

CPTWG Meeting #133



Litigation/Legislative Update

October 16, 2013

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Forecast From Washington

Cloudy With A Chance of Disaster

DC Rep: Ben Grove



An End In Sight?

- Continuing Resolution for Government Funding Until January 15
- Extension of Debt Limit Until February 7th
- May include bicameral budget committee to come to consensus by December 15
- Includes tightening of Affordable Care Act provision related to income verification
- No further ACA restrictions/defunding

ABC v. Dish Networks (SD NY)



- Dish sought a DJ against broadcasters that PrimeTime Anytime and AutoHop not infringing
- ABC sought PI against PTAT and AutoHop for direct and indirect infringement
- Volition – Judge found “DISH has no control over which programs will be shown on those networks or in what order, just as it has no control over which of its subscribers choose to copy those programs.”
- Direct: ABC failed because evidentiary record indicates, and court found, consumer makes the copy
- Indirect: court found DISH has no control over consumer and ABC failed to demonstrate likely to succeed in establishing the illegality of the copying
- DISH’s factual proffer demonstrates likely to succeed on fair use : No evidence of commercial copying – citing *Sony* benefit of time-shifting and because TV offered free of charge, copying entire program doesn’t militate against fair use
- Finally, the 4th factor, not a substitute market “a copyright owner ‘would in general develop or license others to develop.’”

Public Performance

- 106 (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, **to perform the copyrighted work publicly;**
- 101 To perform or display a work “publicly” means—
 - (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Fox Television Stations, Inc. v. FilmOn X, LLC (DC DC)



- District Court Judge Collyer disagreed with 2nd Circuit *Aereo* decision, granted broadcasters' nationwide injunction against FilmOn X's services except for 2nd Circuit
- Judge agreed with CA District Court's *BarryDriller* decision that, despite each customer's "single antenna", services is a public performance
- Judge found "FilmOn X's service violates Plaintiffs' 'exclusive right . . . to perform the copyrighted work publicly.'" ... "[t]o 'transmit' a performance or display is to communicate it by any *device or process*."
- "Two definitions are facially broad and encompass FilmOn X's convoluted process for relaying television signals."
- Found FilmOn X: transmits *i.e.*, communicates from mini-antenna through servers over Internet to a user) the performance (*i.e.*, an original over-the-air broadcast of a work copyrighted by one of the Plaintiffs) to the public (*i.e.*, any person who accesses the FilmOn X service through its website or application) who receive the performance in separate places and at different times (*i.e.* at home at their computers or on their mobile devices).
- Even if 1976 Act was ambiguous "legislative history confirms Congress's intent that the Transmit Clause *and* § 106(4) be applied broadly."
- Judge just ordered FilmOn to show cause why transmitting in Boston

Hearst Stations v. Aereo (DC MA)



- Federal District Judge Gorton denied Hearst's motion for a PI
- Judge held Hearst unlikely to succeed on the merits
- Judge found public performance interpretations by Aereo and the 2nd Circuit to the better ones
- Aereo argued "Hearst's suggestion that the relevant performance is the copyrighted work reads the terms 'a performance or display' out of the statutory phrase 'a performance or display of the work'."
- Judge held "Aereo's interpretation is a better reading of the statute because the 'canon against surplusage' requires this Court to give meaning to every statutory term if possible."
- Agreeing with 2nd Circuit, Judge also found it was the user not Aereo making copies, noting the 2nd, 3rd, and 4th Circuits have adopted the volitional standard
- He also held Aereo's system did not violate Hearst's distribution right nor was a derivative work created in Aereo's process

Broadcasters' Certiorari Petition



- Broadcasters filed a Cert. Petition in the 2nd Circuit *Aereo* case
- Little new in the Petition, as the Broadcasters argued below, and in the *FilmOn* cases, say the 2nd Circuit misinterpreted private performance clause conflating “performance” with “transmission.”
- Plea for immediate relief, even before the 9th Circuit has ruled on the *FilmOn* case
- Petition claims the broadcasters are already suffering irreparable harm from the decision.
- “Time Warner Cable has threatened to develop its own Aereo-like system to avoid compensating copyright owners and broadcasters for the use of their programming.”
- TWC stopped retransmitting CBS to its customers “in an effort to pressure CBS to reduce its retransmission fees.”
- Therefore, the Supreme Court should take the case now to stop the harm

