



**FARELLA
BRAUN + MARTEL** LLP

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Copyright: New Issues Arising From New Technology

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San Francisco Guest Speakers:

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Agenda

- Content Hosting and Transmission
 - Video-hosting platforms
 - Digital re-broadcasting
 - Digital storage lockers
- Fair Use
 - Transformativeness: More Than Meets the Eye
- Interfaces
 - APIs
 - Command-line interfaces

Content hosting

- Video-hosting platforms
 - Example = YouTube
 - Content uploaded by users
 - Both public and private sharing of videos
- Digital re-broadcasting
 - Example = Aereo
 - Aereo retrieves content itself – at the direction of users?
 - Rebroadcasts television from individual antennae to Internet subscribers – is this “public performance”?
- Digital storage lockers
 - Examples = Dropbox, Google Cloud, Amazon Cloud
 - Content uploaded by users / significant non-infringing uses
 - Both public and private sharing of content

Overview of Copyright Liability

A brief summary:

- Direct infringement (*Aereo*, *Cartoon Network*)
- Indirect infringement
 - Contributory Infringement (*Sony/Betamax*)
 - Inducement (*Grokster*)
 - Vicarious Liability (*Perfect 10 v. Visa*)
- DMCA “safe harbors” for qualifying service providers, 17 USC § 512 (*Viacom v. YouTube*)

Video Hosting Platforms

Viacom v. YouTube, 676 F.3d 19 (2d Cir. 2012)

- Significant case pitting technology companies against the media industry and testing the boundaries of the DMCA safe harbor provisions
- Facts: YouTube receives 1 billion daily video views with 24 hours of new video uploaded to the site every minute. Though it describes itself as a “user-generated content” site and requires its users to accept terms of use re copyright infringement, evidence included that YouTube was aware that 75-80% of content was copyrighted, 60% contained **premium copyrighted content** and **only 10% of the premium content was authorized.** YouTube tried to send takedown notices for some specific infringements, but could not keep up with the rapid rate of user uploading.

Video Hosting Platforms (cont.)

- “Viacom cites evidence that YouTube employees conducted website surveys and estimated that 75-80% of all YouTube streams contained copyrighted material. ... Credit Suisse, acting as financial advisor to Google, estimated that more than 60% of YouTube's content was "premium" copyrighted content—and that only 10% of the premium content was authorized. These approximations suggest that the defendants were conscious that significant quantities of material on the YouTube website were infringing... **But such estimates are insufficient, standing alone, to create a triable issue of fact as to whether YouTube actually knew, or was aware of facts or circumstances that would indicate, the existence of particular instances of infringement.**”

Digital Re-Broadcasting

Am. Broadcasting Co. v. Aereo, Inc., 134 S.Ct. 2498 (2014)

- Aereo contended it was providing individual antennae for its subscribers – so its service was just streaming and optimizing a perfectly legal experience - and that there was therefore no “public performance” and therefore no direct infringement.
- Supreme Court reversed the denial of a preliminary injunction. Aereo’s warehouse was “publicly performing” because:
To perform or display a work “publicly” means—
 - to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it **in the same place or in separate places and at the same time or at different times**. 17 U.S.C. § 101 (emphasis added).

Digital Re-Broadcasting (cont.)

- Majority opinion written by Justice Breyer is largely based on analysis of legislative history of 1976 amendments to the Copyright Act that rejected prior Supreme Court holdings relating to cable television systems
- Majority opinion attempts to limit the scope of its holding to this area.

Digital Re-Broadcasting (cont.)

“Aereo and many of its supporting amici argue that to apply the Transmit Clause to Aereo’s conduct will impose copyright liability on other technologies, including new technologies, that Congress could not possibly have wanted to reach...But we do not believe that our limited holding today will have that effect.”

- “[W]e have interpreted the term ‘the public’ to apply to a group of individuals acting as ordinary members of the public who pay primarily to watch broadcast television programs, many of which are copyrighted. We have said that it does not extend to those who act as owners or possessors of the relevant product. And we have not considered whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content.”
- “[T]he doctrine of ‘fair use’ can help to prevent inappropriate or inequitable applications of the Clause.”
- “We cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not before us. We agree with the Solicitor General that ‘[q]uestions involving cloud computing, [remote storage] DVRs, and other novel issues not before the Court, as to which ‘Congress has not plainly marked [the] course,’ should await a case in which they are squarely presented.’”

