

Litigation/Legislative Update

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CPTWG #154

Thompson Coburn LLP



Litigation

- Supreme Court Cases
- *Brammer v. Violent Hues Production LLC* (4th Cir. 2019)
- *Gold Value Int'l Textile, Inc. v. Sanctuary Clothing, LLC* (9th Cir 2019)
- *Pohl v. MH Sub 1 LLC*. (11th Cir. 2019)
- *Green v. U.S. Department of Justice* (D.D.C. 2019)
- *Disney Enterprises, Inc. v. VidAngel, Inc.* (CD CA 2019)
- *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* (SDNY 2019)
- *Stiletto Television, Inc. v. Hastings, Clayton & Tucker, Inc.* (DC CD CA 2019)
- *Red Label Music Publishing, Inc. v. Chila Productions* (ND IL 2019)
- *Strike 3 Holdings, LLC. v. John Doe* (DC SD FL 2019)
- *University of Houston System v. Jim Olive Photography* (1D CA TX)

Supreme Court Cases

- *Oracle America, Inc. v. Google LLC*
waiting for SG's grant or no grant brief
- *Georgia v. Public.Resource.Org Inc.* – cert granted
- *Capitol Records, LLC v. ReDigi Inc.* – cert denied

Brammer v. Violent Hues Production LLC (4th Cir. 2019)

- Lower court held use of part of a neighborhood photograph in festival advertising brochure was fair use
- Fourth Circuit reversed:
 - Not transformative and commercial (for-profit festival)
 - Creative = “thick” protection
 - Used the “heart” of the photograph
 - Because commercial use, court assumed harmed the market

Gold Value Int'l Textile, Inc. v. Sanctuary Clothing, LLC (9th Cir 2019)

- Plaintiff filed registration for a group of “unpublished” fabric designs
- Had sold samples of one cloth to prospective customers
- Copyright Office said would have denied registration if it had know
- Sec. 411(b) says certificate satisfies registration requirement even if inaccurate unless: (1) information included with knowledge inaccurate and (2) if had it know Copyright Office would have denied.
- Plaintiff argued because it didn't know limited distribution was a publication therefore (1) not an issue
- Court disagree affirmed motion to dismiss saying “know” isn't a guilty state of mind, but a knowledge of the facts rather than of the law

Smile!!!



Photos by Mitchell Pohl.

Pohl v. MH Sub 1 LLC. (11th Cir. 2019)

- District Court held “before and after” shots not sufficiently creative to receive copyright protection
- Eleventh Circuit disagreed and reversed
 - Registered so rebuttable presumption and *Feist*: “the requisite level of creativity is extremely low”
 - Photos: “exercised some personal choice in the rendition, timing, or creation of the subject matter involved in the photograph” doesn’t have to be professional
 - No copyright when “found to be so banal and unthinking that they do not qualify as instances of originality in rendition, timing, subject matter, and the like.”
 - Pohl selected subject and timing, took them himself “extremely picky”
 - “*Bleistein*” principle: “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”