The Authors Guild v. Google (SD NY)



- Judge Chin retained the Google MDP case
- Given Judge Chin's other decisions and dissents, thought he would focus on MDP's commercial nature of
- Reports from oral argument said Chin sympathetic to Google Books search capabilities, saying his own clerk had used it
- Chin quoted as saying: "Ultimately the fair use question is whether there's a benefit to society."
- He also said. "Aren't these transformative uses and don't they benefit society?"
- Pointed to anecdotal accounts of scholarly research using Google Books
- Authors Guild argued Google Books a commercial enterprise, authors should be the ones to determine how their works are used
- Question for Judge Chin: whether the fact that Google Books appears to be a completely commercial project militates against a fair use finding

American Institute of Physics v. Schwegman (DC Minn)



- Law Firm reproduced scientific publications for use in preparing and filing patent applications
- Wiley sued for both uses but withdrew infringement counts for filing with USPTO after USPTO filed a memo in support of fair use
- U.S. Magistrate Judge said law firm should not be found liable for internal copying of the publications preparing patent registrations
- Found fair use because the use “facilitates the complete disclosure required in the patent application process.”
- No adverse effect on publications market: “use would not stifle the creativity that the Copyright Act is designed to foster because there is no evidence in the record that authors of scientific journal articles will be less likely to publish what they have discovered due to [the firm’s] use or that [the] use would create any reasonable disincentive for the Publishers to stop publishing their journals.”
- In a two page order the District Court Judge simply affirmed his decision

Seltzer v. Green Day (9th Cir.)



- Green Day's Video designer Staub photographed Seltzer's widely circulated street art drawing *Screaming Icon*; Staub used in video backdrop when band performed "East Jesus Nowhere."
- Seltzer sued band, Staub and others for direct and indirect infringement.
- 9th Circuit affirmed district court's decision granting defendants summary judgment based on fair use, but vacated award of attorneys' fees to Green Day
- 9th examined four fair use factors
 - Work transformative: "...not simply a quotation or a republication; although *Scream Icon* is prominent, it remains only a component of what is essentially a street-art focused music video about religion and especially about Christianity" Green Day's use only "incidentally commercial" (never used it to promote the show, CD or merchandise), found first factor in Green Day's favor
 - Picture a creative work, closer to core of intended copyright protection." But, court quoted *Kelly v. Arriba Soft Corp.*: "Published works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred." Noted *The Scream* widely disseminated. Therefore, found this factor weighed "only slightly in Seltzer's favor."
 - Third factor –quantitative amount and qualitative value of the original work in relation to justification for use – court found Green Day copied most of the work. But, since work not "meaningfully divisible," court noted does not weigh against defendant – even when he copies whole work – if he takes no more than the intended use. Court held Green Day's use of the entire work necessary to achieve transformative use. Therefore, third factor did not weigh against Green Day.
 - Using Seltzer's own deposition, court found use had little or no negative effect on "potential market or value of the copyrighted work." Court concluded fourth factor weighed in Green Day's favor. Thus, the court found Green Day's use was fair.
- Finally, court vacated award of attorneys' fees to Green Day, despite prevailing. Court noted five non-exclusive factors for awarding attorneys' fees: "(1) the degree of success obtained; (2) frivolousness; (3) motivation; (4) the objective unreasonableness of the losing party's factual and legal arguments; and (5) the need, in particular circumstances, to advance considerations of compensation and deterrence." Nothing in the case lent any meaningful support to the idea Seltzer's case was "objectively unreasonable when he brought it." Therefore court found the district judge erred in finding Seltzer acted unreasonably.

