Copyright Developments in the United States

David O. Carson
International Copyright Law 2018
London, 28 November 2018

1

Music Modernization Act

- Enacted 9 October 2018
- 3 Titles:
  - Musical Works Modernization Act
    - Established blanket statutory license for digital music services covering "mechanical" (reproduction and distribution) rights to musical compositions for covered activities
    - "COVERED ACTIVITY.—The term 'covered activity' means the activity of making a digital phonorecord delivery of a musical work, including in the form of a permanent download, limited download, or interactive stream, where such activity is subject to compulsory licensing under this section."
    - Establishes a mechanical licensing collective to receive notices of license, collect and distribute royalties, and maintain a public database "of musical works (and shares of such works) and, to the extent known, the identity and location of the copyright owners of such works (and shares thereof) and the sound recordings in which they are embodied."
      - 2 year transition period.

Music Modernization Act

- Classics Protection and Access Act
  - In effect, brings pre-1972 sound recordings into the federal copyright system, with some modifications.
  - Adjustments re term of protection: 95 years from first publication, but with additional time for older works whose terms would expire soon.
    - Pre-1923: 31 December 2021
    - 1923-46: 5 additional years
    - 1947-56: 15 additional years
    - All others: 15 Feb. 2067
- Allocation for Music Producers Act
  - Allows sound recording producers to receive a share of performers' royalties under the statutory license for noninteractive streaming, when the performers have agreed or are deemed to have agreed.

Marrakesh Treaty

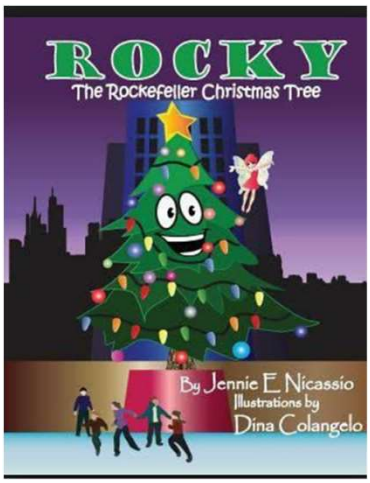
- Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled
- 6 June 2018,
  - Senate unanimously approved resolution of advice and consent to ratification. Now on the President's desk.
  - Senate unanimously passed the Marrakesh Treaty Implementation Act
- 25 September 2018, House of Representatives passed Marrakesh Treaty Implementation Act.
- 9 October, President signed the Act into law.

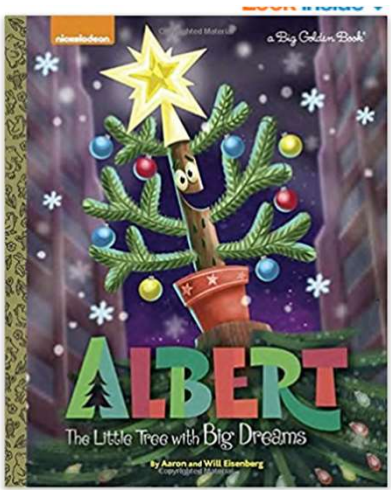
Marrakesh Treaty Implementation Act

- Makes minor revisions to existing U.S. exception for reproduction and distribution of accessible-format copies of works for the blind and visually impaired, to comply with treaty obligations.
- Permits exportation of accessible format copies to authorized entities and eligible persons located in countries that are parties to Marrakesh Treaty.
- Permits importation by authorized entities and eligible persons of accessible format copies.

Nicassio v. Viacom International

U.S. District Court, Western Dist. of Pennsylvania, 27 April 2018





Williams v. Gaye

U.S. Court of Appeals, 9th Circuit, March 2018 (amended July 2018)

"Got to Give It Up" vs. "Blurred Lines."

- Court of appeals upheld judgment of infringement based on jury verdict.
- Original opinion recited the "inverse ratio rule,"
  - "which operates like a sliding scale: The greater the showing of access, the lesser the showing of substantial similarity is required. Williams and Thicke readily admitted at trial that they had a high degree of access to "Got To Give It Up." The Gayes' burden of proof of substantial similarity is lowered accordingly.
  - Amended opinion didn't mention it.
- District court did not permit the jury to listen to the sound recording of "Got to Give it Up."
- Court of appeals said it's an unsettled question, but no need to settle it here because the Gayes won in any event.
- $5.3 million judgment, plus "running royalty" of 50% of publishing revenues.

