

CPTWG Meeting #131



Litigation/Legislative Update

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Litigation



- *Kirtsaeng v. John Wiley & Sons*
- *Fox v. Aereo*
- *UMG v. Veoh*
- *Capitol Records v. ReDigi*
- *SOFA v. Dodger*
- *isoHunt*

Kirtsaeng v. John Wiley & Sons (SCOTUS)



- First sale case: re-sale of textbooks purchased abroad
- Tension between §109(a) & §602(a)(1)
 - 2nd Cir. Found §602 trumped §109, therefore 106 distribution rights infringed
 - “lawfully made under this title”
- 6-3 Majority:
 - §106 conditioned by §109
 - Non-geographic interpretation promotes anti-piracy, support Constitution’s “promot[ing] the Progress of Science ...”
 - Parade of horrors: Wiley allow import and sell texts in US, but prohibit students from reselling; not display games imported from Japan; teacher’s material in a class; etc.
 - No basic principle of copyright that support market division
- Ginsburg dissent: “shrinks [§602] to insignificance”

Fox v. Aereo (2nd Circuit)



- Based on *Cablevision*, Federal District Judge found Aereo system did not infringe— not a public performance
- 2nd Cir. 2-1 (Chin dissenting) affirmed DC
- “Transmit clause [§101] directs us to examining who precisely is ‘capable of receiving *a particular transmission of a performance*.’”
- Rejected dissent’s (Judge “I was right” Chin) aggregation of all transmissions of same underlying performance
- Notes single antenna significance (even without single user copies)
- Nothing wrong with designing a system to avoid copyright liability
- Rejects efforts to distinguish *Cablevision* (license or comparable to VCR)
- Fox threatens to become cable operator

UMG v. Veoh (9th Circuit)



- 2011 9th Cir. Held Veoh protected by DMCA safe harbor
 - Didn't know about specific infringement
 - Couldn't control infringement
- After 2nd Cir. *YouTube* decision decided to re-hear
- Even under different red flag interpretation Court found Veoh still protected
 - Stored at the direction of the user
 - Actual knowledge
 - Red flag knowledge: general knowledge not equal red flag
 - Right & Ability to Control – **not** vicarious, >supervise
 - UMG sacrificed most powerful tool notice and takedown

Capitol Records v. ReDigi (SD NY)



- ReDigi – marketplace for “used” digital music
- Judge finds liable for direct and secondary infringement
- Copyright Act plain text clear: reproduction occurs when work fixed in a new material object
- No other way to “transfer” a digital work, laws of physics confirms
 - Can’t transfer material object over Internet
 - Creation of “*new* material object and not an additional material object that defines the reproduction right.”
 - Doesn’t matter if original reproduction doesn’t exist
 - Electronic “transfer” is a distribution
- Each factor counsels against a fair use
- First sale only applies to distribution rights, so “new material object” not “lawfully made under this title”

SOFA v. Dodger (9th Circuit)



- Fair use case – *Jersey Boys* uses *Ed Sullivan* 7-second clip
- Rightsholder SOFA sues for infringement
- Trial court Summary Judgment to Dodger + \$155,000 attorney's fees
- 9th Cir affirms after analyzing 4-fair use factors
 - Purpose & Character – although commercial was transformative
 - Nature of the Work – factual
 - Amount & Substantiality – insignificant quantity & SOFA “distorts” *Harper & Row*
 - Market Effect – not a substitute for *Sullivan Show*
- “This case is a good example of why the ‘fair use’ doctrine exists.”
- Upholds fees: “lawsuits of this nature ... have a chilling effect on creativity insofar as they discourage the fair use of existing works in the creation of new ones.” ... “fair use gives authors ‘breathing space within the confines of copyright’ to build upon their predecessors’ works.”

isoHunt (9th Circuit)



- Studios allege BitTorrent website operator Fung guilty of inducement; Fung claims DMCA safe harbor
- Websites collected torrent files from users and other torrent sites
 - isoHunt also adds backup trackers to the torrent file
 - Fung's other websites run trackers
- Fung argues no inducement under *Grokster* because he didn't distribute a device – 9th Cir: no device necessary only conduct
- Ample evidence services offered with object of promoting their use to infringe
 - List of 20 highest-grossing movies – click & user invited to upload a torrent file
 - Fung posted messages asking for specific movie torrent files
 - Sites solely advertiser supported
- No safe harbor – clearly meets subjective/objective red flag test

Safety Point Products v. Does (ND OH)



- Request to join 197 unnamed defendants allegedly infringed plaintiff's movie as part of BitTorrent "swarm" in four lawsuits
- Only had IP addresses, after joinder subpoenas
- Joinder discretionary: same transactions & question of law
- Not clear same transaction: exhibits show accessed swarm at different times, on different days and with different BitTorrent clients
- No *prima facie* infringement case – no proof of actual infringing downloads
- Expresses concern over “new business model ... misusing subpoena power”

Legislative-Administrative Developments



DMCA Exemption – Cell Phones



- Last year Library of Congress denied exemption to “unlock” cell phones
- Whitehouse and bipartisan legislators call for legislation
- H.R. 1123, S. 481, & S. 467
- EFF, Mozilla, PublicKnowledge, Reddit, etc. support
- Some public interest organizations call for broader DMCA reform

Registrar Testimony



- Maria Pallante testified before the House Judiciary Committee
- Following a speech earlier, she calls for revising the Copyright Act for the digital age
- Last major revision in 1976 out dated when enacted
- Question of whether Congress has time and appetite to engage in a top-to-bottom review and legislation

International

- HADOPI Ruling on VideoLan – ask DRM owner to obtain cryptography, if that doesn't work start proper procedure
- UK High Court order six largest ISP to block access to three infringing websites
- Spanish bill to increase sanctions on advertisers on infringing website
- Australia – two copyright proceedings
 - AG's office proceeding to see whether circumvention authorizations should be increased
 - Copyright Act review, should it be amended for the “digital age”
- Philippines – New law, circumvention not independent offense, aggravating circumstance = increased penalties if it results in infringement
- German Parliament modifies Google snippets law

Thank You

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