Kienitz v. Sconnie Nation LLC



- Defendant produced a T-Shirt mocking Mayor of Madison's opposition to an anti-establishment block party, which the mayor used to promote during his protest days.
- Mayor wanted it to go away as "he has grown to favor 'a sense of order.'"
- Defendants produced a T-Shirt with a stylized picture of the mayor taken from the town's website and words "Sorry For Partying" imposed over the portrait.
- Federal Magistrate Croker's decision relied mainly on *Cariou v. Prince* and the Supreme Court's *Campbell opinion*
- He casts facts against four factors.
 - Found "robust transformative nature of defendants' shirt tips first factor to fair use, even though shirts a commercial product
 - Found the nature of portrait pointed to both sides under second factor; while artistic contribution of photographer pushed towards fictional, use of portrait as official picture on the town's website and large noncommercial distribution pushed away; therefore, attributed little weight to second factor
 - Found amount and substantiality weighed in favor of fair use because the amount and substantiality of the photograph used "reasonable in relation to the purpose of the copying."
 - Finally, found effect of the use on the market ("the single most important element of fair use") weighed in favor of defendants; shirts not a substitute for the original portrait.
- He found defendants to have prevailed on fair use defense and dismissed suit.
- Magistrate concludes with interesting observation: "In what may be a frustrating paradox to a copyright holder, the farther from his original purpose, character and audience a subsequent use deviates, the more likely this use will be deemed fair because it is anything but a substitute for the copyrighted creation."

Flava Works v. myVidster (ND IL ED)



- Long running legal battle, District Court issued yet another opinion
- Flava Works an adult video site producing images and video, and streams such video
- Flava Works alleged myVidster, an ISP, had infringed seven different ways
- On two occasions 7th Circuit reversed the DC Judge's finding of infringement and issuing of preliminary injunctions
- Flava Works moved to dismiss myVidster's counterclaims that it knowingly misrepresented that certain content on myVidster site was infringing
- myVidster claimed Flava violated DMCA Section 512(f) by making the fraudulent claim in a successful effort to get server operators to cancel their agreements with myVidster.
- Court noted myVidster alleged that Flava's misrepresentation of infringement occurred after myVidster had expeditiously taken down the content and confirmed so in writing to Flava
- Flava argued that myVidster plead knowledge in only a conclusory manner
- The court disagreed and refused to dismiss the complaint.

Legislative -Administrative Developments



House Judiciary Hearing Round Two: “Innovation in America: The Role of Copyrights”



- Chairman Goodlatte spoke about need to retain original Constitutional ideas about copyright protection. Hearing to listen to those most affected by copyright protections and how best to proceed on any reforms that continue to protect copyrights while also promoting innovation
- All of the witnesses spoke about the relevance of copyright in their respective fields
- Photography, music, and 3-D film conversion firms were all represented at this hearing
- All were generally agreed strong copyright laws beneficial to creating jobs and protecting innovation
- All the witnesses said not against technology, and any future changes to copyright law would need to include the tech industry and content creators forming a partnership to stop infringement
- In his testimony, however, Mr. Lapham of Getty images raised concerns with expanded perceptions of fair use, and called for a greater legislative role in curbing copyright infringement and fair use violations
- Not many radical ideas in response to questions – Founders’ principles mainly intact, supported ISP best practices but needed to approach copyright reform in measured steps to work with tech to help pinpoint where adjustments could be made to quickly respond to online infringement

House Judiciary Round Three: “Voluntary Agreements Hearing”



- Subcommittee Chair Coble opening statement: voluntary agreements benefit consumers and reduce infringement; praised private action v. regulation to make progress
- Ranking Member Watt praised opposing sides of SOPA debate for coming together and working to combat online infringement; he hopes voluntary agreements not just window dressing and actually accomplish meaningful progress
- Full Committee Ranking Member Conyers brief statement: voluntary agreements should facilitate technological advances while also protecting creators
- Witnesses, in written statements, addressed importance of voluntary multi-stakeholder, market-driven solutions to address the problem of digital infringement
- Additionally, called out search engines (esp. Google) to do more, specifically Google not doing enough to stop repeat offenders
- Witnesses stated also the search engines responsibility to stop pointing users looking for legitimate content towards infringing sources
- Witnesses discussed how voluntary agreements allow more flexibility and build trust, rather than rigid law and regulations.
- Rep. Poe (R-TX) inquired about role of government in crafting voluntary agreements. From the response of the witnesses, Rep. Poe summarized that voluntary agreements can be beneficial, but if stakeholders are unable to come to agreement, government should step in and act. He said even then, threat of government action can spur stakeholders to come to a consensus
- Ranking Member Watt's questioned when government should step in to regulate and legislate. Noted the SOPA debate regarding foreign sites and inquired whether voluntary agreements had efficiently dealt with this issues. Mr. Barchiesi of the International Anti-Counterfeiting Coalition said had been done and referenced the current IACC program

