CPTWG Meeting #136

Litigation/Legislative Update

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Litigation

- *Aereo*
- *Authors Guild v. HathiTrust*
- *Oracle Am., Inc. v. Google Inc.*
- *Conrad v. AM Cmty Credit Union*
- *AF Holdings, LLC v. Does 1-1058 and Cox Commc'ns*
- *BMI v. Meadowlake*
- *Automated Solutions Corp. v. Paragon Data Sys., Inc.*
- *Klinger v. Conan Doyle Estate, Ltd.*
- *Fox Broadcasting Company v. DISH Network, L.L.C.*
- *Edward L. White v. West Publishing Corp*
- *Tarantino v. Gawker Media*
- *Caner v. Autry*

Aereo – the Supremes Rule

- 6-3 Majority held Aereo publicly performed copyrighted works without authorization
- "Believed" wouldn't affect cloud-storage providers
- Opinion focuses on '76 Act legislative history
  - Congress' intent overturn Supreme Court decisions finding CATV outside Act
  - Rejected Aereo's argument distinguishing it from cable
- "Aereo's activities are substantially similar to those of the CATV companies that Congress amended the Act to reach"
- Thus, "Aereo, and not just its subscribers, 'perform[s]' (or 'transmit[s])"

Aereo – the Dissent

- Scalia/Alito/Thomas dissent characterized Aereo like a "copy shop"
- Under "volitional-conduct" test, users, not Aereo, perform the works
- Majority holding disrupts "settled jurisprudence" bright-line "volitional" test
- Dissent concerned about the impact of the Court's "outcome determinative test" on technology

Aereo Follow-up

- Letters to Judge Nathan
  - Broadcasters – dismiss Aereo's case and enter injunction we will provide
  - Aereo claims it's a cable system entitled to statutory license, may not be enjoined
- *FilmOn* – Judge ordered parties to file briefs addressing implications of the *Aereo* decision
- Copyright Office – notes Aereo compulsory license filing, nothing in *Aereo* changes *ivi* decision, but accepts filing pending court action

Authors Guild v. HathiTrust (2nd Cir.)

- Found fair use allowed HathiTrust to create full-text searchable database
- HathiTrust Digital Library – 10 million works
  - "HDL" available for public to search
  - Provide works in formats accessible to disabled
- Fair Use
  - "Transformative use" – full-text search, HDL "adds to the original something new with a different purpose & character"
  - Noted Chafee Amendment

Oracle Am., Inc. v. Google Inc. (Fed. Cir)

- Oracle suit against Google, claimed Android infringed its Java packages copyright
- Jury found infringement, (including declaring elements & SSO)
- But judge found not copyrightable as code was merger of idea & expression, employed short phrases, and SSO was a "method of operation"
- Federal Cir. Reversed, using 9th Circuit "abstraction-filtration-comparison" test
  - Determined declaring code entitled to copyright protection
  - Google did not need to copy SSO
- Fair Use sent back to trial court; but Google copied not to be compatible with existing Java programs, but to make Android programming easy for Java programmers

Conrad v. AM Cmty Credit Union (7th Circuit)

- "Banana Lady" sues for infringement
- Audience members photographed & videoed performance and post online
- 7th Circuit affirmed trial court's dismissal.
- Questioned copyright on a banana costume as (surprisingly) common
- Performance not copyrightable because not "fixed in any tangible medium of expression"
- While has right to derivative works, unlikely photos & videos were such works

AF Holdings, LLC v. Does 1-1058 and Cox Commc'ns (D.C. Cir.)

- DC Circuit Reversed district court's discovery grant against five ISPs linked to 1,058 IP addresses
- "Quintessential "porn-trolling," massive John Doe suits aimed at monetary settlements; but dismissed when opposed
- Discover denied as Plaintiff didn't have good faith belief court had person jurisdiction over individuals, i.e., that all 1,058 IP address were in DC
- Also, joinder improper, plaintiff did not seek relief from all John Does "with respect to arising out of the same transaction, occurrence, or series of transactions or occurrences"
- "Unconvinced all 1,058 Does in same BitTorrent Swarm
- AF's © notice had forged signatures, Court referred sanctions to the district court

BMI v. Meadowlake (6th Cir.)