Green v. U.S. Department of Justice

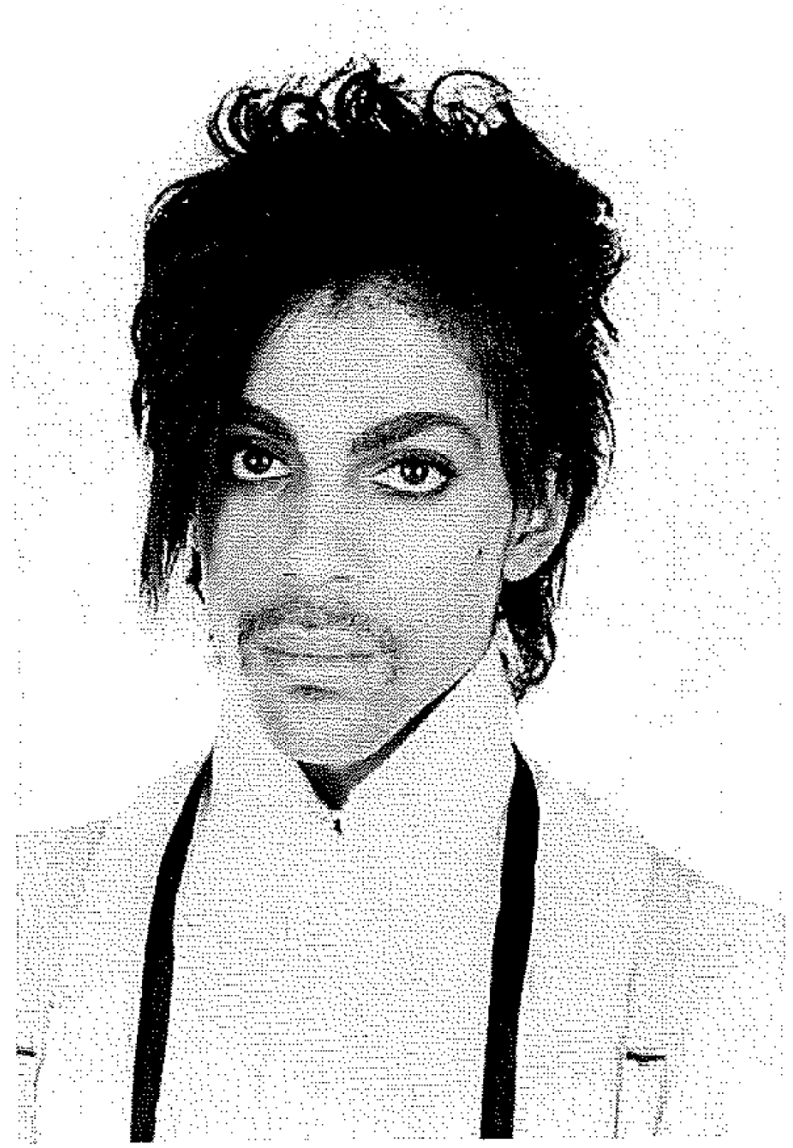
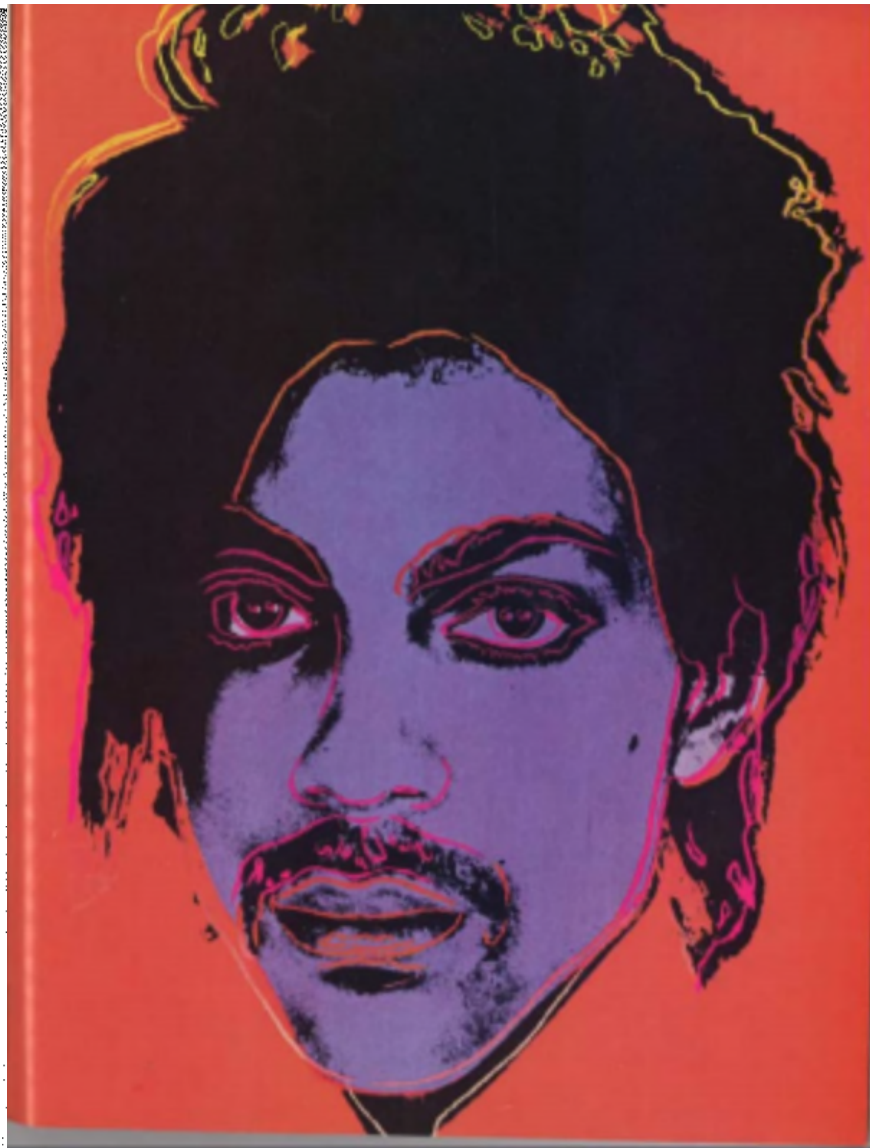
(D.D.C. 2019)

