

Copyright Update

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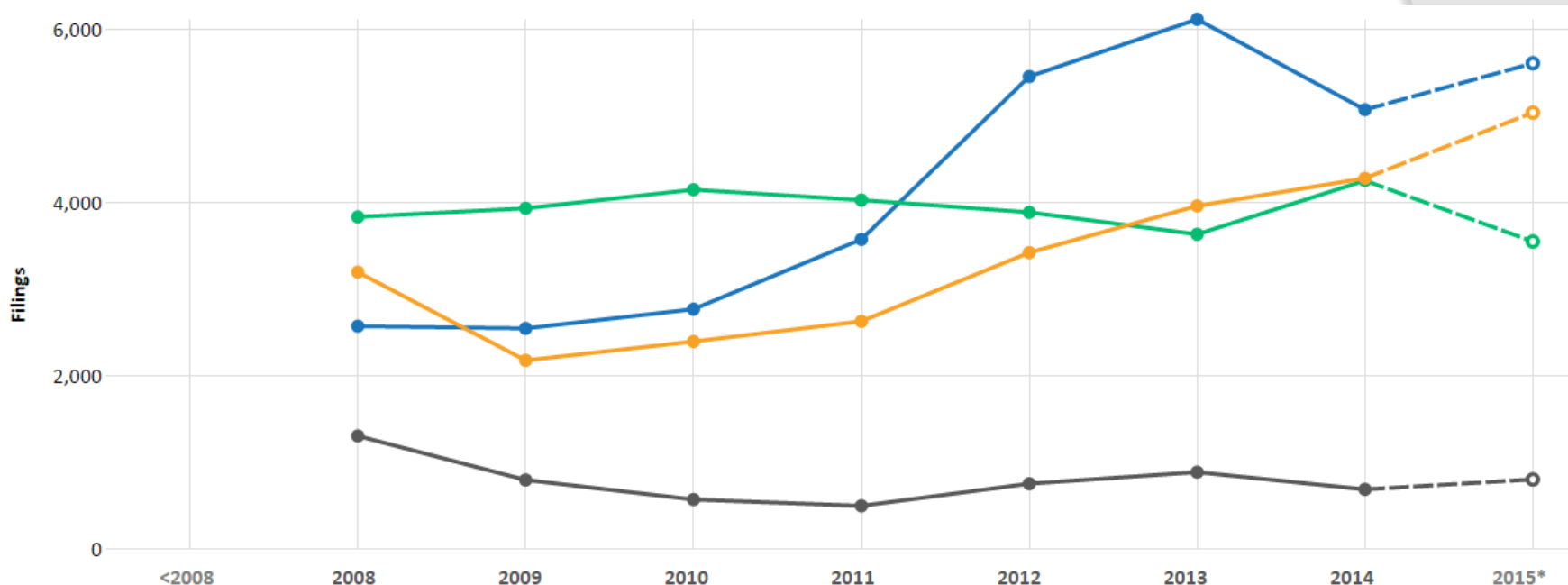
Nevada Bar Intellectual Property Law Section
Intellectual Property Law Conference
October 23, 2015

- 1. Statistical Update**
- 2. Significant Copyright Decisions in the Last Year**
- 3. Pending Legislation**
- 4. Pending Initiatives of the U.S. Copyright Office**
- 5. International Developments**

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1. Statistical Update

Patent, Trademark, Copyright, and Antitrust Cases Filed in all U.S. District Courts in 2008 – 2015*