Williams v. Gaye

U.S. Court of Appeals, 9th Circuit, March 2018 (amended July 2018)

- Dissent: "The majority allows the Gayes to accomplish what no one has before: copyright a musical style. 'Blurred Lines' and 'Got to Give It Up' are not objectively similar. They differ in melody, harmony, and rhythm. Yet by refusing to compare the two works, the majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere.
- Majority: "Our decision does not grant license to copyright a musical style or 'groove.' Nor does it upset the balance Congress struck between the freedom of artistic expression, on the one hand, and copyright protection of the fruits of that expression, on the other hand. Rather, our decision hinges on settled procedural principles and the limited nature of our appellate review, dictated by the particular posture of this case and controlling copyright law. Far from heralding the end of musical creativity as we know it, our decision, even construed broadly, reads more accurately as a cautionary tale for future trial counsel wishing to maximize their odds of success.

Skidmore v Led Zeppelin

U.S. Court of Appeals, 9th Cir., Sept. 2018

Skidmore v Led Zeppelin

U.S. Court of Appeals, 9th Cir., Sept. 2018

We are persuaded that for unpublished musical works under the 1909 Act, the deposit copy defines the scope of the copyright. Overall, the structure of the 1909 Act demonstrates that the deposit copy encompasses the scope of the copyright for unpublished works, as the deposit copy must be filed not only to register the copyright, but for the copyright to even exist. The 1909 Act states that "copyright may also be had of the works of an author of which copies are not reproduced for sale, *by the deposit*, with claim of copyright, of one complete copy of such work."

Skidmore v Led Zeppelin

U.S. Court of Appeals, 9th Cir., Sept. 2018

Skidmore argues that by not allowing the jury to observe Page listening to the recordings of "Taurus," the effect of the court's ruling was to decrease the probative value of Skidmore's questioning of Page. Although the jury could still draw conclusions and inferences from Page's demeanor during his testimony, allowing the jury to observe Page listening to the recordings would have enabled them to evaluate his demeanor while listening to the recordings, as well as when answering questions. Limiting the probative value of observation was not proper here, as the risk of unfair prejudice or jury confusion was relatively small and could have been reduced further with a proper admonition. For example, the district court could have instructed the jury that the recordings were limited to the issue of access and that they were not to be used to judge substantial similarity. … Given the probative value of the information and the relatively low risk of unfair prejudice, we conclude that the district court abused its discretion in excluding the evidence.

Skidmore v. Led Zeppelin

U.S. Court of Appeals, 9th Cir., Sept. 2018

Skidmore also argues that the district court erred by not including a jury instruction on the inverse ratio rule. Under the "inverse ratio rule," a lower standard of proof of substantial similarity is required "when a high degree of access is shown." We recently clarified the framework underlying the inverse ratio rule. *See Rentmeester*, 883 F.3d at 1124–25. This rule "assists only in proving copying, not in proving unlawful appropriation". Even if a plaintiff proves that a defendant copied his work, the plaintiff must still show that the copying "amounts to unlawful appropriation." The showing of substantial similarity necessary to prove unlawful appropriation does not vary with the degree of access the plaintiff has shown."

17 U.S.C. §107 - Fair Use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

17 U.S.C. §107 - Fair Use (cont'd)

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Oracle America Inc. v Google LLC

US Court of Appeals, Federal Circuit – 2018

```
package java.net;                                        [package statement]

import java.io.IOException;                              [import statement]
import java.io.Serializable;                             [import statement]

* * *

public final class URL implements Serializable           [class declaration]
{
    * * *
    private String host;                                 [field declaration]
    * * *
    private int port = -1;                               [field declaration]

    * * *

    public URL(String spec) throws MalformedURLException [method declaration]
    {
        [method body (i.e., implementing code) not copied]
    }

    public Object getContent() throws IOException        [method declaration]
    {
        [method body (i.e., implementing code) not copied]
    }

    private static synchronized URLStreamHandler         [method declaration]
    getURLStreamHandler(String protocol)
    {
        [method body (i.e., implementing code) not copied]
    }
}
```

Transformative Use

- A use is “transformative” if it “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.” The critical question is “whether the new work merely supersede[s] the objects of the original creation . . . or instead adds something new.”
- To be transformative, a secondary work must either alter the original with new expression, meaning, or message or serve a new purpose distinct from that of the original work.
- Where the use is for the same intrinsic purpose as [the copyright holder’s] . . . such use seriously weakens a claimed fair use.

Oracle America Inc. v Google LLC

First Fair Use Factor: purpose & character of the use

- District Court: a reasonable jury could have found that, although Google's use was commercial, it was transformative because Google integrated only selected elements for mobile smart-phones and added its own implementing code.
- Court of Appeals:
  - Google's use of the declaring code served commercial purposes, even though Google gives it away for free.
  - Google's use of the API packages is not transformative as a matter of law because:
    - (1) it does not fit within the uses listed in the preamble to § 107;
    - (2) the purpose of the API packages in Android is the same as the purpose of the packages in the Java platform;
    - (3) Google made no alteration to the expressive content or message of the copyrighted material; and
    - (4) smartphones were not a new context.

