...ation/Legislative Update

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CPTWG #149

Thompson Coburn LLP

Litigation

- *Oracle American, Inc. v. Google LLC* (Fed. Cir. 2018)
- *Fox News Network, LLC v. TVEyes, Inc.* (2nd Cir. 2018)
- *BMG Rights Management (US) LLC v. Cox Communications, Inc.* (4th Cir 2018)
- *Disney Enterprises, Inc. v. Redbox Automated Retail, LLC* (C.D. CA 2017)
- *Rearden LLC v. The Walt Disney Company* (ND CA 2018)
- *Pieter A. Folkens v. Wyland Worldwide, LLC* (9th Cir. 2018)
- *Spanski Enterprises, Inc. V. Telewizja Polska, S.A.,* (DC Cir. 2018)
- *Alliance of Artists & Recording Cos v. General Motors Company* (D.D.C. 2018)
- *Solid Oak Sketches, LLC v. 2K Games, Inc.* (S.D.N.Y. 2018)
- *Justin Goldman v. Breitbart News Network, LLC* (S.D.N.Y. 2018)
- *Universal City Studios Productions LLP, et al. v. TickBox TV LLC* (C.D. CA 2018)
- *Ashton v. U.S. Copyright Office* (D.D.C. 2018)
- *Jean-Etienne De Becelievre v. Anastasia Musical LLC* (SDNY 2018)

Oracle American, Inc. v. Google LLC (Fed. Cir. 2018)

- Long-running $8.8 BN suit – Google copied 37 Java API declaring code packages (11,500 lines) to make it easier for Java programmers to code for Android
- Earlier, Fed. Cir. found Oracle's API & SSO entitled to © protection, remanded to DC for fair use trial, Jury found fair use
- Reviewed facts under the fair use four factor test
  - Found commercial (free but ads) and not transformative (served same purpose in Android)
  - Jury could find functional characteristics but 9th Cir. precedent downplay factor
  - Google copied far more than was necessary
  - Android devastated Java SE mobile phone market
- Weighing four factors together (1 and 4) for Oracle, 2 for Google, 3 neutral at best – not fair use as a matter of law

Fox News Network, LLC v. TVEyes, Inc. (2nd Cir. 2018)

- TVEyes recorded 1,400 TV/radio channels, created searchable database
- $500/month subscribers could search and watch, download, archive, etc. 10-minute clips
- Fox sued not on search but other functions
- Another fair use four factor decision
  - Found watch moderately transformative, but commercial nature – finds slightly in favor of Δ
  - Second factor "has rarely played a significant role"
  - Amount made available to users: unlike *Google Books* snippet view, provides users with "heart of the" content
  - Finds displaces potential Fox licensing revenues
- Weighing four factors, concludes Δ's service "is not justifiable as a fair use."

BMG Rights Management (US) LLC v. Cox Communications, Inc.

- Trial Court denies DMCA Safe Harbor, finds contributory liability - $25 million, plus costs and attorneys' fees – Cox Appeals
- 4th Circuit notes: from start of case to Sept. 2012, never terminated a subscriber, *always* reactivated: 13-Strike policy
- After Sept. didn't terminate and reactive, simple didn't terminate
- Be careful what your email says "[t]his customer pays us over $400/month … [e]very terminated Customer becomes lost revenue."
- 4th Circuit upholds denial of safe harbor – no reasonable implementation of repeat offender termination policy
- Court remands on contributory infringement jury instruction: not "knew or should have known" but test is "knew or was willfully blind"

Disney Enterprises, Inc. v. Redbox Automated Retail, LLC (C.D. CA 2017)

- Redbox purchased Disney "combo packs," separately rented/sold DVD, Blu-ray and download coupon
- In PI motion, Disney argued violated notice on some packs: "Codes are not for sale or transfer" – argued breach of K and Redbox contributory infringer
- Court held language insufficient to form a contract
- Requiring consumer to give up first sale rights was copyright misuse – no infringement
- Rejected Redbox's contention first sale covered the coupon – held coupon not the "work"
- Disney has revised license terms :
  - "To redeem a Code … a user must represent that he or she, or a member of his or her family, 'obtained the [C]ode in an original disc + code package [i.e., a Combo Pack] and the [C]ode was not purchased separately.'"

Rearden LLC v. The Walt Disney Company (ND CA 2018)

- Reardon owned equipment and software used to provide facial capture services and output CGI images using facial images of actors (e.g., using Dan Stevens in *Beauty & the Beast* to create the animal-like face with Stevens' expressions)
- Reardon claimed © to the output because his software created the images
- Citing SDNY precedent, Judge found the standard to be © may extend to output if the program "does the lion's share of the work" and user's role "marginal"
- Judge points to actors' creative input – not a marginal role

Pieter A. Folkens v. Wyland Worldwide, LLC (9th Cir. 2018)

- ¶ created bare pen and ink drawing of two dolphins crossing – one vertically, other horizontally
- Δ created color underwater scene with two dolphins crossing, with various fish/sea-life
- Court noted that protected elements in an otherwise unprotectable work gets thin protection
- Here commonality was an element found first in nature, not protectable because "nature has already expressed for all …."