Cell Phone Unlocking



- In a rather contentious markup session, House Judiciary Committee passed Unlocking Consumer Choice and Wireless Competition Act ([H.R. 1123](#))
- In addition to allowing consumers to unlock their cell phones, bill also allows third parties to assist consumers, when necessary, in unlocking their cell phones further ensuring that all consumers have the ability to unlock their cell phone
- Now it must pass the House floor and be considered by the Senate
- DoC files petition with FCC seeking to rewrite the rules and force mobile carriers to let consumers take their phones to a rival network

Department of Commerce Green Paper



- DoC's Internet Policy Task Force (IPTF) issued a green paper on copyright: [*Copyright Policy, Creativity, and Innovation in the Digital Economy*](#)
- "...most thorough and comprehensive analysis of digital copyright policy issued by any administration since 1995"
- Calls for new public input on critical policy issues "central to our nation's economic growth, cultural development and job creation"
- Reference for stakeholders, blueprint for further action, and contribution to global copyright debates
- Recently, debates over copyright increasingly contentious but paper's goals must be accomplished in tandem—ensuring a meaningful and effective copyright system that continues to provide necessary incentives for creative expression, preserving technological innovation and free flow of information made possible by the Internet, and delivering creative content in the broadest possible fashion
- No substantive policy recommendations, except where Administration already has a stated position
- Rather, seeks to provide thorough and objective review of the lay of the land—describing changes that have already occurred, identifying areas for more work and setting out paths to move that work forward.
- Paper expresses support for efforts underway to address some of the open issues in other forums—notably Congressional attention to music licensing, the Copyright Office's work on orphan works and mass digitization, and IPEC's facilitation of cooperative efforts by stakeholders to curb online enforcement

NTIA Notice



- NTIA RFC on behalf of the Internet Policy Task Force based on Green Paper “seeks public comment from all interested stakeholders on the following copyright policy issues critical to economic growth, job creation, and cultural development:”
 - Legal framework for the creation of remixes;
 - Relevance and scope of the first sale doctrine in the digital environment;
 - Appropriate calibration of statutory damages in the contexts of individual file sharers and of secondary liability for large-scale infringement;
 - Whether and how government can facilitate further development of a robust online licensing environment; and,
 - establishing a multi-stakeholder dialogue on improving the operation of the notice and takedown system for removing infringing content from the Internet under the DMCA
- Comments due on or before November 13, 2013, and comments public meeting is scheduled on December 12, 2013

IPEC Office Open



- Victoria Espinel leaves for Business Software Alliance

International



- End of October goal
- Now end of the year,
- Will affect large swath of Pacific but S. Korea and China not in
- US pushing for extending copyright for motion pictures, particularly for those countries with only 50 year protection: Canada, Japan, Malaysia and New Zealand
- Obama – Elevated IP protection to use as club against China

- France – No real change until 2014
 - HADOPI exist for several months – rule whether tech pro measure which restricts content to STB and no copying – whether unlawful interference with private copying
- Switzerland – reform report in late Nov.– Internet and downloading current allows circumvention unless results in infringement.
- EU – next year turn to review of EU copyright law for the digital age – change copyright directive
- ECJ decision – on whether legally permissible to include in a device authentication tech which blocks playback not only of infringing content but legitimate content that the device mfg has not authorized (e.g., homebrew content – video cgame industry only)
- Australia – (1) Law reform commission will publ its report on Nov. 30 – very comprehensive review of © - fair use issue (prelim yes but storm of opposition; (2) AG's office considering wh. To consider new exdceptions to allow circumvention of tech mesaures – notime deadline (dormant 1 yr)

TransPacific Partnership (TPP)

- ▣ Coming down to the wire – end of October
- ▣ Will affect large swath of Pacific but S. Korea and China not in
- ▣ Don't know all of IP provisions
- ▣ US pushing for extending copyright for motion pictures, particularly for those countries with only 50 year protection: Canada, Japan, Malaysia and New Zealand

Thank You

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