



# Litigation/Legislative Update

CPTWG #147

October 25, 2017

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Thompson Coburn LLP

# Litigation

- *Disney Enterprises, Inc. v. VidAngel, Inc.* (9th Cir. 2017)
- *Lombardo v. Dr. Seuss Enterprises, L.P.* (SDNY 2017)
- *Peteski Productions,, Inc. v. Rothman* (ED TX 2017)
- *Hosseinzadeh v. Klein* (SDNY 2017)
- *Davidson v. The United States* (Fed. Ct. of Claims 2017)
- *Penguin Random House, LLC v. Colting* (SDNY 2017)
- *Sid Bernstein Presents, LLC. V. Apple Corps Limited* (SDNY 2017)
- *We Shall Overcome Foundation v. The Richmond Organization, Inc.* (SDNY 2017)
- *Parker v. PayPal, Inc.* (ED PA 2017)
- *Universal v. TickBox TV LLC* (DC WD CA 2017)

*VidAngel* 

# *Disney Enterprises, Inc. v. VidAngel, Inc. (9th Cir. 2017)*

- Last left VidAngel – lost at DC
- Appealed to 9<sup>th</sup> Circuit – lost again
  - DVD Decryption violated DMCA
  - Server copies infringing
  - Streams infringing public performance
- Rejected defenses
  - First Sale
  - Family Movie Act
  - Fair Use
- New VidAngel “system” seeks declaratory judgment
- Just filed bankruptcy to freeze studio suit

# *Lombardo v. Dr. Seuss*

## *Enterprises, L.P. (SDNY 2017)*

- Author of *Who's Holiday* play sought DJ against *How the Grinch Stole Christmas* (Grinch) copyright holder
- Know *Grinch* story
- Play features down-and-out 45 year old, Cindy Lou Who, Grinch impregnated her, kills him when he abuses her, was incarcerated, alcohol and substance abuser, and lives in a trailer on Mt. Crumpet
- Held a fair use parody
  - 1<sup>st</sup> – transformative parody
  - 2<sup>nd</sup> – while fiction: infringing goats/fair use sheep
  - 3<sup>rd</sup> – taking reasonably related to purpose of copying
  - 4<sup>th</sup> – doesn't usurp current market and no impact on potential “traditional, reasonable, or likely to be developed markets”

# *Peteski Productions, Inc. v. Rothman* (ED TX 2017)

- CA civil case by Rothman: false imprisonment, etc.
- Dr. Phil production co. sues for infringement in ED TX
- Judge Gilstrap finds 9-second clip from Archive of day's footage for use in CA case infringing
- No fair use
  - 1<sup>st</sup> – breach of employment agreement weights against
  - 2<sup>nd</sup> – mixed fact/fiction, neutral but unpublished (*Harper & Row*)
  - 3<sup>rd</sup> – copied whole work; only 9-second clip registered
  - 4<sup>th</sup> – Plaintiff failed to show market impact
  - Repeats agreement breach, finds judgment for Plaintiff

# *Hosseinzadeh v. Klein* (SDNY 2017)

- When is a YouTube “reaction” video fair use?
- Judge: Fair Use as a matter of law
  - 1<sup>st</sup> – most recognized exception: criticism
  - 2<sup>nd</sup> – creative, but rarely determinative
  - 3<sup>rd</sup> – taking reasonably related to purpose of copying
  - 4<sup>th</sup> – Not a market substitute

# *Davidson v. The United States* (Fed. Ct. of Claims 2017)

- USPS issued stamp based on picture thought was of the Statue, but was from Casino NY NY
- Plaintiff said, purposely didn't copy original exactly; Defendant said, differences too subtle
- Summary judgment motions
- Judge dismisses Plaintiff's motion: unresolved questions of fact (artistic choices or necessity)
- Dismisses Defendant's Motion
  - Not under §120 as part of architectural work in public
  - Fair use: Judge – all questions of fact: millions sold: statue a “factual” representation; did take only as much as necessary, and impact on market for original



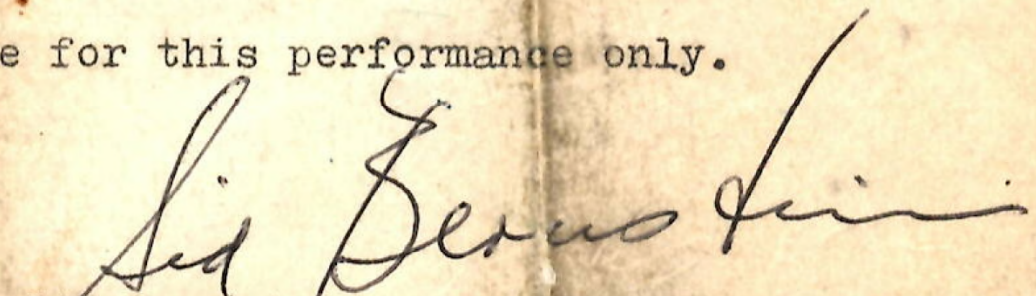
# *Penguin Random House, LLC v. Colting (SDNY 2017)*