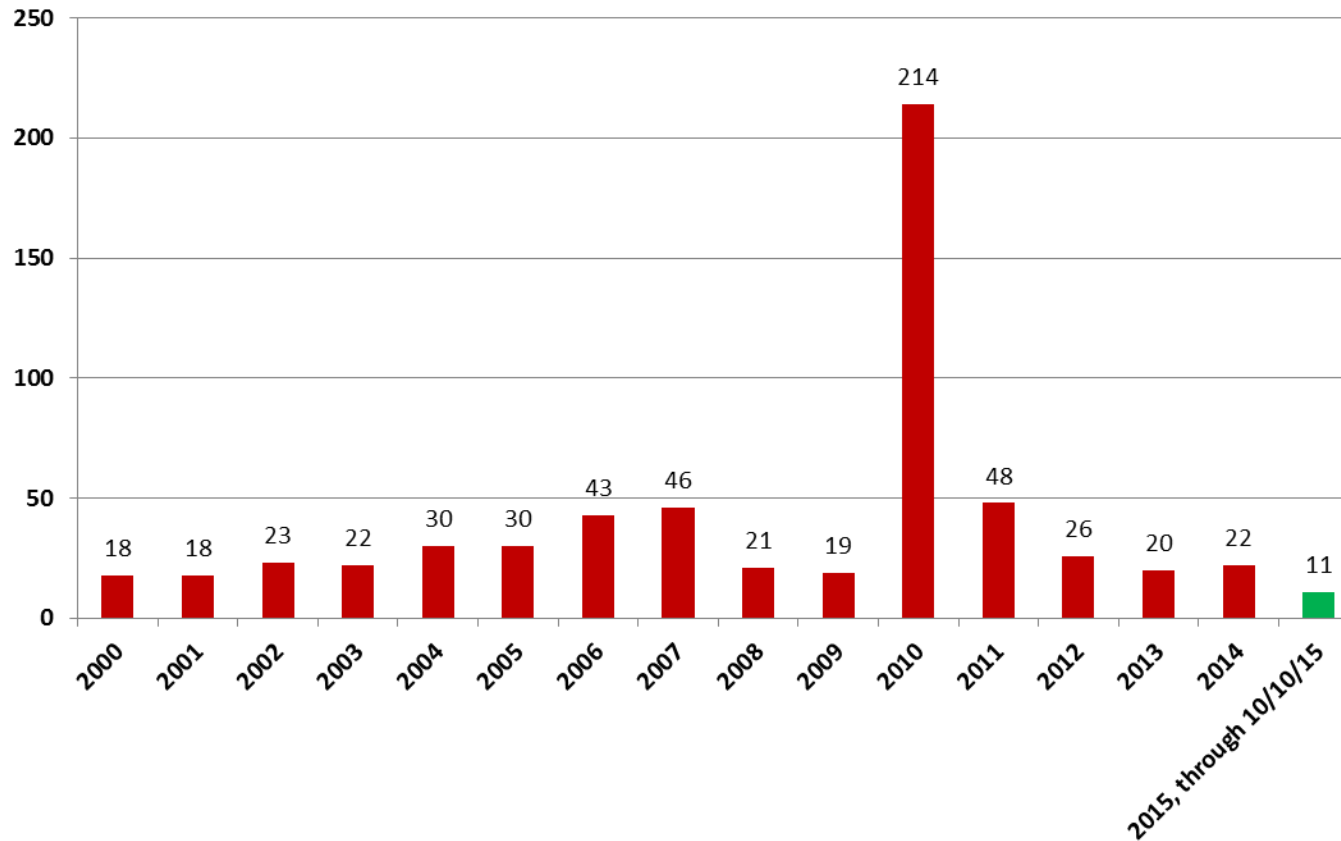


	<2008	2008	2009	2010	2011	2012	2013	2014	2015*
Patent <input checked="" type="checkbox"/>	20,682	2573	2547	2769	3575	5454	6115	5071	4404
Trademark <input checked="" type="checkbox"/>	30,312	3834	3933	4148	4028	3887	3633	4253	2672
Copyright <input checked="" type="checkbox"/>	26,781	3197	2178	2396	2629	3422	3961	4280	4128
Antitrust <input checked="" type="checkbox"/>	6850	1306	798	572	499	755	888	689	636

* Prediction for 2015 based on data as of October 2015.