- Score: Oracle 1, Google 0

Oracle America Inc. v Google LLC

Second Fair Use Factor: nature of the copyrighted work

- District Court: a reasonable jury could have concluded that, while the declaring code and SSO were creative enough to qualify for copyright protection, they were not highly creative, and that functional considerations predominated in their design.
- Court of Appeals:
  - Some works are closer to the core of intended copyright protection than others, and fair use is more difficult to prove when such works are copied.
  - This factor turns on whether the work is informational or creative.
  - A reasonable jury could have found that the declarations and their structure, sequence, and organization of the were functional, which favors a finding of fair use.
- But the second factor "typically has not been terribly significant in the overall fair use balancing."
- Score: Oracle 1, Google 1

Oracle America Inc. v Google LLC

Third Fair Use Factor: amount & substantiality of the portion used

- District Court: a reasonable jury could have found that Google copied only so much as was reasonably necessary for a transformative use," and that the number of lines duplicated was minimal.
- Court of Appeals: The third factor is at best neutral, and arguably weighs against fair use.
  - What is important is how much was taken from Java, and not how much was added to Android.
  - Analysis is both quantitative and qualitative.
  - Because Google's use was not transformative, it's irrelevant whether Google took more than was reasonably necessary for its purpose.
  - Only 170 lines of code were necessary to write in the Java language. Google copied 11,500 lines of code—11,330 more than was necessary.
  - There is no inherent right to copy in order to capitalize on the popularity of the copyrighted work or to meet the expectations of intended customers.
- Score: Oracle 1½ , Google 1

Oracle America Inc. v Google LLC

Fourth Fair Use Factor: effect of the use on the potential market for or value of the copyrighted work

- District Court: the jury could reasonably have found that use of the declaring lines of code (including their SSO) in Android caused no harm to the market for the copyrighted works, which were for desktop and laptop computers.
- Court of Appeals: Fourth factor weighs heavily in favor of Oracle.
  - Fair use is limited to copying by others which does not materially impair the marketability of the work which is copied, including derivative markets.
  - Courts look at the impact on impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets.
  - Evidence showed Java SE had been used in smartphones for years, and Android competed in the same marketplace and had an impact on Java's marketability.
  - No reasonable jury could conclude that there was no market harm to Oracle from Google's copying.
  - And in any event smartphones were at least a "likely to be developed" market.
  - We conclude that "unrestricted and widespread conduct of the sort engaged in by" Google would result in "a substantially adverse impact on the potential market for the original" and its derivatives.
  - Score: Oracle 3½, Google 1

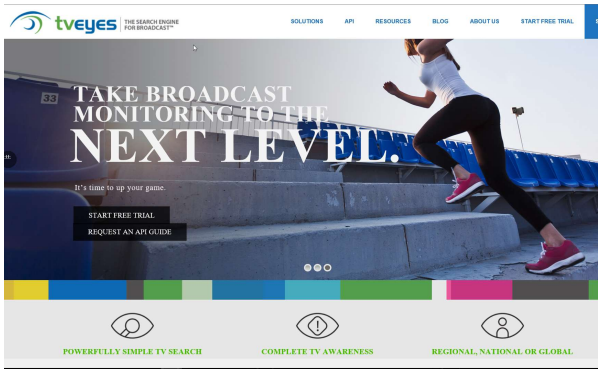
Oracle America Inc. v Google LLC

Balancing the 4 Factors

- Allowing Google to commercially exploit Oracle's work will not advance the purposes of copyright in this case.
- There is nothing fair about taking a copyrighted work verbatim and using it for the same purpose and function as the original in a competing platform.
- Android's release effectively replaced Java SE as the supplier of Oracle's copyrighted works and prevented Oracle from participating in developing markets. This superseding use is inherently unfair.
- On this record, factors one and four weigh heavily against a finding of fair use, while factor two weighs in favor of such a finding and factor three is, at best, neutral. Weighing these factors together, we conclude that Google's use of the declaring code and SSO of the 37 API packages was not fair as a matter of law.

Fox News Network v. TVEyes

US Court of Appeals, 2d Circuit – 27 February 2018



Fox News Network v. TVEyes

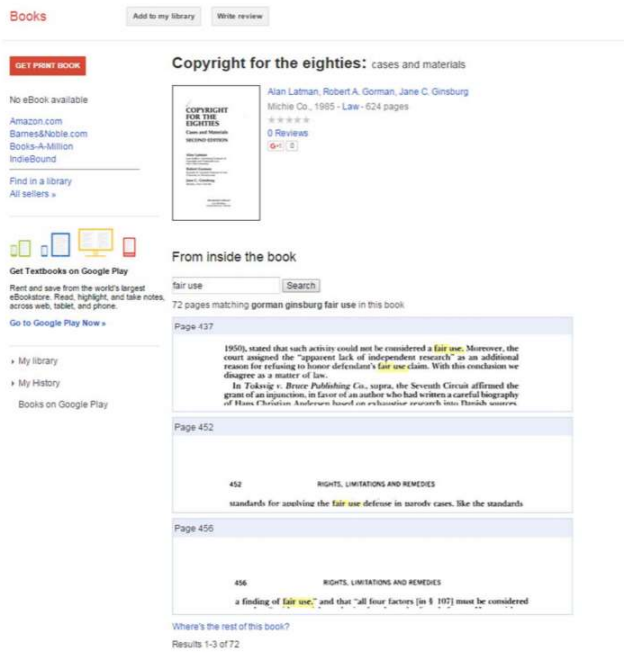
US Court of Appeals, 2d Circuit – 27 February 2018