Digital Re-Broadcasting (cont.)

- Justice Scalia’s dissent contends that Aereo does not “perform” at all and therefore cannot be liable for direct infringement
- The dissent is particularly notable because it focuses on a “volitional conduct” requirement for direct infringement, relying in particular on the Second Circuit’s decision in *Cartoon Network*.
 - Aereo “assigns each subscriber an antenna that-like a library card-can be used to obtain whatever broadcasts are freely available.... Aereo’s operation of that system is a volitional act and a but-for cause of the resulting performances, but ... that degree of involvement is not enough for direct liability.”

Digital Storage Lockers

Smith v. BarnesandNoble.com, LLC, No. 1:12-cv-04374, 2015 WL 6681145 (S.D.N.Y. Nov. 2, 2015)

- Applies *Cartoon Network's* volitional conduct requirement to find no direct liability.
 - “In this Circuit, however, a showing of reproduction requires more than that. ‘When there is a dispute as to the author of an allegedly infringing instance of reproduction,’ courts must examine “the volitional conduct that causes the copy to be made.’ *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir.2008). The plaintiff must prove that defendant ‘engaged in some volitional conduct sufficient to show that [it] actively’ violated one of Plaintiff’s exclusive rights. *Capitol Records, LLC v. ReDigi Inc.*, 934 F.Supp.2d 640, 657 (S.D.N.Y.2013). As in *Cartoon Network*, the volitional element is missing here, and this Court cannot ‘impose liability as a direct infringer on a different party for copies that are made automatically upon [the] customer’s command.’ *Id.*

Digital Storage Lockers (cont.)

- The court also found no liability for contributory infringement under the *Sony-Betamax* rule re substantial non-infringing uses.
 - “The digital locker system is capable of substantial non-infringing uses, and those uses are commercially significant.”
 - “This noninfringing capability sets Barnes & Noble apart from the defendants who provided the site and facilities for infringement and were found liable under theories of contributory infringement.”

Content Hosting: Recap

- Volitional conduct
 - First-line defense
 - Direct infringement?
 - Contributory infringement?
- DMCA Safe Harbors
 - 17 U.S.C. § 512(c) – Information Residing on Systems or Networks at Direction of Users
 - Storage must be “at the direction of a user”
 - No “actual knowledge” of infringement
 - Take-down policy
 - No financial benefit directly attributable to the infringing activity

Expansion of Fair Use

Rogers v. Koons,
960 F.2d 301 (2d Cir. 1992)

Authors Guild v. HathiTrust,
755 F.3d 87 (2d Cir. 2014)

Kelly v. Ariba Soft Corp.,
336 F.3d 811 (9th Cir. 2003)

Perfect 10 v. Amazon,
508 F.3d 1146 (9th Cir. 2007)

Campbell v. Acuff-Rose,
510 U.S. 569 (1994)

Seltzer v. Green Day,
725 F.3d 1170 (9th Cir. 2013)

Fair Use

- 17 U.S.C. § 107 lays out the test for fair use:
 - the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - the nature of the copyrighted work;
 - the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - the effect of the use upon the potential market for or value of the copyrighted work.

Parodic Puppies



Parodic Puppies

Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992)

- “Cubist/Dadaist/Absurdist” takes a postcard picture of 8 puppies and turns it into a sculpture worth \$100K+ and claims it is a “parody.”
- Second Circuit rules, this is no fair use:
 - Factor 1. “If an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer’s claim to a higher or different artistic use — without insuring public awareness of the original work — there would be no practicable boundary to the fair use defense.”
 - Factor 2. Creative expression.
 - Factor 3. Copied “essence of the photograph.”
 - Factor 4. “[T]he inquiry considers not only harm to the market for the original photograph, but also harm to the market for derivative works.”

