

CPTWG Meeting #132



Litigation/Legislative Update

July 24, 2013

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- **Breaking News:** *Fox Broadcasting v. Dish Networks*
- *Patrick Cariou v. Richard Prince*
- *Viacom International Inc. V. YouTube, Inc.*
- *Aereo and AereoKiller Update*
- *Ingenuity 13 LLC v. John Doe*
- *Faulkner Literary Rights v. Sony Pictures Classics*
- *John Wiley & Sons, Inc. v. Allen Air Conditioning Co.*

Fox Broadcasting v. Dish Networks 9th Cir



- Trial Judge's Denial of Preliminary Injunction Upheld
- Applies *Cablevision*, finds Dish does not make the copies; customer does
- Affirms home recording fair use under *Sony*: users making a non-commercial private use
- Holds (c) owners have no "copyright interest" in controlling commercial skipping, especially when do not own the (c) in underlying commercials
- Affirms denial of breach of contract claim, but very close call
- QA copies likely infringing, but likely small damages compensated by money

Patrick Cariou v. Richard Prince (2nd Cir)



- Prince “Appropriation Artist”
- Incorporated a number of Cariou’s published photographs

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- Prince “Appropriation Artist”
- Incorporated a number of Cariou’s published photographs
- Trial SJ – To be entitled to Fair Use must comment :
 - On Cariou, on the Photos, or
 - Aspects of popular culture associated with Cariou
- 2nd Cir. Reversed – fair use determination open-ended, context sensitive
- Found Prince’s work transformative: “to qualify as a fair use, a new work generally must alter the original with new expression, meaning or message.”
- “Passed” the four factor fair use test


Viacom International Inc. V. YouTube, Inc. (SD NY)



- 2nd Circuit vacated Judge's first decision finding YouTube protected under DMCA § 512
- Remanded to determine whether YouTube knew it hosted specific infringing material, or willfully blind
- Judge rejected that burden shifted to YouTube, because neither party could provide evidence of knowledge
- Willful blindness – only comes from blindness to “specific and identifiable instance of infringement”
- As to “right and ability to control,” requires something more than just control of what is on the website – “provider must influence or participate in the infringement

Aereo and AereoKiller Update

■ Aereo

- Petition for rehearing en banc denied by 2nd Circuit – “blistering dissent” by Denny Chin
- Fox returns to trial judge arguing in addition to infringing public l
l the user
-  BS and
ston
expansion
- Instead, Hearst Stations and their Boston affiliates sue Aereo in Boston

■ Aereokiller

- Appeal of Trial Judge’s decision granting the broadcasters a Preliminary injunction to 9th Circuit
- Networks and affiliates file a complaint against Aereokiller in the Federal District Court for DC

Ingenuity 13 LLC v. John Doe (CD CA)



- Scathing opinion against principals for exploiting “nexus of antiquated copyright laws, paralyzing social stigma and unaffordable defense costs.”
- Filed John Doe defendants for downloading single porn video
- Settle for sum just less than cost of a minimum defense
- If defended “vexatious litigation designed to coerce settlement”
- Engaged in fraud re copyright assignments
- Lied to Judge about location of defendants’ home
- Disregarded order vacating discovering hoping ISPs hadn’t seen it
- Awarded Defendants attorney’s fees of \$40 then doubled it
- Referred counsel to US Attorney (RICO), IRS CID, state and local bars, as well as other judges with cases involving these lawyers

Faulkner Literary Rights v. Sony Pictures Classic



- Faulkner sued Sony for using words from *Requiem for a Nun* in *Midnight in Paris*
 - “The past is never dead. It’s not even past”
 - The past is not dead. Actually, it’s not even past.”
- Sony argued *de minimus*
- Court analyzed under fair use
 - Dramatically different use
 - Fictional but neutral
 - Not of quantitative importance – idea not expression
 - No commercial impact on the work

John Wiley & Sons, Inc. v. Allen Air Conditioning Co.



- In copyright suit Defendant requested final judgment include order Wiley notify online sales portals of non-objection to sale of foreign editions
- In essence, Wiley says *Kirtsaeng* doesn't matter
- Still has trademark and unfair competition claims

