

2020 – Washington Update

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Introduction

- Intellectual Property
 - Copyright 101
 - The Courts
 - The Congress
 - International
- If time – the Monkey & questions; otherwise available at roundtable breakfast tomorrow

Copyright 101

- Fix original expression, get bundle of exclusive rights: 
 - Reproduction
 - Distribution
 - Derivative works – e.g., movie based on a book
 - Public Performance/Display
- “Original,” not facts, ideas, methods of operation, limited, or scènes à faire
- Exceptions & Limitations: Fair use – four factor non-exclusive test
 - Nature & character of use (commercial vs. educational or transformative, e.g., parody)
 - Nature of the work – fiction vs. factual
 - Amount used
 - Effect of the use on the value of the work including potential market
- DMCA – anticircumvention provision



Google LLC v. Oracle American, Inc. (SCOTUS 2020)



- Long-running \$8.8 BN suit – Google copied 37 Java API declaring code packages (11,500 lines): attract Java programmers to code for Android or compatibility?
- 2014 Federal Circuit found Oracle’s API & SSO entitled to copyright protection, remanded to DC for fair use trial, Jury found fair use
- 2018 Federal Circuit reviewed facts under the fair use four factor test
 1. Held commercial use (free but ads)/not transformative (same purpose in Android)
 2. Jury could find functional characteristics but 9th Cir. precedent downplays factor
 3. Google copied far more than was necessary
 4. Android devastated Java SE mobile phone market
- Weighing four factors together: 1 and 4 for Oracle, 2 for Google, 3 neutral at best – not fair use as a matter of law
- Google Supreme Court Cert Petition granted challenging API copyrightable and fair use decision
- 26 Amicus Briefs supporting Google, 2 Supporting Oracle

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



- District Court held dentist's "before and after" shots not sufficiently creative to receive copyright protection
- Eleventh Circuit disagreed and reversed
 - Registered – so rebuttable presumption entitled to copyright, and *Feist* (phonebook case): Supremes said “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, 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

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, a non-profit, funds 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, no foul
- Weighing 1st, 3rd and 4th factors (latter heavily) in favor of AWF, grants AWF's SJ

Yang v. Mic Network, Inc.

(S.D.N.Y. 2019)



- Plaintiff licensed picture of Mr. Rochkind to *NY Post*
- Defendant used partial screenshot of *Post* story in his article
- Plaintiff sued for infringement, Defendant moved to dismiss
- Fair use analysis
 - Transformative – identified subject & informed viewers, embedded tweets commented on subject, poked fun at *Post* treatment, while commercial less important
 - Nature – creative, but not much weight in transformative
 - Amount & Substantiality – cropped, but used enough to identify object of controversy and to satirize *Post* article and Rochkind
 - “Implausible” would supplant demand for original

Charles v. Seinfeld (S.D.N.Y. 2019)

- Charles claimed to be author of *Comedians in Cars Getting Coffee* – suggested concept to Seinfeld and did treatment
- Shot pilot; however, things went south and Seinfeld brought in different production company for the series
- Early 2012 Charles requested compensation, Seinfeld said a Work Made For Hire & paid pre-production costs
- Issue: is claim time barred by three-year statute of limitations?
 - Under 2d Cir. precedent one shot at ownership claim: when diligent Plaintiff “put on inquiry as to the existence of a right”
 - Notice when claims rejected in 2012 and no credit for Charles

Hoff v. Walt Disney Pictures (C.D. Cal. 2019)



- Hoff claimed Disney reproduced copyrighted elements of *Secret Agent 00K9* in *Zootopia*
- Both about anthropomorphic animals investigating crime
- Two tests to prove substantial similarity:
 - Extrinsic focusing on objective similarity of protectable elements
 - Intrinsic holistic, subjective total concept and feel substantially similar – must pass extrinsic first
- Hoff fails extrinsic – animals investigating crime too high level – plaintiff would get monopoly over idea
- Examined Hoff's examples of copying and found similarities scènes à faire or too generic to merit protection, and alleged similarities naturally flow from the basic plot premise

Shull v. TBTF Productions Inc. (S.D.N.Y. 2019)



- Shull (performance coach) sued Defendants for infringing her book *Market Mind Games* and her “persona”
- Shull “consulted” on show, book uses fiction characters to illustrate teachings, Shull claims “Wendy Rhodes” (clip) is “Denise” the performance coach in the book aka the author
- *Billions* wholly fictional: “Axe,” “Chuck Rhodes,” and Wendy vs. “Michael” and “Denise”
- Motion to dismiss granted – more discerning observer test – don’t confuse mere copying with wrongful copying
- Book and movie “do not seem to resemble each other in the least.”
 - One academic with fictional scenes using Denise to help the reader understand concepts
 - Other a “drama that lies in the age-old trifecta of money, power, and sex.”
 - Differ greatly in “total concept and feel, theme, characters, plot, sequence, pace, and setting.”
 - Wendy-Denise scènes à faire – role of hedge fund in-house psychologist not unheard of
 - Characters in each are different in personas
 - Clip (the “alpha”) different delivery in book (Denise used to explain) than in *Billions*

Abdin v. CBS Broadcasting, Inc. (S.D.N.Y. 2019)



- Plaintiff published video game designs, videos, and descriptions
- Registered game concept “distillation”
- Sued CBS claiming *Star Trek Discovery* copied his concept
- Ordinary observer test – supernatural forces, war games and space exploration scènes à 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

*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

EU Copyright Directive - Process

- Parliament and the EU Council of Minister approved the Directive
- Left in two controversial provisions Article 11 (now 15) and 13 (now 17)
- Each EU state must incorporate the Directive into their law by mid-2021

EU Copyright Directive – Article 15



- Article 15 – websites pay publishers fees to use content on their news sites or to use snippets linking to their website, the so-called link tax
- Doesn't apply to hyperlinks, individual words or very short extracts
 - Critics: will shut down search in EU and publishers can block today
 - Proponents: should share revenue attributable to their content and doesn't forbid linking, just snippets

EU Copyright Directive – Article 17



- Article 17 –Online content-sharing service provider must get authorization for user-posted copyrighted content
- If service providers do not get authorization are liable unless:
 - Made best efforts to obtain authorization, and
 - Have made, in accordance with the high industry standards of professional diligence, their best efforts to ensure the unavailability of specific works for which the rightholders have provided the relevant and necessary information, and
 - Expeditiously take down infringing content at rightholders' requests
- Will Google's content ID pass the test?

Thank you



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Monkey Selfie

H2A
TECH RETREAT



Naruto and Artificial Intelligence

- What did the Monkey decision teach us?
 - An animal cannot create copyrighted material
- What is emergent AI?
 - Creating content not expected by either the programmer or the user
 - Many think years away (or never)
 - But has Copyright Office and WIPO atwitter