1. Statistical Update

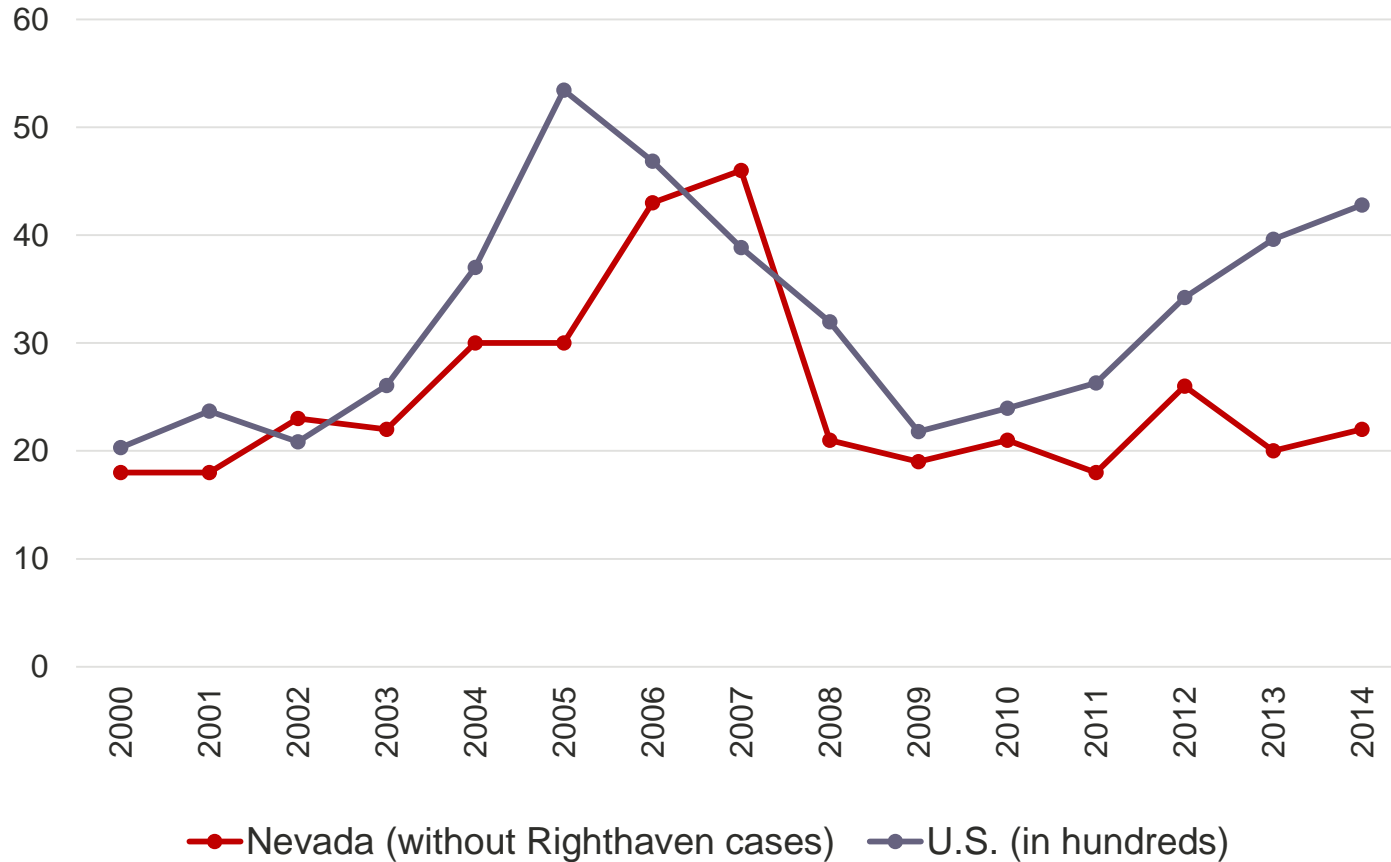
Copyright Cases Filed in the U.S. District Court for the District of Nevada January 1, 2000 – October 10, 2015



Data by Lex Machina, <https://lexmachina.com/>

1. Statistical Update

Copyright Cases Filed in all U.S. District Courts and the U.S. District Court for the District of Nevada (without Righthaven) January 1, 2000 – December 31, 2014



Data by Lex Machina, <https://lexmachina.com/>

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2. Significant Copyright Decisions in the Last Year

Oracle America, Inc. v. Google, Inc., 750 F.3d 1339 (Fed. Cir. 2014)

- Oracle's Java in Google's Android
- Analysis of copyrightability v. analysis of infringement
 - In the Ninth Circuit:
 - Originality – copyrightability
 - Merger and scenes a faire – infringement
- For protectibility, assessment of the merger and scenes a faire must be conducted at the stage of development of the original work, not at the stage of the development of the allegedly infringing work
- Remanded for further proceedings on fair use
- **cert. denied in June 2015**

2. Significant Copyright Decisions in the Last Year

Bikram's Yoga College of India v. Evolation Yoga, ... (9th Cir. 2015)

- Copyrightability of a yoga routine
- The sequence was not copyrightable because of the idea/expression dichotomy.
- The sequence was not copyrightable as a compilation.
- The sequence was not copyrightable as a choreography.

2. Significant Copyright Decisions in the Last Year

DC Comics v. Towle, ... (9th Cir. 2015)

- Batmobile
- An especially distinctive character entitled to copyright protection
- The publisher owns copyright to Batmobile character
- The publisher retained rights to the Batmobile character
- Production and sale of Batmobile replicas infringed copyright

2. Significant Copyright Decisions in the Last Year

Garcia v. Google, 786 F.3d 733 (9th Cir. 2015) *en banc*

- Performance in the video *Innocence of Muslims*
- The Copyright Office refused to register the performance
- No performer's right in the fixed performance of a short duration embedded in the motion picture that the performer did not fix herself
- Irreparable harm: "Garcia's harms are too attenuated from the purpose of copyright."
- J. Watford's concurrence:
 - The court should have focused only on the irreparable harm prong
- J. Kozinski's dissent:
 - "[T]he court robs performers and other creative talent of rights Congress gave them."
 - Question of compatibility with the 2012 WIPO Beijing Treaty on Audiovisual Performances

