

2017 – Washington Update

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Washington Update

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February 22, 2017



LOBBYING & POLICY



Introduction

- Intellectual Property
 - Congress
 - Litigation
- Communications - FCC
- FAA

Administrative – Legislative Developments



Goodlatte-Conyers Show



Congressman Bob Goodlatte
Chairman, House Judiciary Committee

Library of Congress & Legislative Proposals

- Oscar to: Goodlatte-Conyers Video
- Background
 - Hearings, Listening, Meetings
 - Maria Pallante “Resigns”
- Proposals
 - Copyright Office out of Library of Congress (Marino-Chu-Comstock bill)
 - Establish Copyright Advisory Committee
 - Create copyright small claims court
- Music licensing next – additional proposed reforms over time



Litigation



Photo credit: Jonathan Satriale

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

- In \$8.8 bn case, Fed Cir held Oracle's Java APIs (declaring code and SSI) protected
- Fed Cir remanded for jury trial on fair use
- Jury found fair use
- DC Judge denied Oracle's challenge to instructions and jury decision
- Oracle appealing to Fed Cir again

BMG Rights Management (US) v. Cox Communications (ED VA) (August 8, 2016)

- BMG claimed Cox secondarily liable for users infringing 1,397 musical compositions
- Cox claimed safe harbor protection, as mere conduit
- Did Cox adopt and reasonably implement termination policy?
- “13 Strike” policy
- Record “replete” with negative evidence
 - Head of Abuse Group: “f the dmca”
 - Black listed BMG notices – some 1.8 million
- Judge: no safe harbor; jury: willful contributory infringement
- \$25 million statutory damages, \$8 million legal fees

Green v. Department of Justice (DC DC)

(Sept. 29, 2016)

- EFF challenges DMCA anti-circumvention/anti-trafficking provisions
- DOJ Memo supporting Motion to Dismiss
 - No standing as no credible threat of prosecution
 - Failed to credibly assert acts qualify as speech
 - Failure to state claim: all previous constitutional challenges upheld DMCA
 - DMCA not unconstitutional prior restraint –not a speech “licensing regime” – triennial not based on content
 - As applied challenged – no example of Plaintiffs’ conduct involving speech regulation
 - Finally APA doesn’t apply to the Librarian

Green v. Department of Justice (DC DC)

EFF Memo in Support of PI

- Focus on Dr. Green – encryption researcher
- Suppression of book
- Circumvention “necessary predicate” to speech
- DMCA prevents Green from collecting information necessary to speak about security flaws
- Direct 1st Amendment violation: prosecuting Dr. Green for publishing book reproducing circumventing code

AACS v. Feng Tao (DBA DVDFab) (2d Cir) (Oct. 4, 2016)

- Online sale of circumvention software
- District Court: AACS LA wins injunctions
 - Feng Tao not to circumvent via online platforms and disable certain domains
 - Enjoined third parties from providing services
 - OSC why not in contempt
- Feng Tao appeal to 2d Cir:
 - Email service violates Hague Convention
 - Federal Rules do not permit this type of service
 - English service by mail to China violates due process
 - AACS failed to demonstrate irreparable harm
 - By enjoining 3rd parties judge applied DMCA beyond US territory

Monkey Selfie



Naruto v. David J. Slater (9th Cir) (July 28, 2016)

- Can't keep a good monkey down!
- Naruto didn't have standing, PETA appeals decision
 - Questions DC holding: what about computer created works?
 - Watson created work? Who owns such a work? Is there copyright?
- PETA: Constitution intended broadest possible meaning, neither it nor Act literally limited to human authors
 - Act protects “original works of authorship” not works of human authors
 - Protection not based on author's humanity but work's originality
 - Nonhuman authors – studios, labels, publishers, tech companies
 - Duration clause: §301(c), works where “no natural person is identified as author”

VidAngel



Disney Enterprises, Inc. v. VidAngel, Inc.

