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Copyright: New Issues Arising From New Technology

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San Francisco Guest Speakers:
Fred von Lohmann, Google Inc.
Corynne McSherry, Electronic Frontier Foundation

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, Vimeo, Facebook
    - Content uploaded by users
    - Both public and private sharing of videos
- Things that look like cable TV
  - Example = Aereo, FilmOnX
    - Individual antennas and storage dedicated to individual users
    - No sharing
- Digital storage lockers
  - Examples = Dropbox, Google Cloud, Amazon Cloud
    - Content uploaded by users
    - Mix of “Me 2 Me”, enterprise, and public sharing uses

Overview of Copyright Liability

A brief summary:

- Direct infringement (*Aereo*, *Cartoon Network*)
  - Reproduction – but the service or the user?
  - Performance – but is it "to the public"?
- Indirect infringement
  - Contributory Infringement (*Perfect 10 v. Amazon*)
  - Inducement (*Grokster*)
  - Vicarious Liability (*Perfect 10 v. Visa*)
- DMCA "safe harbors" for qualifying service providers, 17 USC § 512 (*Viacom v. YouTube*)

Video Hosting Platforms

DMCA safe harbors

- No damages, limited injunctive relief
- Covers four functions: (a) conduit; (b) caching; (c) hosting; (d) linking.
- For all of them, OSP must terminate repeat infringers (and accommodate standard technical measures, which don't exist)
- For (b), (c), and (d), notice-and-takedown
- For (b), (c), and (d), two disqualifiers:
  - Actual or red flag knowledge
  - Financial benefit and substantial involvement
- Register a Copyright Agent!!

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Video Hosting Platforms

Hot topics in DMCA safe harbors and hosting

- What about side-loading? (*Capitol Records v. MP3Tunes.com*)
- Employee reviewers and Red Flag Knowledge (*Capitol Records v. Vimeo*)
- Willful blindness and Actual Knowledge (*Capitol Records v. Vimeo; Capitol Records v. MP3Tunes*)
- Control and substantial influence

Things that look like cable TV

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

- Individual antenna and storage, individual transmisssions.
- The question: a public performance?

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).

Things that look like cable TV

- We have a problem, Houston.
  - What does Aereo do that every cloud hosting provider doesn't also do?
  - And what about *Cartoon Networks*?

Things that look like cable TV

- The Valet Defense: "**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."

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Things that look like cable TV

- Justice Scalia's 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*.
- And the issue is now squarely before the 9th Cir. in *Perfect 10 v. Giganews* (see amicus briefs).

Things that look like cable TV

- Keep in mind why this case is special: no DMCA safe harbor defense.
  - No one wants a cloud DVR where things disappear before you can watch them thanks to notice-and-takedown.
  - But this puts additional pressure on the safe harbors, and reminds us that activities that fall outside the four categories are still left on the storms seas of copyright law, tossed by disputed direct and secondary infringement doctrines.

Digital Storage Lockers

DMCA 512(c) safe harbor applies, of course

- In addition to the other hot topics noted earlier…
- … how should we think about notice-and-takedown for private or semi-private files? (*Capitol v. MP3Tunes.com*)

…and what about the law outside the safe harbors?

Digital Storage Lockers

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

- Applies *Cartoon Network*'s volitional conduct requirement to find no direct liability.
- Also held no liability for contributory infringement under the *Sony-Betamax* rule re substantial non-infringing uses.
- And: "An individual may move copyrighted material around on his personal hard drive without infringing on copyrights."

Content Hosting: Recap

- DMCA Safe Harbors
  - 17 U.S.C. § 512(c) – Information Residing on Systems or Networks at Direction of Users
- Volitional conduct
  - The line between direct and secondary infringement (and thus between strict liability and something else).
- Secondary liability
  - What a mess.

Fair Use

- 17 U.S.C. § 107:
  - 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.

Fair Use and New Tech

Sony Corp. v. Universal (1984):

- Contributory infringement for marketing VCR?
- No: Time shifting = fair use
- If substantial noninfringing uses, then can't sue tech out of existence

Judge Pierre Leval, 1990

"Transformativeness" is key:

- Court should ask whether "the secondary use adds value to the original – if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings"

- "[T]his is the very type of activity that fair use doctrine intends to protect for the enrichment of society."

The "Pretty Woman" Case: "the fair use blueprint:

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

- Two Live Crew copied some lyrics and sampled the signature riff.
  - Purpose/nature of use: "transformative"
    - "The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."
  - Nature of the work: "not much help"
    - Why is the nature of the work unhelpful?
  - Amount used: parody will use the work substantially
  - Effect on the market: no presumption of market harm for parody
  - Assess factors "in light of the purposes of copyright"
  - Are tech uses "transformative"?

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

- 2005: 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. Authors Guild sues.
- March 2011: Massive settlement rejected
- Sept. 2011: Orphan Works Project announced. AG launches second lawsuit. Fair use?

Authors Guild v. Hathitrust:

- "the creation of a full-text searchable database is a quintessentially transformative use."
- "any economic 'harm' caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work."

But different facts; Google is commercial. Is that a difference that makes a difference?

Judge Pierre Leval, 2015

Authors Guild v Google:

- "Snippet view thus adds importantly to the highly transformative purpose of identifying books of interest to the searcher."
- "[W]hile authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship."
- "We see no reason in this case why Google's overall profit motivation should prevail as a reason for denying fair use over its highly convincing transformative purpose . . . "

On the horizon: *Fox v TVEyes*

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Fair Use Creep?

Software is ubiquitous =>

Copyright is ubiquitous (copyright creep)

Robust fair use doctrine ensures
users, innovators and creators aren't also infringers

Fair Use and the DMCA

Lenz v. Universal Music

- Mom posts video of son kinds dancing in the kitchen, “Let’s go Crazy” by Prince playing on CD player in background
- Universal Music Group, acting for Prince, sends takedown notice
- Mom counters, UMG doubles down – not licensed => takedown proper

Fair Use and the DMCA

- DMCA requires affirmation of good faith belief that not authorized by copyright owner or the law.
- Do you have to consider whether a use is lawful before you send a takedown notice, or risk liability?
  - Lenz: Crucial protection for free speech, statute clear
  - UMG: Aff. defense, burden, counter-notice option
- Ninth Circuit: Yes, must consider whether targeted use is fair "Fair use is not just excused by the law, it is wholly authorized by the law." BUT
- Although copyright owners must consider fair use, they only need to form a *subjective* good faith belief
- Both sides seeking rehearing en banc

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."
  - Relevant timeframe?
- 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

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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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