2. Significant Copyright Decisions in the Last Year

The Authors' Guild v. Google, (9th Cir. 2015)

- Google's *Library Project* and *Google Books* (scanning, search, and snippets displays)
- The copying is transformative
- The copying does not offer the public a meaningful substitute for original works
- Fair use

2. Significant Copyright Decisions in the Last Year

Lenz v. Universal, 2015 WL 5315388 (9th Cir. 2015)

- The “dancing baby” case
- The DMCA requires that a copyright holder consider fair use before sending a takedown notice
- Good faith belief to be assessed based on actual knowledge
- “[T]he willful blindness may be used to determine whether a copyright holder knowingly materially misrepresented that it held a good faith belief that the offending activity was not a fair use.”
- “[The plaintiff] did not show that the defendants subjectively believed there was a high probability that the video constituted fair use.”

2. Significant Copyright Decisions in the Last Year

Corbello v. DeVito, 777 Fed.3d 1058 (9th Cir. 2015)

- An unpublished autobiography used to create the Broadway musical *Jersey Boys*
- The author transferred ownership of his right to create derivative works
- A genuine issue of material fact existed as to whether the transfer was later terminated
- No implied license to use the autobiography

2. Significant Copyright Decisions in the Last Year

Spanski Enterprises v. Telewizja Polska

- A long running dispute involving multiple issues; some of them have been decided
- Ongoing dispute regarding a geoblocking issue: Spanski Enterprises, Inc. v. Telewizja Polska, S.A., D.D.C., 1:12-cv-00957-TSC

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3. Pending Legislation

- **American Royalties Too Act of 2015, H.R. 1881, 114th Cong. (2015).**
- **American Royalties Too Act of 2015, S. 977, 114th Cong. (2015).**

- **Songwriter Equity Act of 2015, H.R. 1283, 114th Cong. (2015).**
- **Songwriter Equity Act of 2015, S. 662, 114th Cong. (2015).**

- **Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. (2015).**

- **Allocation for Music Producers Act, H.R. 1457, 114th Cong. (2015).**

- **You Own Devices Act, H.R. 862, 114th Cong. (2015)**

- **Unlocking Technology Act of 2015, H.R.1587, 114th Cong. (2015).**

- **Copyright and Marriage Equality Act, H.R. 238, 114th Cong. (2015)**
- **Copyright and Marriage Equality Act, S. 23, 114th Cong. (2015)**

- **Breaking Down Barriers to Innovation Act of 2015, H.R. 1883, 114th Cong. (2015).**
- **Breaking Down Barriers to Innovation Act of 2015, S. 990, 114th Cong. (2015).**

- **Affordable College Textbook Act, H.R. 3721, 114th Cong. (2015).**

- **O PACK Act of 2015, H.R. 3496, 114th Cong. (2015).**

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4. Pending Initiatives of the U.S. Copyright Office

- **Ongoing Congressional Copyright Review:**
 - Since 2013 a total of 20 hearings

- **Eight Policy Issues that the Register of Copyright Has Identified as “Ready for Legislative Development:”**
 - Copyright Office Modernization
 - Music Licensing
 - Small Claims
 - Felony Streaming
 - Section 108
 - Orphan Works
 - Resale Royalty
 - Improvements for Persons with Print Disabilities
 - Section 1201 – Regulatory Presumption

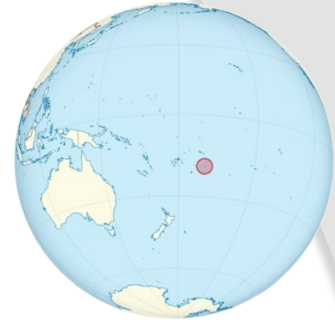
- **Copyright Office Reports in 2014 and 2015:**
 - Document Recordation
 - Compendium of Copyright Office Practices
 - Technical Upgrades
 - Fair Use Index
 - Music Licensing
 - Orphan Works and Mass Digitization

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5. International Developments

➤ WIPO

- Niue's accession to the WIPO
- 2012 Beijing Treaty on Audiovisual Performances
- 2013 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled
- Discussed proposals:
 - Revision of the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the U.S. not a party)
 - Exceptions for libraries and archives, and for people with other disabilities
 - Protection of folklore



➤ European Union

- 2014 Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use (implementation date April 10, 2016)
- Single Digital Market for Europe
- Copyright review

➤ Trans-Pacific Partnership

- Copyright provisions

➤ Draft Trade in Services Agreement

- Server location but possible exception for copyright

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