

A nighttime photograph of the United States Capitol building in Washington, D.C. The building is illuminated with warm yellow lights, and the sky is a deep blue with some clouds. The text is overlaid in a yellow, serif font.

Litigation/Legislative Update

CPTWVG Meeting #142

July 27, 2016

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Litigation



- *Green v. Lynch* (DC DC) (June 21, 2016)
- *Oracle v. Google* (ND CA) (June 8, 2016)
- *Kirtsaeng v. John Wiley & Sons.* (SCOTUS) (March 2016)
- *Lenz v. Universal Music Corp.* (9th Cir. 2016)
- *ABS Entertainment v. CBS Corp.* (CD CA) (May 30, 2016)
- *VMG Salsoul v. Madonna Louise Ciccone* (9th Cir.) (June 2, 2016)
- *Skidmore v. Led Zeppelin* (ED PA) (June 23, 2016)
- *Disney Enterprises v. VidAngel, Inc.* (CD CA) (June 9, 2016)
- *Capitol Records v. Vimeo* (2nd Cir) (June 16, 2016)

Green v. Lynch (DC DC) (June 21, 2016)



- Electronic Frontier Foundation complaint for declaratory & injunctive relief
- Challenging DMCA anti-circumvention and anti-trafficking provisions
- Lack fair use protection for free speech and doesn't coexist with First Amendment
- Threat of enforcement chills protected and noninfringing speech
- Triennial rulemaking an unconstitutional speech-licensing regime

Oracle v. Google (ND CA) (June 8, 2016)



- Oracle accused Google of infringing its Java APIs
- On remand from Fed Cir, for jury trial on fair use
- Jury found fair use
- DC Judge denied Oracle's challenge to instructions and the jury decision
- "Good Faith" issue (*Harper Row vs Campbell*)

Kirtsaeng v. John Wiley & Sons. (SCOTUS) (March 2016)



- Fee award in first sale case
- Unanimous: Plaintiff's objectively reasonable position should be accorded "substantial weight," but not conclusive
- Other factors; e.g., general conduct during litigation or across different infringement cases
- Reversed 2nd Cir's denial of fees to Defendant came close to a presumption
- Sent back to consider "other factors"

Lenz v. Universal Music Corp. (9th Cir. 2016)



- Dancing baby case, Lenz claimed misrepresentation in DMCA notice
- Court denied both SJ motions
- Is fair use a “wholly authorized by law” use – Yes
- UMG conflated two types of affirmative defense:
 - Procedural affirmative defense
 - Affirmative defense excusing impermissible conduct
 - Fair use only the former, §107 non-infringing use
- Did UMG have a subjective good faith belief not a fair use – court not in a position dispute that belief

ABS Entertainment v. CBS Corp. (CD CA) (May 30, 2016)



- Pre-1972 songs – covered only by state rights
– radio stations need authorization to use
- Issue: sound engineer’s subjective/artistic remastering entitled to federal protection if publicly performed?
- Holding: sufficiently original to qualify as derivative works under §106 – variation can be low
- Enough changes that originality not in dispute

VMG Salsoul, LLC v. Madonna Louise Ciccone (9th Cir.) (June 2, 2016)



- Does the de minimis rule apply to music?
- Leading decision 2005 *Bridgeport Music, Inc. v. Dimension Films* – No
- 9th Circuit in 2-1 decision – Yes
- Madonna’s *Vogue* allegedly copied a 0.23 second horn segment from *Love Break*
- Leval: *Bridgeport* weakness – relies on §114 limitations:
 - Section says: Exclusive rights don’t extend to making another sound recording that *consists* of independent fixation of other sounds
 - *Bridgeport* concluded rights do extend to making another that *does not consist* entirely of an independent fixation
 - “It rained, the grass is not dry,” also means “if it hasn’t rained, the grass is dry.” **No**
- *Bridgeport* 3rd factor – amount doesn’t matter, only would take if valuable – *Madonna* – music not unique

Skidmore v. Led Zeppelin (ED PA)
(June 23, 2016)