- Δs wrote children's guides to *Breakfast at Tiffany's*, *The Old Man and the Sea*, *On the Road*, and *2001: A Space Odyssey*
- Judge held copying without authorization
- Defendants said lifted no protectable expression: characters, plots and setting are made-up facts/ stock characters
  - Judge says “sophistry” – conflating with historical or independently existing facts
  - Sufficiently delineated characters are protected
  - Finds guides are infringing derivative works
- Finds no Fair Use defense
  - 1<sup>st</sup> – not transformative just recasts novels for children
  - 2<sup>nd</sup> – novels fiction – heightened level of protection
  - 3<sup>rd</sup> – weighed amount and substance against Defendants
  - 4<sup>th</sup> – found adaptation for children a valid protectable market

SID BERNSTEIN ENTERPRISES \* SHEA STADIUM

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This is to authorize that James M. Burger  
is a member of SID BERNSTEIN ENTERPRISES or is working in  
conjunction with the with the company on the BEATLE CONCERT  
on August 23, 1966 at Shea Stadium and will be allowed  
admittance through the press gate for this performance only.

  
Sid Bernstein

# *Sid Bernstein Presents, LLC. V. Apple Corps Limited (SDNY 2017)*

- Famous promoter of '65 Beatles Shea concert, LLC claims video from concert a work for hire
- Bernstein contracted with Beatles' management Co. (Nems)
  - Supply Beatles and complete show
  - Nems had “sole and exclusive” right to video
  - Bernstein bar other videographers
- Nems and ownership successors create TV and movies using the “Master Tapes”
- 2015 Bernstein LLC “learned” of Movie registration, LLC attempted to register – denied
- Suit claiming work for hire
- Judge no need to look beyond contract, also barred by 3-year statute of limitations – ownership not infringement claim
- No sanctions—“long shot theory” not necessarily sanctionable

## *We Shall Overcome Foundation v. The Richmond Organization, Inc.* (SDNY 2017)

- Plaintiffs Summary judgment motion – Song in public domain, Defendant’s copyright invalid
- Judge reviews lengthy history
  - 18<sup>th</sup> century hymn registered in 1900
  - Used in 1940s by strikers
  - Seeger statements attribute to African Americans in South
- Court: 1<sup>st</sup> and 5<sup>th</sup> verses not original
  - While low, requires “at least some level of creativity”
  - Minor variations not enough to constitute new work, do not create new version
  - Change “will” to “shall,” “down” to “deep” too trivial

# *Parker v. PayPal, Inc.* (ED PA 2017)

- Plaintiff's singles book copied and sold online using Amazon cloud storage
- Sued Amazon for direct and indirect infringement because hosted copies sold
- Amazon moved to dismiss – failure to state a claim
- Plaintiffs claimed *Aero* decision permitted claim
- Citing 3<sup>rd</sup> & 4<sup>th</sup> Cir. Precedent court found volition required: "... merely hosting infringing content does not constitute direct copyright infringement"
- Found material contribution lacking and no direct financial interest required for vicarious

If you're sick of paying high monthly fees and expensive bills for your regular cable bill and premium cable channels like HBO and SHOWTIME...

Or if you're tired of wasting money with online streaming services like Netflix, Hulu, or Amazon Prime...

## Get ready to cut the cord, because **TickBox TV™** is exactly what you're looking for!



Simply plug the Tickbox TV™ into your current television and enjoy unlimited access to ALL the hottest TV shows, Hollywood blockbusters and LIVE sporting events in one convenient little device...

**ABSOLUTELY FREE**

# *Universal v. TickBox TV LLC*

## (DC CD CA 2017)

- Movie copyright holders' complaint claims copyright inducement and contributory
- TickBox and software between Internet and consumer's TV or computer
  - Accesses unauthorized copies of movies on the Internet
  - Ads: don't waste "money with online streaming services like Netflix, Hulu or Amazon Prime"
  - Uses Plaintiffs' <sup>TM</sup> to demonstrate wide range of available infringing content
- Induces and contributes to infringement of public performance rights
- Materially contributes by "supplying physical devices that facilitate, encourage, enable, and create direct links between TickBox TV customers and infringing" streaming operators

# Administrative – Legislative Developments





# U.S. Copyright Office Section 108 Discussion Document

- §108 exceptions for libraries and archives
- Document to serve as starting discussion point for interested parties and Congress
- Number of proposals, e.g.,
  - Add museums as exempted entities
  - “Common-sense” criteria for entitlement
  - When institutions users can make copies and digital distribution
  - Override license restrictions for preservation or security reproductions
  - Allow 3<sup>rd</sup> party K for performing permitted acts