- Search function:
  - TVEyes records essentially all television broadcasts as they happen, drawing from more than 1,400 channels, recording 24 hours a day, every day. By copying the closed-captioned text that accompanies the content it records (and utilizing speech-to-text software when necessary), TVEyes creates a text-searchable transcript of the words spoken in each video. The videos and transcripts are consolidated into a database. A client inputs a search term and gets a list of video clips that mention the term.
- Watch function:
  - A click on a thumbnail image of a clip plays the video, beginning fourteen seconds before the search term was spoken, and displays a segment of the transcript with the search term highlighted. The parties dispute the quality of the clips. Fox contends that the clips are high definition; TVEyes contends that the clips are grainier than the original broadcasts. The clips can be played for no more than ten minutes, but a user can play an unlimited number of clips.

Fox News Network v. TVEyes

US Court of Appeals, 2d Circuit – 27 February 2018

- Ancillary functions:
  - A TVEyes client may “archive” videos permanently on the TVEyes servers and may download videos directly to the client’s computer. These services are useful because TVEyes otherwise deletes captured content after thirty-two days. Clients can also email the clips for viewing by others, including those who are not TVEyes clients. And clients can search for videos by date, time, and channel (rather than by keyword).



Fox News Network v. TVEyes

US Court of Appeals, 2d Circuit – 27 February 2018

First Fair Use Factor: purpose & character of the use

- The "purpose and character" of the secondary use, 17 U.S.C. § 107(1)--the primary inquiry is whether the use communicates something new and different from the original or otherwise expands its utility, that is, whether the use is "transformative."
- To be transformative, a use must "do something more than repackage or republish the original copyrighted work"; it must add something new, with a further purpose or different character, altering the first with new expression, meaning or message.

Fox News Network v. TVEyes

US Court of Appeals, 2d Circuit – 27 February 2018

First Fair Use Factor: purpose & character of the use (cont'd)

- The Watch function has only a modest transformative character because, notwithstanding the transformative manner in which it delivers content, it essentially republishes that content unaltered from its original form, with no "new expression, meaning or message."
- The commercial nature of a secondary use weighs against a finding of fair use. And it does so especially when, as here, the transformative character of the secondary use is modest.
- The first statutory factor therefore favors TVEyes, albeit slightly.
- Score: Fox 0, Google ¾

Fox News Network v. TVEyes

US Court of Appeals, 2d Circuit – 27 February 2018

Second Fair Use Factor: nature of the copyrighted work

- This factor "has rarely played a significant role in the determination of a fair use dispute," and it plays no significant role here.
- TVEyes presses the argument that, since facts are not copyrightable, the factual nature of Fox's content militates in favor of a finding of fair use. We have rejected this argument: "Those who report the news undoubtedly create factual works. It cannot seriously be argued that, for that reason, others may freely copy and re-disseminate news reports."
- Score: Fox 0, Google ¾

Fox News Network v. TVEyes

US Court of Appeals, 2d Circuit – 27 February 2018

Third Fair Use Factor: amount & substantiality of the portion used

- The relevant consideration is the amount of copyrighted material *made available to the public* rather than the amount of material *used by the copier*.
- This factor clearly favors Fox because TVEyes makes available virtually the entirety of the Fox programming that TVEyes users want to see and hear.
- TVEyes redistributes Fox's news programming in ten-minute clips, which--given the brevity of the average news segment on a particular topic--likely provide TVEyes's users with all of the Fox programming that they seek and the entirety of the message conveyed by Fox to authorized viewers of the original.
- Score: Fox 1, Google ¾

Fox News Network v. TVEyes

Fourth Fair Use Factor: effect of the use on the potential market for or value of the copyrighted work

- The fourth factor focuses on whether the copy brings to the marketplace a competing substitute for the original, or its derivative, so as to deprive the rights holder of significant revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original.
- It requires consideration of not only the market harm caused by the particular actions of the alleged infringer, but also the market harm that would result from unrestricted and widespread conduct of the same sort.
- But the focus is on the impact on potential licensing revenues for "traditional, reasonable, or likely to be developed markets."
- By providing Fox's content to TVEyes clients *without* payment to Fox, TVEyes is in effect depriving Fox of licensing revenues from TVEyes or from similar entities.
- In short, by selling access to Fox's audiovisual content without a license, TVEyes deprives Fox of revenues to which Fox is entitled as the copyright holder. Therefore, the fourth factor favors Fox.
- Score: Fox 2, Google ¾

