

Litigation/Legislative Update

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CPTWG #156

Thompson Coburn LLP



Litigation

- *Oracle v. Google* at the Supreme Court
- *Vacchi v. E*Trade Financial Corporation* (S.D.N.Y. 2019)
- *Abdin v. CBS Broadcasting, Inc.* (S.D.N.Y. 2019)
- *Oyewole v. Ora* (2d Cir. 2019)
- *Johnson v. Magnolia Pictures LLC* (S.D.N.Y. 2019)
- *Pickett v. Migos Touring, Inc.* (S.D.N.Y. 2019)
- *Sony Music Entertainment v. Cox Communications* (E.D. VA. 2019)
- *Strike 3 Holdings, LLC v. John Does Subscriber* (D.N.J. 2019)
- *Synopsys, Inc. v. InnoGrit Corp.* (N.D. Cal 2019)
- *Great Minds v. Office Depot, Inc.* (9th Cir. 2019)

Google LLC. v. Oracle America, Inc

- Supreme Court granted certiorari
- Google filed main brief on Jan. 6th
- By Jan. 13 some 26 Amicus briefs filed in support of Google
- Two in support of neither party
- Oracle brief due February 12th

Green v. U.S. Department of Justice (D.D.C. 2019)

- Government filed its memo in opposition to Plaintiffs day after last CPTWG
- Intel/DCP/DVD CCA & AACCS LA filed Amicus briefs and Motion for Leave to Intervene as did content creators
- Briefs to fill the “gap” in government’s pleadings:
 - 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
- Court granted leave and accepted the briefs

*Vacchi v. E*Trade Financial Corporation* (S.D.N.Y. 2019)

- Vacchi – Italian entrepreneur with significant social following
- Registered five videos, sued E*Trade for infringement for two commercials – *Yacht Life* and *Hard Work*
- Issue: were the two characters substantially similar?
- Discerning analysis – characters get copyright protection, but less developed, less protection
- Found similarities unprotectable young woman dancing with older man requires older man
- Found videos not similar and older men not substantially similar: one not fit, tattoos, beard, and jewelry different
- Stock character – older man as playboy

Abdin v. CBS Broadcasting, Inc.

(S.D.N.Y. 2019)

- Plaintiff published video game designs, videos, and descriptions
- Registered “distillation” of game concept
- Sued CBS claiming *Star Trek Discovery* copied his concept
- Ordinary observer test – supernatural forces, war games and space exploration scenes-a-faire
- Tardigrade not original to Abdin, since 2007 known to survive in outer space – physical characteristics not protectable, used before
- Tardigrades fictional characters in other works

Oyewole v. Ora (2d Cir. 2019)

- Plaintiff's dark song – phrase to encourage people not to waste time but move to success
- Defendant celebrating hip hop life style
- Second Circuit adopted Judge Nathan's well-reasoned opinion finding fair use
- Assuming valid copyright and protectable expression – while commercial use, transformative
- While fictional, published
- Amount – phrase not critical
- Unlikely to usurp market for *When The Revolution Comes*

Pickett v. Migos Touring, Inc. (S.D.N.Y. 2019)

- Picket registered performance and sued Migos
- Problem: didn't also register composition
- Even though dismissed under *Fourth Estate*, Judge ruled on infringement
- Found “*Walk It Like I Talk It*” to be “short” phrase, not protectable
- Noted used some 32 times, many prior to 2007 Plaintiff's recording – dismissed lack of claim

Johnson v. Magnolia Pictures LLC (S.D.N.Y. 2019)

- Infringement claim and for Declaratory Judgment
- Plaintiff hired to interview Gilda Radner for autobiography
- Used excerpts in *Love, Gilda*
- Admit couldn't register, Gilda's brother wouldn't give tapes to Plaintiff
- Under *Fourth Estate* – no registration (or rejection) claim fails
- Because DJ cannot give independent relief, dismissed

Sony Music Entertainment v. Cox Communications (E.D. VA. 2019)

- Record labels sought summary judgment on Cox's knowledge element of contributory infringement
- Cox relied on *Cobbler Nevada v. Gonzalez* (IP address insufficient to ID infringer)
- Court: Not *Cobbler* problem, here know defendant = Cox—that could do something about infringement
- Labels' notices adequate to notify Cox and it failed to enforce its TOS to suspend/terminate—SJ as to knowledge
- Jury found, by preponderance of evidence guilty of willful 2nd liability – statutory damages.\$99,830.29 per work
- Times 10,000 works = \$1,000,000,000!