Spanski Enterprises, Inc. v. Telewizja Polska, S.A. (DC Cir. 2018) - Infringement

- TVP exclusive N. American license to SE for 51 TV shows, SE registered ©
- TVP failed to ensure geoblocking was engaged or willfully removed
- TVP said lacked required volition because user-actuated automated VOD system
- Court rejected, Act's clear meaning – TVP showed the 51 episodes "to the public"
- Cites *Aereo:* "intermediary … publicly performs even where its conduct consists only of capturing and retransmitting a broadcast in automatic response to an end user's request."
- TVP says precedent for limitless liability for any 3rd party posting
- Court disagrees – notes §512 safe harbor, 3rd party posting volition requirements, and need not here decide extent of volitional conduct require post-*Aereo*

Spanski Enterprises, Inc. V. Telewizja Polska, S.A. (DC Cir. 2018) – Extraterritoriality

- SE's act occurred abroad, case of first impression applying the Act when performance abroad but reaches US viewers
- Admit no clear Congressional indication
- Question: did conduct relevant to Act's focus occur in the US even if some acts abroad?
- Court concludes infringing performance originating abroad but terminates in U.S. is a domestic violation of the Act
- TVP – but would leave casual user liable for uploading content to foreign website that despite geoblocking US user "stumbles upon;" Ct – not prejudge cases, but notes proximate cause defense and lack of personal jurisdiction
- Upholds willful $3 Meg statutory damages award noting "daunting task" to overturn bench trial damages judgment; finds no reason to overturn award since TVP deliberately removed geoblocking – ample evidence of misconduct – TVP "knew it was up to no good."

Alliance of Artists & Recording Cos v. General Motors Company (D.D.C. 2018)

- Good old Audio Home Recording Act 88-92, *Diamond* case
- AARC sues auto companies and suppliers of in-car entertainment systems, claiming violate AHRA by ripping CDs onto systems' hard drives
- Earlier Judge confirmed plain reading of statute – hard drive with programs other than for music not a DARD and, as in *Diamond*, music on such a drive (material object) is not covered as a Digital Music Recording (DMR)
- AARC argues the relevant "material object" is not the hard drive but the partition where the music is recorded
- In granting auto companies SJ motion Judge rejects AARC's argument because a partition cannot be a DMR because it's the same material object as the hard drive
  - AARC's definition would wipe the exception from the rule, if a partition could be a separate material object, so could a file on a smartphone, iPod, tablet or computer

Solid Oak Sketches, LLC v. 2K Games, Inc. (S.D.N.Y. 2018)

- ¶ held © to tattoos on basketball players, which were reproduced in Δ's games, sue for infringing public display right
- Δ argued *de minimus* and fair use, moved to dismiss
- Earlier decisions looked at "qualitative and quantitative" components of the use
- Judge's problem: no agreement on the use; objective analysis lacking, i.e., how game played or to what extent game features are used
- Court can't determine choices and subsequent observations of "average lay observer" or prominence of the tattoos
- Denied motion to dismiss

Justin Goldman v. Breitbart News Network, LLC (S.D.N.Y. 2018)

- News organizations embedded tweet that included copyrighted Tom Brady picture – photographer sued for infringement of public display right
- Judge rejected 9th Cir.'s *Google* Perfect 10 decision "Server Test"
  - There Google embedded HTML code, which user clicked and retrieved picture from other site
- Looks to literal language of the Act
  - "… to display a work publicly means to 'to transmit … a … display of the work … by means of <u>any device or process</u>.'"
  - Pasting code line into blog/article an active process, nothing in Act requires storage on Δ's server
  - Finds support in principle undergirding *Aereo* decision – invisible technical processes should not be copyright liability "lynchpin"
- Attempts to distinguish *Google* – Δ operated search engine and user made active choice to click on an image suggests *Aereo* not be read that broadly
  - Here news organization made the active choice to display the picture, not the user

Universal City Studios Productions LLP, et al. v. TickBox TV LLC (C.D. Cal. 2018)

Universal City Studios Productions LLP, et al. v. TickBox TV LLC (C.D. CA 2018)

- Δ distributed device that, with add-ons, accesses live sports, movies, and other copyrighted material
- Six studios, Amazon and Netflix filed for injunctive relief, including impounding all devices in Δ's control
- Δ claimed product simply a hardware device, no more liable than a computer manufacturer
- Judge disagreed – sufficient evidence of TickBox fault – e.g., ads and customer support
- Denied impounding (Δ claimed removed apps) – but maintain status quo until parties agree on injunction permitting sale of boxes for uses other than accessing infringing content

People Please
in
Recovery

Refill

2008 © USA

Ashton v. U.S. Copyright Office (D.D.C. 2018)

- While "creativity" test for "originality" is low, there is some bar
- Copyright Office denied registration for ¶'s graphic and short phrase
- Office found insufficient originality in the short phrase and graphic
- Under the "clear error of judgment" standard, the Judge held that the:
  - "combined elements of Plaintiff's Work are not sufficiently creative to receive copyright protection."