Fox News Network v. TVEyes

Balancing the 4 Factors

- The factors should not be treated in isolation, one from another; rather, all are to be explored, and the results are to be weighed together, in light of the purposes of copyright.
- We conclude that TVEyes's service is not justifiable as a fair use. As to the first factor, TVEyes's Watch function is at least somewhat transformative in that it renders convenient and efficient access to a subset of content; however, because the function does little if anything to change the content itself or the purpose for which the content is used, its transformative character is modest at best. Accordingly--and because the service at issue is commercial--the first factor favors TVEyes only slightly. The second factor is neutral in this case. The third factor strongly favors Fox because the Watch function allows TVEyes's clients to see and hear virtually all of the Fox programming that they wish. And the fourth factor favors Fox as well because TVEyes has usurped a function for which Fox is entitled to demand compensation under a licensing agreement.

Cambridge University Press v. Albert

US Court of Appeals, 11th Circuit – 19 Oct. 2018

- From coursepacks to eReserves.
- First trial: 48 excerpts constituted prima facie infringement but 43 of them were fair uses.
- First appeal: Reversed because of errors by district court, including:
  - Giving equal weight to each of the 4 fair use factors
    - District court failed to recognize that a given factor may be more or less important depending on the circumstances of the case.
    - District court erred in treating the four factors as a simple mathematical formula
  - Insufficient weight given to threat of 4th fair use factor (market harm).
- Second trial: 44 of the 48 excerpts were fair uses.

Cambridge University Press v. Albert - 2

- Second appeal: Reversed because:
  - District court should not have changed its ruling of factor 4 because court of appeals had upheld it.
    - The only problem with the original analysis of factor 4 was that in weighing and balance all 4 factors, the district court had undervalued the severe threat of market harm posed by the nontransformative copying. It's earlier analysis of factor 4 was correct.
      - District court must reinstate its original finding that factor 4 strongly disfavors fair use.
  - District court did adjust the weights of the factors, but after assigning each factor a particular weight, it applied that weight across the board, applying a mathematical formula, rather than exploring the factors "holistically," considering each instance of copying in light of its particular facts.
    - The review must be qualitative, not quantitative, and the 4th factor looms large in the overall analysis.
  - District court erred by considering whether the publishers' licenses were excessively costly in the context of the 3rd factor (amount & substantiality of the portion used).
    - Cost of the use is irrelevant to that factor, which is about how much the defendant copied.

Cambridge University Press v. Albert - 2

- Court of Appeals concluded:
  - "The district court must reinstate its earlier findings that factor four strongly disfavors fair use for 31 of the 48 excerpts. The district court must eschew a quantitative approach to the weighing and balancing of the fair-use factors and give each excerpt the holistic, qualitative, and individual analysis that the Act demands. And the district court must omit any consideration of price from its analysis of the third factor."

https://law.resource.org/pub/us/code/safety.html

Public Safety Codes of the ...

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Public Safety Codes Incorporated By Law

ATTENTION! Always Check With Your Authority For Additions, Deletions, and Errata!

This page is dedicated to Peter Veeck in recognition of his pioneering work in public safety.
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Please send updates and corrections to Public.Resource.Org.

Building	Fire	Mechanical	Plumbing	Fuel/Gas	Electrical	Accessibility	Energy
ALABAMA		Authority: Building Commission					
IBC2009 | IBC2009 Storm: ICC500-2008	IFC2009 | IBC2009	IMC2009 | IBC2009	IPC2009 | IPC2009	IFGC2009	NEC2011 | NEC2011		ASHRAE 90.1-2007
ALASKA		Authority: Fire					
IBC2009 | IBC2009	IFC2009 | IBC2009	IMC2009 | IBC2009	UPC2003	IFGC2006	NEC2005 IEE C2-2002		
ARIZONA		Authority: SOS Authority: Fire					
	IFC2006						IECC2006
Phoenix		Authority: Building					
IBC2012 IRC2012 IEBC2012 IPMC2012 | IPMC2012	IFC2012	IMC2012	UPC2012	IFGC2012 | IFGC2012	NEC2011 | NEC2011	A117.1-2009	IECC2012
ARKANSAS		Authority: Fire Authority: Building					
IBC2006	IFC2006	IMC2006	IPC2006	IFGC2006			
CALIFORNIA		Authority: BSC					
2016 Building	2016 FIRE	2016 MECH	2016 PLUM		2013 ELEC		ENERGY GREEN
COLORADO		Authority: Architect					
IBC2012	IFC2006	IMC2012	IPC2009 | IPC2009	IFGC2009	NEC2011 | NEC2011	A117.1-2003	IECC2012

