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**

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

[Graph showing the number of copyright cases filed from 2000 to 2014, with two lines representing Nevada (without Righthaven cases) and the U.S. (in hundreds).]

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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

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  - 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

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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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- **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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