quantity and value reasonable to the use
- Effect on market “single most important element”
  - Different markets addressed by tracks
  - P never attempted to establish market – 31 years to register
  - Coupled with “highly transformative” nature, not a competing work
- Judge found fair use
Administrative – Legislative Developments
Register of Copyrights Selection and Accountability Act of 2017 (H.R. 1695)

- Update – recall: would amend Copyright Act to require Presidential appointment the Registrar with the advice and consent of the Senate
- House passed 378-48
- Received in Senate, referred to Committee on Rules and Administration
- Rumor some Republican Senators unhappy with the President appointing head of a Congressional body
IPEC Appointed

- President appointed Vishal J. Amin of Michigan to be Intellectual Property Enforcement Coordinator
- Awaiting Senate confirmation
- Amin was Senior Counsel on House Judiciary
- In Bush II White House and Department of Commerce
Release last month, found 1201 working as Congress intended, no need for fundamental changes

Recommends legislative “updates:”
  • Expand security & encryption research provisions
  • Exceptions for use of assistive reading tech and device repair
  • Give Librarian discretion to authorize 3rd party assistance to those granted triennial exemptions

Identifies regulatory changes it can make to streamline the triennial exemption process
Exemptions to Permit Circumvention of Access Controls on Copyrighted - NOI

- 7th Triennial under the DMCA
- Determine whether to grant exemptions from §1201(a) prohibiting circumvention of an effective technological measure
- Difference: streamlined renewal
- Renewal petitions: July 31, 2017
- Comments in response: September 13
- New exemption petitions: September 13
International
Canada: *Google Inc. v. Equustek Solutions Inc*

- In trade secrets case trial court issued injunction requiring Google to de-index Datalink worldwide – Google.ca insufficient
- Supreme Court affirmed finding only effective remedy because the “Internet has no borders”
- Dismissed as hypothetical potential conflict with other countries’ laws
- Rejected freedom of expression issues as outweighed by need to prevent harm from “Google’s facilitation” of Datalink’s breach of court orders
- Dissent notes remedy not very effective and other avenues of redress (e.g., freeze assets in France)
United Airlines, Inc. v. Cooperstock (Con’t)

- Operator of site devoted to criticizing UAL sued for ™ and © infringement
- Found work original and Δ copied
- Question whether “fair dealing”
  - Two step test – (1) allowable purpose (defined in law) and (2) dealing was fair
  - US fair use and precedent not automatically imported into Canada
United Airlines, Inc. v. Cooperstock (Con’t)

- Satire allowable – untied.com is parody: evokes work, with some differences, and expresses mockery
  - Purpose – assessment of real purpose, punish/defame P
  - Character – found works widely distributed
  - Amount – substantial, copied home page
  - Alternatives – found were available
  - Nature – UAL widely available
  - Effect – substantial copying harm of confusion

- Fails second step – questionable purpose, amount of dealing, and effect weigh against fair dealing
Stichting Brein v. Ziggo BV (EU Court of Justice)

- Netherlands Supreme Court asked ECJ whether Pirate Bay platform communicates works to the public in violation of the EU Copyright Directive
- PB system connects Internet users to share BitTorrent segments of protected works, operates a site where users can download torrent files, and indexes torrent files so that segments of protected works can be downloaded as a whole
- ECJ found that making available is an act of communication – PB did so in full knowledge of consequences of providing easy access to protected works
- In addition to “making available,” works must be communicated to a “public,” found the “several dozens of millions of ‘peers’” on the platform fulfilled that requirement
- ECJ found that such a platform could be found in violation of the Directive
Watch everything!

You decide what you want to watch!

Unlimited access to the best films, series and sports without a subscription. That’s what you want too, right?

That’s now possible with the Mediaplayer X9!

Works world wide
we do free shipping world wide!
Stichting Brein v. Jack Frederik Wullems (ECJ)

- ECJ found Wullems sales of filmspeler likely to be copyright infringement
- Note ads make it clear easy to watch “pirate” movies
- Issue: was marketing a “communication to the public”
- ECJ: interpret broadly – pre-installation of software to find and access protected works
- Because widespread distribution of the device, a communication to the public
Scanbox Entm't A/S v. Telenor AS, Norges (Supreme Court of Norway)

- No disclosure of ISP subscribers’ information without demonstration of “grave and harmful effects”
- District Court had ordered Telenor to reveal
- Appeals court reversed saying Ps failed to show sufficient scale of filing sharing under the Copyright Act
- Supreme Court affirmed saying failed to show grave and harmful effects outweigh subscribers’ privacy rights
- Burden on rightsholders to demonstrate balance
Draft EU Copyright Directive

- New provisions seem to make compromise before October vote near impossible
  - “Quality journalism against fake news” &
  - Save copyright on the Internet
- Special press publishers provision (ancillary ©)
  - Fee for “snippets”
  - Opponents point to Spain and Germany
- SP intermediate liability for user uploads
  - Compete with licensed services
  - Should be liable for use of content and enter into licenses
  - Must filter and monitor (ECJ decision against)
New EU Copyright Rules

- Marrakesh Treaty implementation
  - EU Parliament 609 to 22 approved rules for EU-wide copyright exceptions to ease access to works for the visually impaired
  - Won’t need permission to make accessible-format books
  - Better access to special-format books from abroad
  - 29 countries have ratified, vote allows EU ratification

- Cross-Border portability for online services
  - Allow Member State consumers temporarily present in another Member State to access services they subscribed in home state
  - Covers TV, recorded music, e-books, video games, sporting events and “entertainment programs”
  - Allies to all 28 member countries plus 3 EEA countries
  - Geo limiting provisions are “unenforceable”
Permit DRM circumvention for “lawful” purposes, e.g.,
• Private right to copy
• Accessing public domain or government works

Awaiting President’s signature
Australia Copyright Amendment (Disability Access and Other Measures) Bill 2017

- After at least five years of debate, Australian Parliament passes an amendment to their Copyright Act
- Permits disable person (or assistant) to access copyrighted material under fair dealing
- Fair dealing criteria similar to US
  - Purpose and character
  - Nature of material
  - Effect on potential market or value
  - Amount taken in relation to whole
- Education copying permitted if pay “equitable remuneration” to collecting society
- Library preservation (if version or format not available)
- No fair dealing for individuals nor ISP safe harbors to OSPs
Thank You

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