- EFF backed Plaintiffs (Green & Huang) 1st Amendment challenges to §1201 faced DOJ motion to dismiss
- Court found standing but dismissed all but one challenge
- Facial: failed to show anti-circumvention and anti-trafficking provisions unconstitutional in a “substantial” number of applications
- Rejected Librarian prior restraint in failure to grant exemptions in 2015 Triennial – did not engage in prior restraint (decisions based on disliked content or speaker)
- Reject APA claim – Library not an “agency” under APA
- Allowed “as applied” to proceed; found DMCA content neutral (intermediate scrutiny)
 - Government failed to sufficiently show that the anti-circumvention and anti-trafficking provisions do not burden substantially more speech than necessary to further government’s interest in preventing trafficking in measures that would undermine access controls protecting copyrighted works
 - Because of shortcomings of government’s evidence accepted Plaintiffs’ allegations as true (motion to dismiss) and allowed as-applied claim to proceed
- Plaintiffs tell Judge will renew Preliminary Injunction motion, but limited to HDCP

Disney Enterprises, Inc. v. VidAngel, Inc.

(CD CA 2019)

- District Court had granted Disney's summary judgment motion on DMCA anticircumvention violation, as well as copying and public performance infringement
- Now jury damages hearing
- In eight hours, eight jurors found VidAngel willfully infringed Plaintiffs' copyrights
- $819 \text{ works} / \$7,500 \text{ per work} = \$61,425,000$
- DMCA violations for $\$1,250/\text{work} = \$1,023,750$
- Surprise: VidAngel – “we will appeal”



The Condé Nast magazine cover and the Goldsmith Prince Photograph.

Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith (SDNY 2019)

- AWF sought DJ again photographer-Defendant who counterclaimed infringement
- Warhol's painting based on her photos, AWF claimed fair use, asks for SJ
- Judge's fair use analysis:
 - While commercial, AWF non-profit used funds on its artistic projects, found works transformative: 2d rendition vs. photos' 3d, loud colors vs. B&W
 - Creative but not useful in transformative case
 - Warhol creation "new and different" so third factor weighs for AWF; also Judge found that Warhol had removed almost all protectable elements
 - No usurping of direct sales; but she claimed harmed licensing; Judge disagreed licensing market for prints is for "Warhols" so no harm
- Weighing 1st, 3rd and 4th factors (latter heavily) in favor of AWF grants AWF's SJ

Stiletto Television, Inc. v. Hastings, Clayton & Tucker, Inc. (DC CD CA 2019)