(CD CA) (June 9, 2016)

- District Court: no to VidAngel “sales & stream” model
 - DMCA Circumvention – space-shifting – Wrong
 - Reproduction Right – not “copies” – Wrong
 - Private Performance – not public because users created filtered versions – Wrong no “lawful” copy
- Family Movie Act – expressly permit 3rd party to copy, filter and transmit – Wrong
- Fair Use Defense – Wrong
- Preliminary Injunction issued
- VidAngel appeals to 9th Circuit

Paramount Pictures Corp. v. Axanar Productions, Inc. (CD CA Dec. 12, 2016)

- Goal: produce film faithful to genre depicting Battle of Axanar – 21 years before original *Star Trek*
- Paramount claims infringes as substantially similar
- 9th Circuit two part test:
 - Objective Extrinsic – similarity of ideas and expression measured by external, objective criteria – “in a Vulcan-like manner”
 - Subjective Intrinsic – ordinary reasonable person finds “total concept and feel” substantially similar
- Judge –if I find objectively similar goes to jury, “reasonable person”

Paramount Pictures Corp. v. Axanar Productions, Inc. (con't)

- Judge: *Axanar* takes directly from *Star Trek* — characters, species, garb, planets, military spaceships, plot points, Federation, Klingon Empire and conflict between them, phasers, photon torpedoes, *Prelude*, *Klingon Language*, *etc.*

Copyright Klingon?



Paramount Pictures Corp. v. Axanar Productions, Inc. (con't)

- Judge finds substantially similar under objective extrinsic test
- Fair use ruling
 - Not a parody or in any way transformative, commercial not educational
 - *Star Trek* clearly fiction – broad protection
 - Quantity, quality and importance of materials used “pervade” *Axanar* and are qualitatively important
 - Separate demand for work like *Axanar* P’s may seek to exploit; if unrestricted and widespread would be a substantially adverse impact for *Star Trek* copyrighted works
- Axanar and Paramount Settle
 - Axanar agrees “crossed [copyright law] boundaries”
 - Will make changes to comply with new Paramount “Guidelines”

Photo credit: Jean-Pierre Dalbéra

Modern Communications



FCC

- Net Neutrality
- Spectrum Auctions
- OTT MVPD
- Set-Top Boxes

FCC Net Neutrality Rule – Court Victory

- In June DC Circuit Court of Appeals ruled 2-1 in favor of the FCC's net neutrality rules.
- Decision also allowed net neutrality rules to apply to wireless internet (Smartphones)
- Judge Stephen Williams, only dissenter, agreed FCC had ability to change broadband providers regs, didn't think the FCC gave 'sufficient justification
- AT&T: going to appeal to the Supreme Court
- But then...

Network Neutrality – Under Trump

- Appoints Ajit Pai FCC Chairman: “favors an open Internet and opposes Title II”
- Question isn’t whether Net Neutrality Regs will be removed, it’s whether FCC will enforce current Regs until removed
- More likely there won’t be Reg repeal, just non-enforcement or legislation
- ... looks like the end of Net Neutrality

Spectrum Auctions

- As of Feb. 17 FCC took in \$19.6 bn from bids for spectrum for wireless use
- Less than initial estimates, but still second highest of any spectrum license auction
- Broadcasters gave up a total of 84 MHz of spectrum

Auction Next Steps

- “Assignment phase” –previous phase winners can bid for frequency-specific licenses
- FCC announced assignment phase will run from March 6th-March 30th
- After assignment phase will be a 39-month TV station repack process

OTT MVPD Rulemaking

- Comments were filed last February 17th
- The rulemaking never went anywhere



Unlock Set-top Boxes – Locked Up

- Chairman Ajit Pai strips item from agenda
- File not closed official file “altogether”
- Could still act, but last year Pai and Commission O’Rielly (R) highly critical
- House E&C R leaders say: close proceeding
- O’Rielly tweet: closing docket “sounds good to me”

Current Location, Now



Flight Prohibited

You are in an area with flight restrictions.

Do not fly your aircraft.

[More Status Information](#)



STATUS



MAP



PLANNER



MORE

Credits: West Covina Drone

&

THE FAA & DRONES

New Drone Rules

- **Increasingly useful tool in motion picture/television industry**
 - Popular/safer production substitute (vs. manned aircraft)
 - Unique aerial perspective useful for site planning/overviews
 - Small camera equipment/technology catching up
- **FAA commercial rules eased substantially in August for <55 lbs (sUAS)**
 - “Remote Pilot-in-Command” certificate and aircraft must be registered/marked
 - Pre-flight inspections
 - Visual line-of-sight, daylight operation. Under 400’ AGL, Slower than 100 mph
- **Important restrictions remain (some can be waived)**
 - No flights directly over non-participants and no multiple/simultaneous UAS operations
 - No operations from moving/chase vehicle and no operations near aircraft/busy airports
 - State/local laws
- **More changes on the horizon**

Digital Copyright

- User-Generated Content (UGC)
 - DMCA "notice & takedown"
 - Duty to police?
- *Viacom v. YouTube*

Thank you

Questions at Roundtable Tomorrow

Thank you

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