- Defendant Barr = 95% owner of restaurant; manager 5%
- Years hosted live bands, no authorization
- Numerous BMI warning letters
- Barr said no responsibility, manager booked bands
- Court: Wrong: "What matters is whether Roy had "*right* and *ability*" to supervise the infringement, not whether he in fact supervised it

Automated Solutions Corp. v. Paragon Data Sys., Inc. (6th Cir.)

- Software development/support contract
- Paragon terminated, unsuccessfully attempt to use ASC's SCDS software
- Developed "DRACI" program "from scratch"
- ASC claimed infringement
- Paragon filed for summary judgment, claiming ASC hadn't established substantial similarity
- Trial judge found ASC failed to identify and original elements Paragon copied
- ASC did not "even attempt to specify exactly what portions of SCDS software are protectable original elements and which are unprotectable." Affirmed

Klinger v. Conan Doyle Estate, Ltd. (7th Cir.) aka Sherlock Holmes in Public Domain

- First Holmes story 1887, last in 1927, ACD died in 1930
- Final protection not to expire until 2018-2022
- Other 46 stories & 4 novels copyrights expired
- Klinger, author of "In the Company of Sherlock Holmes," sought DJ free to use expired material but none of the new elements in the remaining 10 stories
- 7th Circuit affirmed: rejected argument that copyright of a "complex" character remains protect until works revealing full character falls into public domain
- SCOTUS denies stay

Fox Broadcasting Company v. DISH Network, L.L.C. (CD CA & 9th Cir.)

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- Fox letter to Judge: *Aereo* stands for unauthorized retransmission over the Internet is a public performance
  - *Aereo* decision rejected Aereo's argument subscribers solely responsible for transmission
  - DISH's arguments here the same as Aereo
- Oral argument before 9th Cir. on Judge Gee's denial of injunction based on no irreparable harm
  - Fox argued *Aereo*
  - Court said not a merits appeal
- Short 9th Cir. Order denied Fox's appeal
  - Judge Gee didn't abuse discretion

Edward L. White v. West Publishing Corp. (SDNY)

- Summary judgment dismissing copyright infringement claim
- West took White's federal briefs, annotated, x-reference, etc. & publish
- Fair use:
  - Transformed into a different kind of work, therefore commercial use not significant
  - Briefs facts and law, therefore more likely fair use
  - Use all – a neutral factor – all was necessary
  - "in no way economically a substitute for the use of the briefs in their original market"

Tarantino v. Gawker Media, LLC (C.D. CA)

- Tarantino screenplay leaked by unknown persons
- Gawker published article with link to script
- Tarantino sued "John Does" for direct and Gawker to contributory infringement
- Court dismissed contributory: Tarantino failed to allege a single act of direct infringement committed by any member of the public

Gorski v. Gymboree Corporation

- Plaintiff has registered copyright in clothing featuring phrase “lettuce turnip the beet”
- Gymboree subsequently sold t-shirts with same phrase
- Gorski sued Gymboree for copyright infringement; Gymboree moved to dismiss
- Issues whether there has been copying of original constituent elements of the work
- Courts find that “Short phrases, no matter how distinctively arranged, are not protectable elements”

Caner v. Autry (W.D. Va.).

- Defendant posted videos of Plaintiff's (former Dean of Liberty University) public speeches: grew up (1) in Ohio; grew up (2) in Turkey
- One claim dismissed – video not registered
- Examined four fair use factors
  - Transformative use (criticism), dismissed profit
  - Nature (information)
  - Amount and Substantiality (all but transformative)
  - Market effect – not a market substitute

Legislative -Administrative Developments

S. 517 Cellphone Unlocking

- Similar to House bill, but without "bulk unlocking" prohibition
- Reported out of the Senate Judiciary Committee
- Last Wednesday evening "Hotlined" and passed by Unanimous Consent
- "Held at the Desk" in the House

Legislation

- *H.R. 4588, the Protecting the Rights of Musicians Act*
  - On May 7, Reps Marsha Blackburn (R-TN) & Anna Eshoo (D-CA) introduced H.R. 4588
  - Performers and labels to be paid when their music is played on AM/FM radio.
  - Legislation condition ability of broadcasters to opt for retransmission consent payments on whether radio stations they own pay performers for their music
  - House to voted yesterday to approve
- *S. 2454, Satellite Television Access Reauthorization Act of 2014*
  - Sen Patrick Leahy (D-VT) introduced S. 2454
  - Would renew nation's pay-TV laws for another 5 years & preserve current broadcast carriage rules in the Satellite Television Extension and Localism Act (STELA)