The “Pretty Woman” Case

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)

- Two Live Crew copied some lyrics and sampled the signature riff.
- Question: Whether the parodic character of the song made this a fair use?
- Here it was parodic – this was a “critical element” of the analysis
- However, a very close call as to the bass riff.
- Remand.

Early “Thumbnail” Cases

Kelly v. Ariba Soft Corp., 336 F.3d 811 (9th Cir. 2003) and
Perfect 10 v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007)

- Thumbnails shown in image search result are a fair use.
- “Although an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information. Just as a ‘parody has an obvious claim to transformative value’ because ‘it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one,’ [Campbell, 510 U.S. at 579, 114 S.Ct. 1164](#), a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.”

Book Search and Fair Use

Scenario:

- A group of university libraries works with a private corporation to scan 20 million books in order to create a digital library with a keyword searching feature. They do not request permission of the copyright owners before scanning or creating a keyword index of all the books.

Search Engines and Fair Use

Which of the following is true:

- A. Scanning the books is not a prima facie copyright infringement, because it does not create a copy in a tangible medium.
- B. Potential statutory damages under the Copyright Act are \$5 million.
- C. It is fair use to scan the books and create a keyword index, so long as the digital library displays just book titles, and page numbers, but not snippets of pages that hit on each keyword.
- D. None of the above.

Search Engines and Fair Use

Answer: (D) None of the Above.

Authors Guild v. HathiTrust, No. 12-4547, June 10, 2014
and Authors Guild v. Google, No. 13-4829, October 16, 2015

- “Google’s making of a digital copy to provide a search function is a transformative use, which augments public knowledge by making available information about Plaintiff’s books without providing the public with a substantial substitute for Plaintiffs’ books...”
- “Snippet view thus adds importantly to the highly transformative purpose of identifying books of interest to the searcher.”

Digital Mashups



Digital Mashups

Seltzer v. Green Day, 725 F.3d 1170 (9th Cir. 2013)

- It is a fair use because copyright law should not “stifle the very creativity which that law is designed to foster.” (*quoting Campbell*)
- Original was used as “raw material” for a song speaking about religion. The original was not about religion.

Photographs



Photographs

Cariou v. Prince, 714 F. 3d 694 (2d Cir. 2013)

- “These twenty-five of Prince's artworks manifest an entirely different aesthetic from Cariou's photographs. Where Cariou's serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince's crude and jarring works, on the other hand, are hectic and provocative. Cariou's black-and-white photographs were printed in a 9 1/2" x 12" book. Prince has created collages on canvas that incorporate color, feature distorted human and other forms and settings, and measure between ten and nearly a hundred times the size of the photographs. Prince's composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the expressive nature of Prince's work.”

Fair use and the DMCA

Lenz v. Universal Music (13-16106) (9th Cir. Sept. 14, 2015)

- Under the DMCA Section 512(f), DMCA takedown notices must contain a certification that the sender has a “good faith belief” that the identified infringement is “not authorized by the law.” Making that statement requires that you consider fair use. As the record label did not even *consider* fair use – e.g. was the use a substantial portion of the work, was it transformative and did it affect the market for the work? – there was a jury question of whether the label performed the required diligence for the good faith belief certification.

Interfaces and copyright

- APIs
- Command-line interfaces

Copyrightability of Interfaces

- Is an API copyrightable?
- What is an API?
 - Short for **application programming interface**, **API** is a set of routines, protocols, and tools for building software applications. APIs allow programmers easier entry into another company's program or service. For example, large companies and communities such as Facebook and Twitter use APIs to allow programmers or website developers easier access to their services and members. (Computerhope.com)

Copyrightability of Interfaces

Oracle v. Google

- Looks at interface specification (command names + parameters) making up the API (not implementations):
- When creating an early version of Android, Google recreated 37 API packages from Oracle's base Java programming language.
- Copied 7,000 lines of declaring code and generally replicated the overall structure, sequence, and organization, but did not copy the implementing code.