- Complex fact pattern in copyright dispute over two Barry Manilow videos where Plaintiffs claimed ownership
- Plaintiff's personnel had some roles in the production of the video (but Manilow contributed most of the creativity)
- Court rejected Plaintiff's statute of limitations argument
- Rejected transfer argument – no evidence of assignment
- Rejected joint authorship: (1) no demonstration of intent to be joint authors; (2) did not “superintend the work;” and (3) no audience appeal due to contribution
- Not a work for hire (no written agreement)

Red Label Music Publishing, Inc. v. Chila Productions (ND IL 2019)

- Defendants created documentary video about '85 Chicago Bears
- Used eight seconds of *Super Bowl Shuffle*, showed 59 seconds of music video in 100-minute film
- Plaintiff moved for summary judgment
- Judge found fair use
 - Transformative: used for historic narrative not expressive value
 - While creative, use not related to song's expression
 - Amount not substantial
 - Grappled with market effect – affirmative defense issue (burden on defendant – but plaintiff has information); concluded little damage
- Held 1st & 3rd for Defendant, 2nd and 4th neutral: ruled fair use

Strike 3 Holdings, LLC. v. John Doe (DC SD FL 2019)

- Plaintiff ordered to show cause why the court should rely on geolocation data to establish Defendant's identity and that person may be found in the District
- Plaintiff said only "plausible" could ID the Defendant
- Court said not enough to say the software can identify the infringer or that he or she may be found in the district
- Accordingly, the court found Plaintiff failed to show good cause as to why the court shouldn't dismiss for lack of venue
- Dismissed with prejudice

University of Houston System v. Jim Olive Photography (1D CA TX)

- As Supreme Court hears a constitutional challenge to Copyright Remedy Clarification Act abrogating state's copyright immunity, Texas appellate court hears Fifth Amendment “taking” challenge to copyright immunity
- State University argued no state court jurisdiction because not a “taking”
- Appeals court finds that while copyright is property, as a tort, it is not property for takings purposes
- Distinguishes from trade secret precedent; more like patent precedent due to nonrivalrous nature of copyright – owner not excluded from the property – whereas revealing a trade secret destroys its value

Administrative – Legislative Developments



Copyright Alternative in Small-Claims Enforcement Act of 2019 – H.R. 2426

- Congressman Hakeem Jeffries introduces CASE Act with bipartisan co-sponsors (S.1273 in Senate)
- Establish Copyright Claims Board under Copyright Office
- Alternate, voluntary forum to hear certain copyright claims
- Three Claims Officers appointed by Librarian
- Recover up to \$30k total, cap of \$15k statutory per work infringed
- Senate Judiciary will take up S.1273 this Thursday

International



Credit: [Thijs ter Haar](#)

EU Copyright Directive - Process

- Last CPTWG reported Council of Ministers approved
- Now each state must incorporate into domestic law by mid-2021
- Polish government filed lawsuit with Court of Justice of the European Union (CJEU)
 - Challenges validity of Directive Article 17 (upload filter)
 - Barebones filing – just filing date and language is Polish, otherwise “information not available”

Canada Statutory Review of Copyright

- Standing Committee on Industry, Science & Technology produced 182-page review of the Canadian Copyright Act
- Includes protection of traditional/cultural expressions, term extension, computer-generated works, artist's resale rights, fair dealing, safe harbour provisions, perceptual disability provisions, online piracy, proceedings before the Copyright Board, and statutory review process itself
- Move fair dealing towards US-style fair use
- Recommends review TPMs relevance “notably to facilitate the maintenance, repair or adaptation of a lawfully-acquired device for non-infringing purposes.”

South Africa Proposed New Copyright Act (South African Parliament)

- Called a dramatic revision of copyright law
- Maintain 50-year motion picture term
- Keep fair dealing but add general fair use exception
- Copying for educational purposes
- TPM – a process that “prevents or restricts infringement of copyright;” but, not access control
- Trafficking not illegal if to be used to perform “permitted act”
- Where a TPM restricts permitted act, may ask copyright owner for help in circumventing; if refuses may hire 3rd party
- Appears not signed into law

Thank You

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