ASTM v. Public.Resource.Org

U.S. Court of Appeals, District of Columbia Cir., 17 July 2018

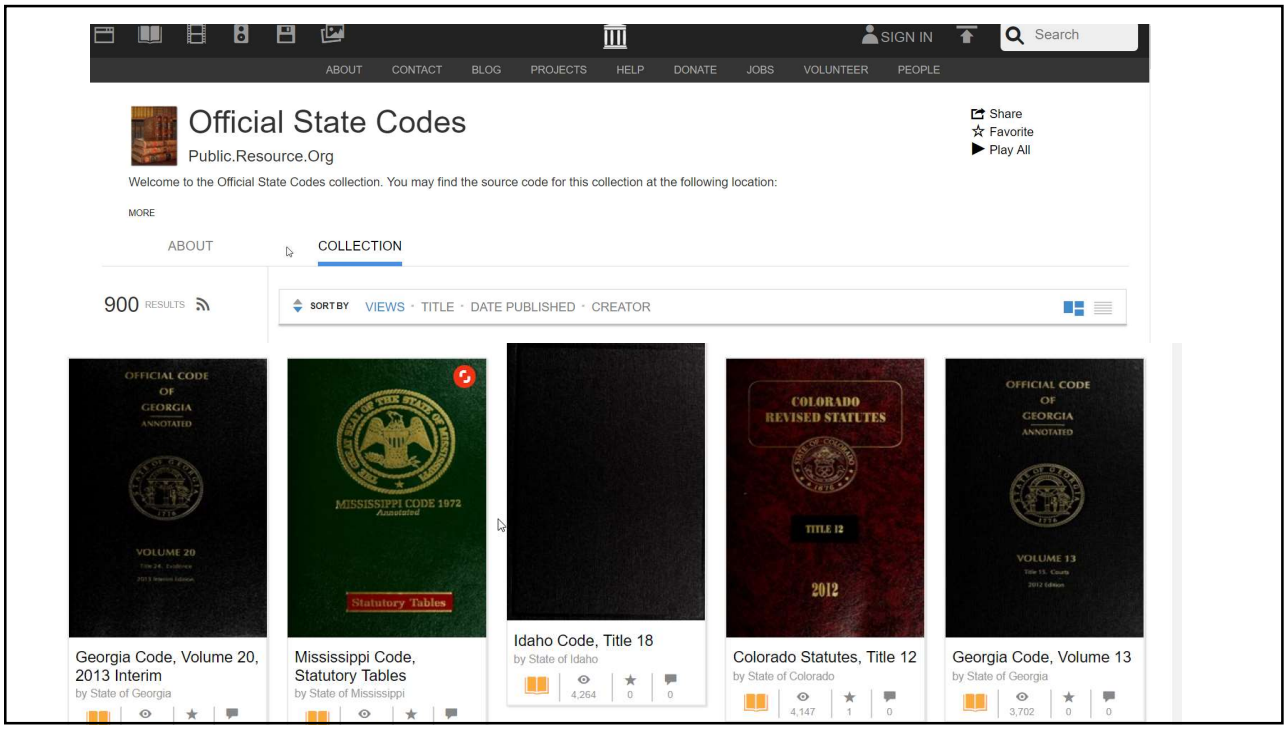
- The question in this case is whether private organizations whose standards have been incorporated by reference can invoke copyright and trademark law to prevent the unauthorized copying and distribution of their works.
- Put simply, the incorporated standards at issue here vary considerably in form, substance, and effect. … These ten standards, in turn, represent but a fraction of the heterogeneity of the hundreds of other incorporated standards not at issue in this appeal.
- Although PRO raises a serious constitutional concern with permitting private ownership of standards essential to understanding legal obligations, we think it best at this juncture to address only the statutory fair use issue—which may provide a full defense to some, if not all, of the SDO's infringement claims in this case—and leave for another day the question of whether the Constitution permits copyright to persist in works incorporated by reference into law.

ASTM v. Public.Resource.Org

- **Purpose & character of the use:**
  - The use was noncommercial and for the purpose of facilitating public debate.
  - Court suggested that posting the standards may have been "transformative" in function or purpose, apparently because it facilitates public access to the law.
- **Nature of the copyrighted work:**
  - All of the works at issue here fall at the factual end of the fact-fiction spectrum, which counsels in favor of finding fair use.
  - Standards incorporated by reference into law are, at best, at the outer edge of copyright's protective purposes.
- **Amount and substantiality of the portion used:**
  - If PRO limits its copying to only what is required to fairly describe the standard's legal import, this factor would weigh strongly in favor of a finding of fair use here, especially given that precision is nine-tenths of the law."

