



Litigation/Legislative Update

CPTWG #148

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Litigation

- *Perfect 10, Inc. v. Giganews, Inc.* (SCOTUS 2017)
- *Dr. Seuss Enterprises, L.P. v. Comicmix LLC* (SD CA 2017)
- *Signature Management Team, LLC. v. Doe* (6th Cir. 2017)
- *OpenRisk, LLC. V. MicroStrategy Services Corporation* (4th Cir. 2017)
- *Google v. Equustek Solutions Inc.* (N.D. CA 2017)
- *American Chemical Society v. Sci-Hub* (E.D. VA 2017)
- *James Castle Collection and Archive, L:P v. Scholastic, Inc.* (DC ID 2017)
- *Brown v. Time Warner Inc.* (SD NY 2017)
- *Barcroft Media v. Coed Media Group* (SD NY 2017)
- *The Leader's Institute, LLC v. Jackson* (ND TX 2017)

Perfect 10, Inc. v. Giganews, Inc.
(SCOTUS 2017)

- 9th Circuit had ruled that SCOTUS *Aereo* decision did not eliminate the volitional-conduct requirement
- Perfect 10 lost direct and secondary infringement suit for Usenet postings
- Filed Certiorari Petition
- Cert denied – has meaning as 9th Cir. interpreted SCOTUS decision

Dr. Seuss Enterprises, L.P. v. Comixmix LLC (SD CA 2017)

- Comixmix creates *Oh, the Places You'll Go Boldly!*
 - Mash of Seuss & *Star Trek*
 - Comixmix claims fair use
- Judge earlier denied motion to dismiss
 - Transformative – for Defendant
 - Type of work – slightly for Plaintiff
 - Amount – neutral
 - Harm slightly for Plaintiff
- New facts on 4th factor
 - Court found *Boldly* the type of work Seuss “would in general develop or license others to develop”
- Court: “fair use defense fails as a matter of law”

Signature Management Team, LLC. *v. Doe (6th Cir. 2017)*

- Plaintiff won infringement suit against anonymous critical blogger – posted entire copyrighted book
- DC granted only requested injunctive relief, but refused to unmask Doe
 - Used pre-judgment protective standard
- 6th Cir remanded – apply its new standard for post-judgment with presumption in favor of open court records
 - Plaintiff’s need to learn identity to enforce rights
 - Content/subject of speech, frequency, audience, speaker intent
 - Does Doe engage in significant amount of noninfringing speech that unmasking would chill
- Dissent: no protection for infringer –
 - “The majority’s concern here is like that of an overprotective parent.”

OpenRisk, LLC. V. MicroStrategy Services Corporation (4th Cir. 2017)

- 4th Cir affirms DC summary judgment for Δ holding the Copyright Act preempts ¶'s Virginia law claims
- ¶ contracted with Δ for cloud services, never paid
- Sued Δ claiming conversion and computer fraud under VA law for giving software to ex-OpenRisk officials
- 4th Cir applies two-prong test for §301preemption
 - Material within copyright scope – software clearly yes
 - State rights equivalent to copyright – accusation gave unauthorized copies to execs - precisely ‘equivalent’
 - Rejects claim that VA fraud requires “extra element” – special relationship – finding not sufficient to defeat preemption

Google v. Equustek Solutions Inc. (N.D. CA 2017)

- Canadian Supreme Court affirmed lower court decision requiring Google to de-index a site world-wide, not just .ca
- DC ND CA granted a preliminary and permanent injunction saying Canadian order unenforceable in US
 - Violates 1st Amendment and CDA by eliminating Section 230 immunity for service providers that link to third-party websites. By forcing intermediaries to remove links to third-party material, the Canadian order undermines the policy goals of Section 230 and threatens free speech on the global internet

American Chemical Society v. Sci-Hub
(E.D. VA 2017)

- Defendant site making scientific papers available without authorization
- Order Google and other search engines to cease publishing search results for Defendant's worldwide
- No appearance by Defendant, CDA §230 not discussed

James Castle Collection and Archive, L:P v. Scholastic, Inc. (DC ID 2017)

- “Imagined biography” for children about deaf artist Castle who communicated only through his art
- Author drew 28 copies of Castle’s pictures, rest of 150 in “the style of” Castle
- Plaintiff sought TRO to enjoin sales claiming infringement
- Normally TRO to maintain status quo, here a “mandatory injunction” particularly disfavored
- Fair use analysis – found transformative
 - While protected under 2nd factor – not as significant when transformative
 - Amount and substance necessary to enhance narrative
 - “the Castle Collection dislikes the way Castle is portrayed in the Book and would not have licensed his art for that use” therefore 4th factor favors Defendant