Lots of Roundtables & Hearings

- *First Sale*. House Judiciary Committee's IP Subcommittee
  - Held a field hearing in New York, NY on first sale
  - One hearings in DC: music licensing under Title 17 part two
  - Field hearing on first sale under Title 17
  - this past Monday on moral rights, termination rights, resale royalty and copyright term
  - Thursday copyright remedies
- *Roundtable on Music Licensing Study.* Copyright Office held Music Licensing roundtable in Nashville
- *Roundtable on Copyright Internet Policy Topics*. USPTO and NTIA held the first roundtable on statutory damages, digital first sale and remixes in Nashville
- *Roundtable on Notice and Takedown*. On May 8, the USPTO held second multi-stakeholder forum on "Improving the Operation of the DMCA Notice and Takedown System"

Copyright Office Making Available Study

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- Second round of comments due Aug. 14, regarding "making available" and "communication to the public rights" influenced by *Aereo*, e.g.,
  - To what extent does Supreme Court's construction of the right of public performance in *Aereo* affect scope of US's implementation of the rights of making available and communication to the public?
  - How should courts consider requirement of volitional conduct when assessing direct liability in the context of interactive transmissions of content over the Internet, especially in the wake of *Aereo*?
  - What evidentiary showing should be required to prove a copyright infringement claim against an individual user or third-party service engaged in unauthorized filesharing?

International

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ACI Adam BV v. Stichting de Thuiskopie (European Court of Justice)

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- Countries imposing blank data media levy cannot take into account harm to © holder suffer as a result of copies from unlawful sources
- EU States may provide private copying exemption, but only from lawful sources
  - Provide "fair compensation" to rights holders
  - Because of lawful sources requirement "fair compensation" doesn't include illegal copying

Hi Hotel HCF v. Uwe Spoering (European Court of Justice)

- Article 5(3) which provides Member States courts jurisdiction in which the harmful event occurs, applies to © infringement actions
- Courts of both the place of the event and where damage occurs have jurisdiction
- Cannot sue in a Member State where defendant hasn't acted and where no damage has occurred

Public Relations Consultants Ass'n v. Newspaper Licensing Authority (NLA) (European Court of Justice)

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- Users are free to browse and view articles online, without the copyright holder's authorization
- NLA argued licensing agreements should take into account temporary copies made on readers' computers as they browse the Internet
- UK High Court agreed
- ECJ rejected, copies fall into exception provided under European Copyright Law for temporary copies, cannot be subjected to fees

French Proposal for Thumbnail Images

- *Under Perfect 10 v. Amazon.com* use in US by search engines of thumbnail images is likely fair use
- In France some cases indicated such use is infringement but no liability if
  - Remove promptly, or
  - De-index such images on notification
- French Senator proposed a bill to establish compulsory license regime (collecting society) for search engine use of thumbnail images

Productories de Musica de Espana v. Soto (Madrid District Court)

- Major music records brought suit against the "Spanish Napster"
- File sharing directly between users with this P2P application, service does not provide any caching, hosting or linking services
- Decision discussed US inducement, but no normative basis in Spanish law for indirect infringement
- Thus, Court found no infringement occurred under Spanish law

Google Spain v. AEPD and Mario Costeja González (Court of European Justice).

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- Spanish lawyer complained Google search found 10+ year old article re forced sale of his property
- Spanish Data Protection Agency ordered Google to remove
- Google appealed
- Court found do need to consider such requests where information is "inadequate, irrelevant or no longer relevant"
- "Right to be forgotten"

Technische Universität Darmstadt (European Advocate General)

- Issue of digitization of library texts
- Opinion explained current EU copyright law would allow public libraries to digitalize, without obtaining the copyright owner's permission, all texts offered on paper
- While downloading digital copies would be copyright infringement, AG appears to think printing them would not qualify as a violation of the law

Canadian Notice-and-Takedown Regime

- Canada will formally adopt its notice and takedown copyright enforcement system starting in January 2015
- Copyright Modernization Act covers ISPs and website hosts
- Must notify customers of allegedly infringing conduct or remove infringing content they host upon notice

Thank You

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