

Santa Clara University

Hot Topics in Copyright & Trademark Law

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Copyright at the Supreme Court

- **Fourth Estate Public Benefit Corp. v. Wall-Street.com**

- “Whether the “registration of [a] copyright claim has been made” within the meaning of 17 U.S.C. § 411(a) when the copyright holder delivers the required application, deposit, and fee to the Copyright Office, as the U.S. Courts of Appeal for the 5th and 9th Circuits have held, or only once the Copyright Office acts on that application, as the U.S. Courts of Appeals for the 10th and, in the decision below, the 11th Circuits have held”

- **Fox News v. TVEyes**

- Proposed Q presented: “Can the transformative use of a copyrighted work cause a cognizable market harm under 17 U.S.C. 107(4) if it is used in connection with a commercially successful business that the author is unlikely to enter or authorize?”

Copyright at the Supreme Court

● **Ventura v. Motherless**

- Proposed Qs: presented: “Under the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512, where an Online Service Provider’s (OSP) user uploads over 300,000 pieces of content in one year and had been the subject of numerous copyright complaints, yet whose access was still never terminated, whether the OSP can be held, as matter of law, to have adopted a reasonable termination policy for repeat copyright infringers where the OSP asserts its unwritten policy is to somehow assess, via an undefined “I Know It When I See It” type analysis, the subjective intent of the unknown, anonymous uploader”.
- “Whether the DMCA permits an OSP to itself review and then publish hundreds of thousands of pieces of user-offered content—where undisputed expert testimony showed 66% had watermarks/indicia of ownership and where another 20% had clear indicia of professional production/ownership—yet escape liability, at summary judgment, on the theory that there was neither actual nor apparent knowledge of the infringing activity on the site.”
- “Ultimately, whether OSP’s should receive immunity for copyright infringement liability where the same real-world counterpart businesses face copyright liability for the same volitional conduct—that is, whether the United States has two different bodies of copyright law, a free-pass standard for online businesses and a traditional copyright standard for brick and mortar businesses.”

● **Oracle v. Google**

- 2012: jury rules APIs aren’t copyrightable
- 2014: Federal Circuit reverses, remands for trial on fair use
- 2014-15: Google unsuccessfully petitions SCOTUS
- 2016: jury rules Google made fair use of APIs
- 2018: Federal Circuit reverses, sends to district court to set damages

European Copyright(exi)t

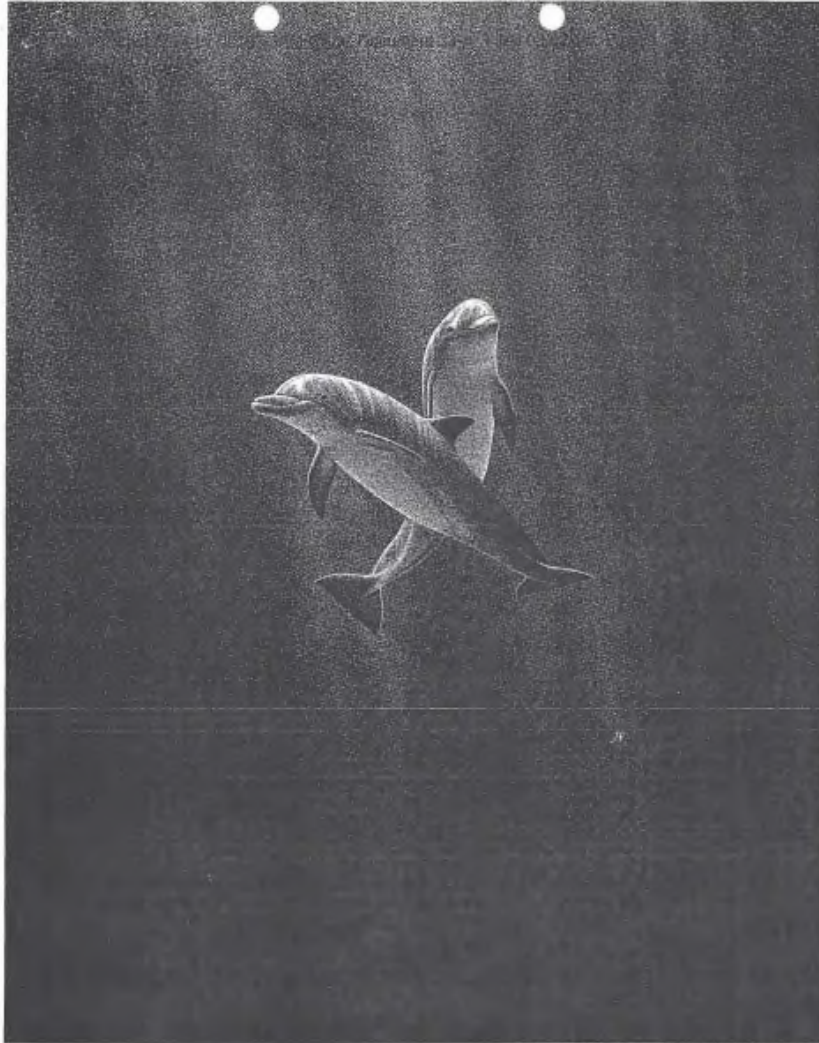
● Directive on Copyright in the Digital Single Market