Brown v. Time Warner Inc. (SD NY 2017)

- Copyright only protects expression of an idea, not the idea
- Author of short story “Thank You Jesus” sued TW claiming TV series infringed
- Judge granted motion to dismiss
- Both stories about an African-American male who believes he is Jesus. Both preach and act in very “un-Jesus-like” ways
- But plots and characters otherwise very dissimilar
- Concept of black Jesus engaging in un-Jesus-like behavior is an “abstract idea,” whereas expression of that idea very different in each work
- Also settings dissimilar and, while both have religious themes, expression of the themes not substantially similar

The Leader's Institute, LLC v. Jackson (ND TX 2017)

- Former employer sued ex-employee & new employer, defendants counterclaimed infringement
 - Plaintiff had framed defendants copyrighted works on its website
 - Citing 9th Cir's *Perfect 10, Inc. v. Amazon.com, Inc.*, plaintiff claimed framing cannot constitute infringement
- Judge disagreed: Plaintiff publicly displayed defendants copyrighted works and infringed:
 - by “‘show[ing] a copy’ of the works via a ‘process.’” (§101)
 - “process” was instructions to user’s browser to display Δs’ works
 - Unlike *Perfect 10* showed defendants’ as their own
 - “to the extent *Perfect 10* makes actual possession of a copy a necessary condition to violating a copyright owner’s exclusive right to display her copyrighted works, the Court respectfully disagrees with the Ninth Circuit.”

Administrative – Legislative Developments



House Judiciary Committee: Retirement & Resignation

- Chair of House Judiciary Committee Announces Retirement
- Ranking Member of House Judiciary Committee Resigns
- Nadler named Ranking Member

Exemptions to Permit Circumvention of Access Controls on Copyrighted Works, Initial Comments

- On December 18th Initial Comments were filed supporting new petitions
- Classes 1-4 Audiovisual
 - 1) Criticism and Comment – 8
 - 2) Accessibility – 2
 - 3) Space-shifting – 3
 - 4) HDCP/HDMI – 2
- Opposing Comments due February 12
- Reply Comments due March 14
- DC Public Hearing week of April 9

International



VCAST Limited v. RTI SpA (ECJ 2017)

- ECJ held remote TV recording service may not record programs and (re)transmit that content to subscribers without copyright holder consent
- VCAST provided list of Italian stations and offered remote cloud system to record programs
- Directive permits exceptions/limitations for reproductions made by a person for noncommercial, private use
 - Can't conflict with "normal exploitation" and "not unreasonably prejudice the legitimate interests of the rightsholder."
- ECJ found VCAST reproduced and made works available and must have consent to communicate with the public
- Even though consumer being transmitted "her" copy found VCAST's service a communication to the public
- Considered "all" the persons targeted by VCAST to constitute a "public"

Canadian Copyright Modernization and Trade Negotiations

- Government launched statutory 5-year review of the 2012 Act
 - Parliament House of Commons Industry, Science and Technology Standing Committee to conduct review
 - Contentious issues, including version of §1201 some feel forced on Canada by US
- Reportedly one of the NAFTA issues – content vs. platforms
- With US out of TPP, Mexico & Canada had the TPP-11 suspend many key IP provisions, IP provisions future unclear
- Reported TPP-11 signed off yesterday and Canada achieved
 - “a significant outcome on culture and an improved arrangement on autos with Japan along with the suspension of many IP provisions of interest to Canadian stakeholders,” Joe Pickerill, director of communications for Canadian Trade Minister Francois-Philippe Champagne, said

French Anti-piracy Agency Hadopi Activity Report

- Released statistics from 2010 through August 2017
 - 1 million “piracy” warnings
 - 800,000 follow-up warnings
 - 2,000 referred to prosecutors
 - 583 court decisions – small fine, caution or community service
 - 189 criminal convictions
- Much work to do: quicker site blocking, unauthorized streams, and “fully-loaded” set-top box sales

Relatório de Discussão e Votação na Especialidade (Portugal)

- Legislature had passed law permitting circumvention of DRM for lawful purposes: private copy right, public domain works or government works
- Became law with President's signature

Swiss Federal Council Sends Draft Copyright Bill to Parliament

- Federal Council sent draft copyright bill to Parliament to create new exceptions for libraries, archives, museums, and scientific research
- If passed circumvention would automatically be permitted, Act currently says:
“the ban on circumvention may not be enforced against those persons who undertake the circumvention exclusively for legally permitted uses.”

Thank You

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