Copyrightability of Interfaces

Declaration:

```
type1 method(type2 x, type3 y);  
Example: int foo(char bar);
```

SSO:

```
java.package.Class.method(x, y, ...);  
Example: java.io.File.getPath();
```

Copyrightability of Interfaces

- Google argued, the Java API is a “method of operation”:

Copyright Act 102(b)

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, **method of operation**, concept, principle, or discovery, **regardless of the form in which it is described, explained, illustrated, or embodied in such work.**

Copyrightability of Interfaces

- *Lotus v. Borland*, 49 F.3d 807, 815 (1st Cir. 1995):

“We think that ‘method of operation,’ as that term is used in § 102(b), refers to the means by which a person operates something, whether it be a car, a food processor, or a computer.... We hold that the Lotus menu command hierarchy is an uncopyrightable ‘method of operation.’ The Lotus menu command hierarchy provides the means by which users control and operate Lotus 1-2-3.... Accepting the district court's finding that the Lotus developers made some expressive choices in choosing and arranging the Lotus command terms, we nonetheless hold that that expression is not copyrightable because it is part of Lotus 1-2-3's ‘method of operation.’”

“Applying copyright law to computer programs is like assembling a jigsaw puzzle whose pieces do not quite fit.” (J Boudin concurring.)

Copyrightability of Interfaces

Oracle v. Google, 872 F.Supp.2d 974 (N.D. Cal. 2012)

- Declaring code: “Significantly, when there is only one way to write something, the merger doctrine bars anyone from claiming exclusive copyright ownership of that expression.”
- Structure, sequence, organization (SSO): Not protectable as a “method of operation”
- “This order does not hold that Java API packages are free for all to use without license. It does not hold that the structure, sequence and organization of all computer programs may be stolen. Rather, it holds on the specific facts of this case, the particular elements replicated by Google were free for all to use under the Copyright Act.”

Copyrightability of Interfaces

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

- Declaring code: “First, we agree that merger cannot bar copyright protection for any lines of declaring code unless Sun/Oracle had only one way, or a limited number of ways, to write them.”
- SSO: Rejects *Lotus v. Borland* rule in the 9th Circuit. “As the district court acknowledged, Google could have structured Android differently and could have chosen different ways to express and implement the functionality that it copied.”
- “Given the court’s findings that the SSO is original and creative, and that the declaring code could have been written and organized in any number of ways and still have achieved the same functions, we conclude that Section 102(b) does not bar the packages from copyright protection just because they also perform functions”

Copyrightability of Interfaces

- Petition for Writ of *Certiorari* by Google:

QWERTY

“Consider, for example, the well-known keyboard design known as QWERTY.... If Remington had brought a copyright infringement lawsuit against a keyboard manufacturer for copying the QWERTY layout, it would have failed.... Otherwise, Remington could have monopolized not only the sale of its patented typewriters for the length of a patent term, but also the sale of all keyboards for nearly a century.”



Copyrightability of Interfaces

- Petition for Writ of *Certiorari* by Google:

QWERTY

“Consider, for example, the well-known keyboard design known as QWERTY.... If Remington had brought a copyright infringement lawsuit against a keyboard manufacturer for copying the QWERTY layout, it would have



14-410

GOOGLE, INC. V. ORACLE AMERICA, INC.

The petition for a writ of certiorari is denied.

keyboards for nearly a century.”

Oracle v. Google “2.0” – Cisco v. Arista

- Are “Command Line Interfaces” (CLIs) copyrightable?
- What is a Command Line Interface?
 - a means of interacting with a computer program where the user (or client) issues commands to the program in the form of successive lines of text (command lines). (wikipedia.com)

Oracle v. Google “2.0” – Cisco v. Arista

Cisco Complaint:

- “[T]he software developer has a range of options in deciding on the structure, sequence, and organization of the interface...” ¶ 28.
- “Arista EOS copied the expressions, organization, and hierarchies of hundreds of multi-word command expressions from Cisco IOS. Arista copied at least 500 multi-word commands—including the expression, organization, and hierarchies of those commands—from Cisco’s CLI, encompassing more than 40% of Arista’s multi-word commands.” ¶ 51.
- Alleges both copyright and patent infringement claims
 - Appeal will go to Federal Circuit

Copyrightability of Interfaces: Recap

- Filling in the *Alice* void?
- Effect on competition?
- Effect on design of interfaces?
- Federal Circuit jurisdiction?

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