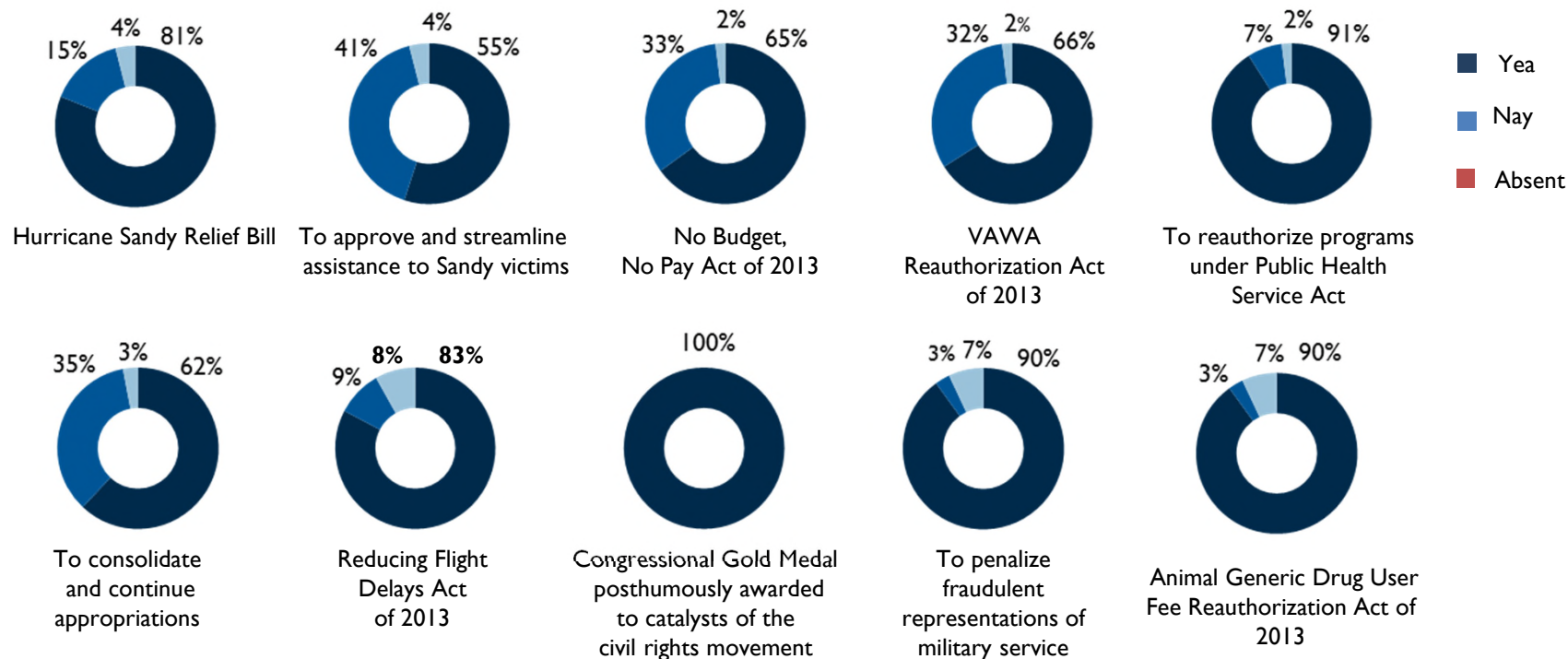
Legislative -Administrative Developments



In Its First Seven Months, 113th Congress Only Enacts Largely Uncontested Bills



House Votes* on Bills Passed by 113th Congress



*Five bills were “voice votes” and as such are not shown here. Voice votes are typically utilized in cases of unanimous approval, or in cases in which the vote is so assured as to not require a formal count

Analysis

- In its first seven months the 113th Congress enacted only fifteen bills
- The strong voting support for successful bills suggests that most bills were passed only when uncontested by either party

House Judiciary Hearings



- Chairman Goodlatte Announced beginning of series of hearings on updating the Copyright Act
- May 1st first hearing:
 - Chairman's opening statement indicated reform a long process: didn't expect Committee to be in a hurry as what parts of the Act to examine
 - Three Copyright professors
 - Jule Segal – Microsoft Assistant General Counsel for Copyright
 - Jon Baumgarten (Former Copyright General Counsel)
 - Little agreement amongst witnesses
- Two more hearings before recess “Focusing on the positive roles copyright and technology play in innovation in the U.S.”
- First, July 25th: “Innovation in America: The Role of Copyrights,” no witness list yet

Cell Phone Unlocking



- In addition to the three cellphone unlocking bills reported last time, Representative Lofgren (D CA) and five other member (Ds & Rs) introduced the Unlocking Technology Act of 2013 (H.R. 1892)
- Allow circumvention to permit users to unlock cell phones in order to switch providers
- Heard that Chairman will introduce his own amendments for a narrower bill

Ad Networks Best Practice



- Top ad networks including Google, Yahoo!, Microsoft and AOL issued “Best Practices Guidelines
- Policies prohibiting websites “dedicated to selling counterfeit goods or engaging in copyright piracy”
- Policies include language that websites should not engage in violation of law
- Dialog with content, rightsholders, consumer organization and free speech advocates
- Identification and Verification Process
- Complaint Process

International



WIPO – Visually Impaired Treaty (VIP)



- World Intellectual Property Organization Treaty for the Visually Impaired (VIP)
- Requires Parties to provide exemption or limitation to rights of reproduction, distribution and making available to the public to facilitate access to works by the visually impaired
- May make public performance exception
- Ensure DMCA-type laws do not thwart the treaty
- May fulfill obligations through “fair practices, dealing or uses”
- US indicated it will sign

International Decisions/Legislation



- *The Public Relations Consultants Association v The Newspaper Licensing Agency*
- *Verwertungsgesellschaft Wort v Kyocera*
- Mission “Lescure” Digital Proposal – French Government overturns “three strikes”
- UK Intellectual Property Office Legislative Proposal
- Australian Law Reform Commission Fair Use Proposal
- Antigua/Barbuda Committee to Oversee Suspension of US IP Rights

Thank You

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