- “online content sharing service provider under this Directive shall cover information society service providers one of the main purposes of which is to store and give access to the public or to stream significant amounts of copyright protected content uploaded / made available by its users, and that optimise content, and promote for profit making purposes, including amongst others displaying, tagging, curating, sequencing, the uploaded works or other subject-matter, irrespective of the means used therefor, and therefore act in an active way”
 - Excludes: microenterprises, small size enterprises, non-commercial service providers (“online encyclopedia”), educational/scientific repositories, “cloud services for individual use which do not provide direct access to the public, open source software developing platforms, and online market places whose main activity is online retail of physical goods”
- Article 11: “Information society service providers” who establish hyperlinks to “press publications” must pay “fair and proportionate remuneration” for 5 years unless they provide “mere hyperlinks which are accompanied by individual words”
 - Article 13b: ditto for image search engines
- Article 12: New copying and making available rights to “sports event organizers”
- Article 13: “Online content sharing service providers perform an act of communication to the public and therefore are responsible for their content and should therefore conclude fair and appropriate licensing agreements with rightholders”
 - “where right holders do not wish to conclude licensing agreements, online content sharing service providers and right holders should cooperate in good faith in order to ensure that unauthorised protected works or other subject matter, are not available on their services.”

Developments in Congress

- **S2823/HR 5447 (Music Modernization Act); HR 1551 (Orrin G. Hatch Music Modernization Act); S2923/HR3301 (CLASSICS Act); S2625/HR 881 (AMP Act). As passed by Senate:**
 - Ease compulsory license obligations for streaming services
 - Allocate money from compulsory licenses
 - Provide federal protection for pre-1972 sound recordings
 - Published before 1923: up to 4 years
 - Published 1923-1946: 100 years
 - Published 1947-1956: 110 years
 - Published 1957-1972: Through Feb. 15, 2067
 - Limits: statutory licensing, noncommercial use of orphan work, 512 safe harbor
 - 47 USC 230 won't apply
- **HR 3945: Copyright Alternative in Small-Claims Enforcement Act of 2017 (CASE ACT)**
- **HR 6695: Trademark Licensing Protection Act of 2018**
 - “The licensing of a mark for use by a related company, and any control or exercise of control over thereof for the purpose of preserving the goodwill, reputation, uniformity, or expectation of the public of the nature and quality of goods or services associated with the mark, may not be construed as establishing an employment or principal-agent relationship between the owner of the mark and the related company.”
- **AIPLA/INTA/IPO: presume irreparable harm from Lanham Act violations**

More Copyright Cases: Folkens v. Wyland (9th Cir.)



Folkens's Two Dolphins



Wyland's Life in the Living Sea²

“a depiction of two dolphins crossing under sea, one in a vertical posture and the other in a horizontal posture, is an idea first expressed in nature and as such is within the common heritage of humankind”

More Copyright Cases: Rentmeester v. Nike (9th Cir.)



Rentmeester's photograph



Nike's photograph

“What Rentmeester’s photo and the Nike photo share are similarities in general ideas or concepts: Michael Jordan attempting to dunk in a pose inspired by ballet’s grand jeté; an outdoor setting stripped of most of the traditional trappings of basketball; a camera angle that captures the subject silhouetted against the sky”



Nike's Jumpman logo

More Copyright Cases

- **Goldman v. Breitbart (SDNY):** in-line linking may be copyright infringement (on appeal)
- **Spanski v. Telewizja Polska (DC Cir.):** international streamer must geoblock to avoid infringing in US
- **BMG v. Cox (4th Cir.):** IAP loses 512 safe harbor for 13 strike policy
- **Gray v. Perry (CD Cal.):** YouTube availability isn't always "access" for copying-in-fact purposes, but 4M views creates an inference of access
- **ABS Entertainment v. CBS (9th Cir.):** remastering sound recordings doesn't create new copyright
- **Philpot v. LM Communications (ED Ky.):** recycling Wikipedia photo without attribution is infringing
- **NAFTA**
- **"Deepfakes"**

The Monkey Selfie (Naruto v. Slater, 9th Cir.)



More Trademark Topics

- **Registration Limits**

- Matal v. Tam (Sup. Ct.): limits on “disparaging” mark registrations are unconstitutional
- In re. Brunetti (Fed. Cir.): limits on “immoral” or “scandalous” mark registrations are unconstitutional (appeal being considered)

- **Keyword Advertising**

Emojis and IP (Shameless Plug)

74	U=1F628											—		fearful face
75	U=1F630											—		anxious face with sweat
76	U=1F625											—	—	sad but relieved face
77	U=1F622													crying face
78	U=1F62D													loudly crying face
79	U=1F631													face screaming in fear
80	U=1F616													confounded face
81	U=1F623													persevering face
82	U=1F61E												—	disappointed face
No	Code	Browser	Appl	Goog	Twtr	One	FB	Sams	Wind	GMail	SB	DCM	KDDI	CLDR Short Name

Eric Goldman, *Emojis and the Law*, 93 WASH. L. REV. ___ (2018), <https://ssrn.com/abstract=3133412>