ASTM v. Public.Resource.Org

- **Effect on the market for or value of the copyrighted work:**
  - District court should consider at least 3 questions:
    - Since the standards development organizations admit that they made the standards freely available, just how much additional harm does PRO's reproduction cause to the market for these standards?
    - Public.Resources.org generally reproduces entire standards. If it were to reproduce only the portions of a set of standards that were actually incorporated into law, would there still be a vibrant market for the standards in their entirety?
    - Standards are routinely updated, and the law doesn't always catch up. Does the posting of outdated standards harm the market for updated unincorporated editions of the standards?
      - There is some reason to think that the market demand for the most up-to-date standards would be resilient since the standards development organizations argue that the primary purpose of the standards is to have them used by private industry or other non-governmental users.
- **Conclusion:**
  - In many cases, it may be fair use for PRO to reproduce part or all of a technical standard in order to inform the public about the law. In the end, however, whether PRO's use as to each standard at issue in this appeal qualifies as a fair use remains for the district court to determine.



Code Revision Commission v. Public.Resource.Org

U.S. Court of Appeals, District of Columbia Cir., 17 July 2018

- In particular, we rely on the identity of the public officials who created the work, the authoritativeness of the work, and the process by which the work was created. These are critical markers. Where all three point in the direction that a work was made in the exercise of sovereign power -- which is to say where the official who created the work is entrusted with delegated sovereign authority, where the work carries authoritative weight, and where the work was created through the procedural channels in which sovereign power ordinarily flows -- it follows that the work would be attributable to the constructive authorship of the People, and therefore uncopyrightable.

Close v. Sotheby

U.S. Court of Appeals, 9th Circuit, 6 July 2018

- Resale Royalty Right
- California's Artist's Resale Royalties Act is preempted by federal copyright law, except for claims arising between 1 January 1977 (when the Act went into effect) and 1 January 1978 (when the Copyright Act of 1976b went into effect).
- 17 U.S.C. section 301:
  - (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

Spanski Enterprises, Inc. v. Telewizja Polska

U.S. Court of Appeals, District of Columbia Circuit, 2 March 2018

- Extraterritorial effect of U.S. Copyright Act.
- "[W]e hold that where a foreign broadcaster uploads copyrighted content to its website and directs that content onto a computer screen in the United States at a user's request, the broadcaster commits an actionable domestic violation of the Copyright Act."

Triple Up Limited v. Youku Toudu Inc.,

U.S. Court of Appeals, District of Columbia Circuit, 17 July 2018

- "Youku lacks a significant "physical presence" in the United States: it maintains no offices and has no employees here."
- "Personal jurisdiction cannot be based solely on the ability of District residents to access the defendant['s] websites, for this does not by itself show any persistent course of conduct by the defendant in the forum. The complaint does not allege that any United States viewer, including Triple Up's attorney, paid for or otherwise engaged in a business transaction with Youku when viewing the videos. … Nor is there any plausible allegation that Youku designed its websites even to make them generally usable by viewers in the United States, let alone to purposefully target them. The text on its websites is entirely in Mandarin Chinese."
- "Third, Triple Up is incorporated in Seychelles and does not allege that it has distinct business operations in the United States that were injured by Youku."
- "Nor are any facts alleged suggesting that Youku acted intentionally or in bad faith in a manner that led to the three films being viewed in the United States."

Allen v. Cooper

U.S. Court of Appeals, Fourth Circuit, 10 July 2018

- State sovereign immunity.
- "[A] State, its agencies, and its officials acting in their official capacities cannot be sued in federal court without their consent."
- "[T]he question presented here reduces to whether Congress validly exercised its constitutional power when enacting the Copyright Remedy Clarification Act."
- Relying on Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) ("the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause"), and noting the failure to demonstrate that Congress acted based" on a record of "widespread and persisting deprivation of constitutional rights" that is required to warrant prophylactic legislation under the 14th Amendment ("nor shall any state deprive any person of life, liberty, or property, without due process of law)," the court found that Congress had no authority to abrogate state sovereign immunity for copyright infringement.
- "[W]e conclude that the Copyright Remedy Clarification Act's wholesale abrogation of sovereign immunity for claims of copyright infringement is grossly disproportionate to the relevant injury under the Fourteenth Amendment, and therefore the abrogation cannot be sustained as an enactment that 'appropriate[ly]' 'enforce[s]' that Amendment."