Jean-Etienne De Becelievre v. Anastasia Musical LLC (S.D.N.Y. 2018)

- Dispute about a play, film and now a musical – know the Anastasia story?
- Δ SJ motion arguing insufficient substantial similarity
  - Historical facts and *scenes a fair* not protected
  - May use from prior work if no "*bodily appropriat[tion] the expression of another*"
- But in denying motion Judge found the works:
  - "share significant commonalities not traced to any documented historical record."
  - E.g., depictions of woman claiming to be Anastasia meeting with the Dowager Empress "entirely fictionalized" by play's authors

Monkey Selfie

And You Thought The Monkey Was Going Away

Naruto v. David J. Slater (9th Cir) (April 13, 2018)

- Last left the monkey, PETA lost at the District Court and had a very bad day (oral argument) before the 9th Circuit
- Parties settled, asked 9th Circuit to dismiss and vacate the District Court verdict
- The 9th Circuit said no:
  - "courts must be particularly wary of abetting 'strategic behavior' on the part of institutional litigants whose continuing interest in the development in the law may transcend their immediate interest in the outcome of a particular case."
- Now we wait for a 9th Circuit decision on the merits

Administrative – Legislative Developments

Music Modernization Act

- Reported out of House Judiciary Committee 32-0
- Combined series of bills into H.R. 4706
- Bills would
  - Create new collective royalty system for interactive digital music services (e.g., Spotify)
  - Establish performance royalties for AM/FM stations
  - Extend coverage of the Copyright Act to pre-1972 sound recordings
  - Provide new royalty for music producers, mixers, and sound engineers

2017 Special 301 Out-of-Cycle Review of Notorious Markets

- USTR announced findings of 2017 Special 301 Out-of-Cycle Review of Notorious Markets
- Highlights 25 online markets and 18 physical markets reportedly engaged in and facilitating substantial copyright infringement
- Spotlights growing concern about illicit streaming devices (e.g., TickBox) as emerging infringement mode
- Urges several e-commerce platforms to improve takedown procedures, adopt proactive measures, and enhance cooperation with rightsholders

United States Trade Representative's Special 301 Report

- Result of Congressional requirement that USTR review IP protection and enforcement by trading partners
- Reports where "laws, policies, and practices that fail to provide adequate and effective IP protection and enforcement for …" US IP
- Priority Watch List: China, India, and Indonesia
- Chile and Columbia failed to deliver on IP commitments
- Many don't provide adequate border protection: Canada, Egypt, Indonesia, Mexico, Turkey, Turkmenistan, and Uzbekistan
- Many haven't addressed continuing problem of copyright infringement: China, Mexico, Romania, Russia, Switzerland, Thailand, Ukraine and Vietnam

Exemptions to Permit Circumvention of Access Controls on Copyrighted Works

- As reported last time, Opposing Comments were due on Feb. 12
  - DVD CCA, AACS LA and DCP LLP filed
  - Concern about renewal/expansion of existing video exemptions
  - Opposed new HDCP/HDMI "bunnie" Huang petition
- Replies were filed March 14
- Copyright Office roundtables last and next week

International

Canada's Copyright Modernization Act

- Reported last time on Canada's five-year review of its copyright law
- Parliament outlines process for that review
- Three phases with testimony of users, content owners, and legal experts
- Plans to issue report before early 2019

EU IP Major Events Schedule

- April 1 – Regulation permitting cross-border portability of online content purchased for download/stream in home country – no geoblocking of legitimate purchaser within EU
- April 10 – supporting declaration of Artificial Intelligence/Machine Learning initiative – comprehensive development plan
- June 21 – (tentative) EU Parliament votes on © reform plan – controversy: Google tax, content filtering and text/data mining limitations: then to full Parliament, Counsel of Europe, then EU Commission for trilateral discussion
- May 25 – General Data Protection Regulation (GDPR) becomes effective; are companies ready? Note Zuckerberg testimony and lobbying
- Dec. 3 – Prohibition of "geo-blocking" to prevent x-border online shopping for goods and services (not applicable to online streams and downloads see April 1 above)
- March 29, 2019 – U.K. formally withdraws from EU

Australia – Authorized Circumvention

- Copyright Regulations 2017 adopted on December 14, 2017
- On April 1 circumvention of access controls effective
  - Libraries/archives for communicating works to users or for other libraries/archives
  - "Defective or damaged" TMPs or one not working properly
  - Partial DVD copying for "instructional" purposes
  - Revisiting fair use
- TPP-11: Australia may urge its circumvention rules be included in "side-letters" to the agreement

Thank You

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