- *Stairway to Heaven* accused of infringing Spirit's *Taurus*
- Jimmy Page and Robert Plant claimed no access to *Taurus*
- After week's trial, jury found Led Zeppelin members had access, but no substantial similarity in the extrinsic elements of "Stairway to Heaven" and "Taurus"

HOW \$1 MOVIES WORK IN 15 SECONDS



Disney Enterprises, Inc. v. VidAngel, Inc. (CD CA) (June 9, 2016)



- VidAngel “sales/filtering’ model
- Studio suit: infringing copying and circumvention
- VidAngel: Family Movie Act and fair use by “owners”

Capitol Records v. Vimeo (2nd Cir) (June 16, 2016)



- Music embedded in curated user created videos
- Does DMCA §512 safe harbor apply to pre-1972 sound recordings?
- Trial Judge: Congress not courts to extended DMCA safe harbor to such videos – Summary Judgment to Plaintiff
- 2nd Cir reverses on Pre-1972, rejects Copyright Office report (*Chevron vs. Skidmore* deference)
 - §512(c) “infringement of copyright” not limited to federal copyright
 - Would thwart Congressional intent
 - Copyright Office incorrectly interprets “canons”
 - Office: Exemptions interpreted narrowly – *Tasini*
 - Leval: 1st guides and 2nd no, *Tasini* only said narrowly so as not to swallow the rule
 - Office: §301(c) state law for 95 years, can’t nullify – *TVA v. Hill*
 - Leval: Office misinterprets *TVA*, SCOTUS said no repeal by implication

Administrative – Legislative Developments



Copyright Alternative in Small-Claims Enforcement Act of 2016



- Cong. Jeffries (D NY)/Marino (R PA) CASE Act
- Create Copyright Claims Board, limited claims
 - Infringement or claim of noninfringement under §106
 - Misrepresentation under §512(f)
 - Counterclaims allowed
 - \$15,000 damage cap per work (registered), \$7,500 per work (later registered)
 - Exclusive of \$5,000 attorneys' fees and costs, limited to total award of \$30,000

Senate Judiciary Committee



- Email to tech, movie & record companies
- Proposed some reforms:
 - New digital copyright ownership tracking mechanism
 - Public advisory committee composed of all factions of the copyright debate
 - Library of Congress to keep Copyright Office
- Seek feedback on staff proposals as they draft a “consensus proposal” to achieve meaningful improvements to the Copyright Office

International



Hütter V. Setlur (German Supreme Constitutional Court)



- Rapper Setlur used a two-second snippet of Kraftwerk's "Metall auf Metall"
- German Federal Court of Justice found infringement noting could have recorded same drum sounds
- German Supreme Constitutional Court reversed saying samples integral to hip-hop and should be allowed in completely new pieces of music
- Remanded to see if sample harmed Hütter's commercial interests

China State Council's IP Guidelines – July 28th



- Outline addresses poor enforcement; but proof will be in new laws and regulations
- Guidelines call for:
 - Stronger enforcement and punishment
 - Cultivate industries heavily dependent on IP
 - Reinforce open use of IP information
- Calls for coordinated work involving 40 government departments
- No timetable

- What does it mean for content protection?
 - No one knows
 - EU Directive incorporated into UK law, while maybe changed likely not dramatic
- More EU proposals for this fall
 - More on portability and harmonization, would apply to UK until exit
 - But needs Council and EU Parliament approval
 - France unhappy with number of exceptions
 - EU v. DBS Sky denying signals to other EU countries – anti-trust and competition law violations

Kickass

- Owner of most visited torrent website arrested in Poland
- Criminal charges brought in Illinois federal court
- Two counts criminal copyright infringement, one count conspiracy to commit criminal copyright infringement and one count conspiracy to commit money laundering
- Charged with operating illegal file-sharing website & unlawfully distributing >\$1 billion of copyrighted content
- Assistant US Attorney General: arrest shows “cybercriminals can run, but they cannot hide from justice.”
- To be extradited

Thank You

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