Strike 3 Holdings, LLC v. John Does Subscriber (D.N.J. 2019)

- Plaintiff – labeled Copyright Troll – sought expedited discovery for infringement of its porn videos
- Judge did a deep dive into litigation practices (40 pages)
- Found unreasonable: (1) based on facts Plaintiff knew were false; (2) subpoenas misleading/misidentification; (3) expedited not only way to stop acts; (4) Plaintiff has other ways to halt; (5) of questionable deterrence; (6) misidentified subs may be substantially prejudiced; and (7) underestimated subs constitutional privacy rights
- Questionable litigation tactics – thousands of John Doe suits “smacking of extortion”

Synopsys, Inc. v. InnoGrit Corp. (N.D. Cal 2019)

- P software has license key access control system—user supplies computer Host ID, P supplies key to unlock on that computer
- D allegedly altered Host IDs and downloaded counterfeit keys and license generator
- D moved to dismiss—used “legitimate” keys on altered computers no §1201(a)(1) circumvention and no §1201(a)(2) because didn’t use the circumventing technology
- Court—no: unauthorized use of passwords/keys is (a)(1) circumvention and (a)(2) trafficking doesn’t require using the tech
- Also, rejected fair use and *de minimus* defenses

Great Minds v. Office Depot, Inc. (9th Cir. 2019)

- Great Minds publishes math curriculum
- Creative Commons Attribution-NonCommercial-Share-Alike Royalty free for NonCommercial use
- Collects royalties for commercial use
- School paid Office Depot to reproduce for its education use
- Issue: whether school licensee hiring Office Depot resulted in the latter becoming a commercial licensee
- Court said no, rejected Great Minds' citation to volition cases arguing pressing the copy button made Office Depot licensee
- Cases held can't be infringement without volition, but none held volition always makes a defendant liable for infringement

Administrative – Legislative Developments



USTR South Africa GSP IP Review

- General System of Preferences – trade benefits for least developed countries – usually tariff reductions
- Eligibility – effective IP protection
- South Africa Copyright Bill adopted fair use
- International IP Alliance petitioned USTR for IP review
 - Combined U.S. fair use plus existing fair dealing provisions
 - Insufficient fair use case law
 - No statutory or punitive damages
- USTR will review

Acting Register of Copyrights

- Librarian Carla Hayden appointed Maria Strong as Acting Register
- Former Director of Policy and International Affairs
- Karyn A. Temple left to become Senior Executive Vice President & Global General Counsel at the Motion Picture Association

International



Credit: [Thijs ter Haar](#)

Bell Media Inc. v. John Does I dba GoldTV.biz (Can. Fed. Ct. Ontario)

- First Canadian website blocking order against “innocent” 3rd party ISPs
- GoldTV operated website infringing access to P’s broadcast content
- Teksavvy Solutions ISP argued:
 - CRTC has jurisdiction
 - Cite to UK law inappropriate since UK law permits blocking
 - Objected to how UK criteria was applied
- Court reviewed eight UK *Cartier* decision criteria: necessity, effectiveness, dissuasiveness, complexity and cost, barriers to legitima^e use, fairness, substitution, and safe guards
- Court held that its proposed blocking order met all the criteria

Nederlands Uitgeversverbond v. Tom Kabinet Internet BV (EJC 2019)

- EU *ReDigi* first sale case, for redistribution of eBooks
- Dutch publishers sought injunction prohibiting Tom Kabinet from making available “used” eBooks
- TK claimed covered by distribution rule of exhaustion
- Court found covered by communication of a work to the public, two parts:
 - Communication – making available whether or not downloaded
 - To the public, not accounted for by rights holders (physical vs. digital)
- TK made infringing communication to the public

French Implementation of Article 17 of the Directive

- EU Members have until June 2021 to implement Copyright Directive including Article 17 uploading filters
- France, strong Art. 17 proponent, already introduced bill with four sections: platform definition, obligations, transparency, & user rights
- Adopts vague Directive “large amount” of © content and appears to expand from Directive “direct benefit” (e.g., YouTube) to indirect (uploading to Tinder)
- No obligation to grant license to content
- While Directive says exceptions mandatory, like US, users may only complain after content taken down
- Needs French legislature approval

Thank You

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