Naruto v. Slater

U.S. Court of Appeals, 9th Circuit, 23 April 2018

- Standing: Monkey lacked statutory standing to file a suit for copyright infringement because Copyright Act does not expressly authorize animals to file copyright infringement suits. "[I]f animals are to be accorded rights to sue, the provisions involved therefore should state such rights expressly.
- "Several provisions of the Copyright Act also persuade us against the conclusion that animals have statutory standing to sue under the Copyright Act For example, the 'children' of an 'author,' 'whether legitimate or not,' can inherit certain rights under the Copyright Act. See 17 U.S.C. §§ 101, 201, 203, 304. Also, an author's 'widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest.' Id. § 203(a)(2)(A). The terms 'children,' 'grandchildren,' 'legitimate', 'widow,' and 'widower' all imply humanity and necessarily exclude animals that do not marry and do not have heirs entitled to property by law."

Additional matter re:
Williams v. Gaye
Skidmore v Led Zeppelin

Williams v. Gaye

U.S. Court of Appeals, 9th Circuit, March 2018 (amended July 2018)

Williams v. Gaye

U.S. Court of Appeals, 9th Circuit, March 2018 (amended July 2018)

NGUYEN, Circuit Judge, dissenting:

The majority allows the Gayes to accomplish what no one has before: copyright a musical style. “Blurred Lines” and “Got to Give It Up” are not objectively similar. They differ in melody, harmony, and rhythm. Yet by refusing to compare the two works, the majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere.

Williams v. Gaye

U.S. Court of Appeals, 9th Circuit, March 2018 (amended July 2018)

Lastly, the dissent prophesies that our decision will shake the foundations of copyright law, imperil the music industry, and stifle creativity. It even suggests that the Gayes' victory will come back to haunt them, as the Gayes' musical compositions may now be found to infringe any number of famous songs preceding them. Respectfully, these conjectures are unfounded hyperbole. Our decision does not grant license to copyright a musical style or "groove." Nor does it upset the balance Congress struck between the freedom of artistic expression, on the one hand, and copyright protection of the fruits of that expression, on the other hand. Rather, our decision hinges on settled procedural principles and the limited nature of our appellate review, dictated by the particular posture of this case and controlling copyright law. Far from heralding the end of musical creativity as we know it, our decision, even construed broadly, reads more accurately as a cautionary tale for future trial counsel wishing to maximize their odds of success.

Skidmore v Led Zeppelin

U.S. Court of Appeals, 9th Cir., Sept. 2018

Skidmore v Led Zeppelin

U.S. Court of Appeals, 9th Cir., Sept. 2018

In sum, we conclude that the district court's originality jury instructions erroneously instructed the jury that public domain elements are not copyrightable, even if they are modified in an original manner or included as part of a selection and arrangement. We further conclude that these instructions were prejudicial as they undermined the heart of Skidmore's argument that "Taurus" and "Stairway to Heaven" were extrinsically substantially similar. Because the district court erred both in the formulation of the originality jury instructions and in withholding a selection and arrangement instruction, we vacate the judgment and remand for a new trial.

Skidmore v Led Zeppelin

U.S. Court of Appeals, 9th Cir., Sept. 2018

We are persuaded that for unpublished musical works under the 1909 Act, the deposit copy defines the scope of the copyright. Overall, the structure of the 1909 Act demonstrates that the deposit copy encompasses the scope of the copyright for unpublished works, as the deposit copy must be filed not only to register the copyright, but for the copyright to even exist. The 1909 Act states that "copyright may also be had of the works of an author of which copies are not reproduced for sale, *by the deposit*, with claim of copyright, of one complete copy of such work."

Skidmore v Led Zeppelin

U.S. Court of Appeals, 9th Cir., Sept. 2018

Skidmore argues that by not allowing the jury to observe Page listening to the recordings of "Taurus," the effect of the court's ruling was to decrease the probative value of Skidmore's questioning of Page. Although the jury could still draw conclusions and inferences from Page's demeanor during his testimony, allowing the jury to observe Page listening to the recordings would have enabled them to evaluate his demeanor while listening to the recordings, as well as when answering questions. Limiting the probative value of observation was not proper here, as the risk of unfair prejudice or jury confusion was relatively small and could have been reduced further with a proper admonition. For example, the district court could have instructed the jury that the recordings were limited to the issue of access and that they were not to be used to judge substantial similarity. … Given the probative value of the information and the relatively low risk of unfair prejudice, we conclude that the district court abused its discretion in excluding the evidence.

Skidmore v. Led Zeppelin

U.S. Court of Appeals, 9th Cir., Sept. 2018

Skidmore also argues that the district court erred by not including a jury instruction on the inverse ratio rule. Under the "inverse ratio rule," a lower standard of proof of substantial similarity is required "when a high degree of access is shown." We recently clarified the framework underlying the inverse ratio rule. *See Rentmeester*, 883 F.3d at 1124–25. This rule "assists only in proving copying, not in proving unlawful appropriation". Even if a plaintiff proves that a defendant copied his work, the plaintiff must still show that the copying "amounts to unlawful appropriation." The showing of substantial similarity necessary to prove unlawful appropriation does not vary with the degree of access the plaintiff has shown."