# *Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, Petitions*

- 7<sup>th</sup> Triennial – ten renewal petitions and many new including:
- Extend §1201(a) right to repair to include avionics, motor vehicles (to 3<sup>rd</sup> party mechanics not just owners), IoT devices, appliances, toys, HVAC systems, etc.
  - One asserts §1201(a) doesn't bar circumventing repair tools distribution, but statute only says acts under §1201(a)(1)(A)
- Exemptions to: circumvent video TPMs including for disabled access, permit exemptions for all face-to-face teaching (not just film study), permit circumvention to almost anyone for purposes of criticism and comment, and circumvent HDCP for “fair and non-infringing uses.” Expand security research exemption
- Jailbreak portable computing devices, expand archive game exception for online and circumvent 3D printer software for feedstock replacement

# Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, NPRM

- Noting no opposition, after reviewing renewal petitions and responsive comments, concludes sufficient information to recommend re-adoption of all existing exemptions in current form
- For new petitions exemptions, three public comment rounds:
  - December 18, 2017 – Initial comments supporting adoption of proposed exemptions, and parties that neither support nor oppose an exemption but to share pertinent information about a proposal
  - February 12, 2018 – Responses comments and multimedia evidence from opponents of a proposed exemption
  - March 14, 2018 – Reply comments from supporters of particular proposals and parties that neither support nor oppose a proposal

# International



## *Vorschaubilder III (Thumbnail III)*

### (Bundesgerichtshof – German Federal Supreme Court)

- Bundesgerichtshof (German high Federal Court) held search engine operators not liable for online materials posted by others
- Perfect 10 accused AOL of reposting Google thumbnails
- Claimed just displaying search results violates German copyright law
- ECJ *GS Media* last September linking for commercial purposes is infringement
- But court says inapplicable to search as “crucial for the functionality of the internet”
- Have to have “actual knowledge” results infringing

## *Undertexter.se, Criminal Copyright Subtitle Case (Attunda Sweden District Court)*

- “Fansubs” – fan created subtitles
- Studios alleged fansubs used to view infringing copies of movies – most movies available legitimately in Sweden with subtitles
  - Only market – infringing market
  - Court agreed
- Are infringing translations/adaptation of copyrighted work (like US derivative work)
- Defendant guilty of criminal copyright fraud
- Convicted and fined 217,462 Krona (\$11k+)

*Roadshow Films Pty Ltd. v. Telstra Corporation Limited* (Fed. Ct. Australia 2017)

- Federal court ordered Australian ISPs to block access to 42 sites
- Judge found: “The infringement or facilitation of infringement by the [sites] is flagrant and reflect a blatant disregard for the rights of copyright owners”
- Ordered Defendant ISPs to use: DNS Blocking, IP Address blocking or re-routing, URL blocking of Target URLs and Target Domain Names or any alternative means to disable access to sites

# Draft EU Copyright Directive

- Complex effort to revise copyright directive
- Must go through 3 bodies EU Parliament (Legal Affairs), Council of Ministers and EU Commission a Trilog discussion
- Estonian Council President issued draft to goad EU action
  - Require ISP filtering/hyperlink tax
  - Many opposed (57 EU groups)
- Can EU finish by October 31, 2019?



## Use of HDCP, Swiss Monitoring Office for Technological Measures (OMET)

- May circumvent when copying for private use
- OMET held not permissible to circumvent HDCP to achieve interoperability between HD content and non-HDCP devices
- Also, upheld HDCP restrictions on making recordings of HD TV content

# Australian Government to Review Fair Use

- Last year reported on Productivity Committee recommendations
- Government announces support in principle of two:
  - Make unenforceable provisions of an agreement restricting use of © material permitted by an exception
  - Permit consumer circumvention of TPMs for legitimate uses of © material
- Will further consult on fair use recommendation
- No specifics, reviewing a simplified implementing process for copyright regulations to determine whether new circumvention regulations needed, and consult on best restrictive agreement provision implementation
- Suggests 12 month process

## *Relatório de Discussão e Votação na Especialidade (Portugal)*

- Legal to circumvent DRM when prevents the use of copyright exceptions to and limitations
- Illegal to use DRM on public domain works
- Legal to circumvent DRM when prevents use of copyright exceptions and limitations
- Device trafficking still apparently illegal
- President signed

# Late Breaking: NAFTA

- One issue in the NAFTA re-negotiations is whether IP provisions should be changed
- Not going well in general:  
OTTAWA — Donald Trump needs to butt out as a hovering presence over the North American Free Trade Agreement talks and U.S. lawmakers must come clean about what they really think of the deal, says a veteran Liberal MP
- Reports Fourth Round ended far from agreement



# Thank You

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