

Copyright Update

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Before a quick sketch of the year's notable copyright decisions, it might help to observe that it has not, or not yet, been a blockbuster year. At least two major cases that were hoped would clarify murky areas of copyright law failed to yield any real resolutions. The first of these was the *Costco v. Omega* case, which produced an affirmance by an equally divided U.S. Supreme Court. The Second Circuit has recently followed the Supreme Court's suggestion (dictum?) that there is no "first sale" defense where goods are manufactured outside the U.S. Other import cases awaiting decision by the Second Circuit may elaborate on this and similar exhaustion principles. The other big case, by almost any reckoning the highest profile copyright case this year, was the proposed settlement of the Google Books litigation that has been in the works for so many years. Although many applauded Judge Chin's refusal to approve the complex settlement worked out among the content providers, libraries, and Google, the failure of the settlement has left wide open the orphan works problem that may now come before Congress. Two big cases now before the U.S. Supreme Court and Second Circuit, respectively, are poised to cause possibly big waves. These will no doubt be considered next year at this conference. The Supreme Court's hoped-for decision in *Golan v. Holder*, 609 F.3d 1076 (10th Cir. 2010), should resolve whether Congress may remove works from the public domain and breathe copyright life back into works that had been freely used for years. Oral arguments were held on October 5. The Second Circuit has still yet to decide *Viacom v. YouTube*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), which may resolve whether the so-called "red flag" awareness has any real meaning. YouTube and other internet service providers have been quite successful in arguing that responding to particularized complaints is the extent of their obligation. So, two big cases fizzled this

year (even the Shepherd Fairey Obama-image controversy settled), and two of the most anticipated have yet to come down.

Other copyright issues not ripe for this year in review involve legislation that is either still or newly before Congress. The bill to provide sui generis protection for fashion designs has shown some progress in recent months. More discussed recently, and more controversial, is the Protect IP Act (S. 968) which has drawn the fire of many in the IP community. This measure would target the domains through which infringing material is made available. The criticism has focused on the ability of claimants to shutdown accused sources of mischief without anything like due process. This measure has, predictably this season, been characterized as a “jobs bill.” Also in the offing is legislation that would make (more?) clear that making content available by streaming is also infringement. The much talked about Anti-Counterfeiting Trade Agreement is thought to have little effect on U.S. law and, at this point, little chance of being widely adopted.

So, while much has not happened this year, several cases have been reported that either further solidify noticeable trends, such as an expansive ISP safe harbor, or develop lines of inquiry that remain unsettled, such as the first sale privilege, standing, preemption, and the constitutional limits on damage awards.

Courts frequently must examine contract language to determine the scope of rights granted to determine infringement. This year the Ninth Circuit focused on contract terms to determine not scope of rights, but ownership of the material object. This was necessary either to determine the application of the first sale doctrine or the privilege under § 117 to adapt software for an essential use. For both defenses the user must be the owner of the copy. In two cases the Court found the software possessor was a mere licensee; in the other, recipients of promotional CD’s were regarded as owners of the unsolicited merchandise. The other contract issue that concerned the courts was the retention of rights so as to allegedly defeat the standing of the grantee. The Copyright Cleanup, Clarification, and Corrections Act of 2010 sets a contract rule providing that rights under a grant are presumably assignable.

In perhaps the second most talked about case this year, a district court found the tattoo on Mike Tyson's face sufficiently copyrightable to escape summary judgment. Most other copyrightability questions were answered in predictable ways. A novelty elf hat and domestic architecture were found copyrightable. Math formulae, a prom dress, and a lighting fixture did not qualify. The Seventh Circuit allowed a reconstructed copy to suffice for registration but, per Judge Easterbrook, could find nothing protectable in the revisions to existing architectural plans. One district court found a furniture design so patently an unprotectable useful article, that it allowed a DMCA "misrepresentation" claim against the person serving a take-down notice to eBay. The Seventh Circuit held that flower beds are not fixed and therefore unprotectable. A district court recently found a bowl of Vietnamese food was also not fixed.

A genuine development in liability was the Ninth Circuit's parting company with the Federal Circuit on whether anti-circumvention liability depended on there also being copyright infringement (Held: no.). The Second Circuit held downloads were not public performances because they are not contemporaneously perceptible. The Third Circuit found that removing a credit line from a photograph could support DMCA liability for removing "copyright management information." Otherwise, infringement results were unremarkable. Flimsy fair use claims failed, as in the generous taking from Sarah Palin's then upcoming book, as did doubtful claims against J.K. Rowling and the "Modern Family" sitcom.

While the copyright community awaits the Second Circuit's *Viacom v. YouTube* decision, there was more assuring news for ISPs. A district court in New York refused to find "red flag" liability for the proprietors of a cloud player. Similarly, a "photobucket" site that allowed users to share pictures had no duty to police for infringing images.

Among the potentially most important developments of the year were the courts considering the enormous awards that can result from the statutory damages formula. Two district courts found these amounts unconstitutional. Although the First Circuit reversed one of these decisions, it did not necessarily reject the constitutional analysis in holding that the due process ruling was premature. A district court in New York held that plaintiffs are entitled to only one statutory damage award per work no matter how

many direct (but unrelated) infringers were encouraged by the defendant. The Ninth Circuit emphatically held that victorious copyright plaintiffs are not even presumptively entitled to an injunction.

The Ninth Circuit tried en banc to clarify the rules for preempting a contract claim in an idea submission case. The resulting 7-4 split perhaps exemplifies how unsettled the area remains. The Second Circuit Court of Appeals found that the “hot news” misappropriation tort did not, after all, survive preemption scrutiny.

Contract Questions

- *Vernor v. Autodesk Inc.*, 621 F.3d 1102 (9th Cir. 2010)

In considering the first sale defense for a thrice warned eBay seller of used software, the court was required to determine whether § 109 applied to the software in question. This, in turn, depended on whether the defendant owned the software after buying it from a previous “owner.” The court determined that the previous possessor was a mere licensee of the software. This it did under a three-part test asking whether the original transfer from the copyright proprietor specified whether it was a mere license, whether it restricted the ability to transfer the software, and whether there were notable use restrictions. Under this test the court determined that the copyright proprietor merely licensed the software and the first sale defense did not, therefore, apply.

- *MDY Ind., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928 (9th Cir.), as amended on denial of reh’g (Feb. 17, 2011) opinion amended and superseded on denial of reh’g, 2011 WL 538748 (9th Cir. Feb. 17, 2011)

Again, the Ninth Circuit had to decide whether the purchaser of software was truly its “owner.” In this case the defendant made a product that allowed gamers to rapidly advance through initial levels of plaintiff’s video game. If the gamers were not infringing by running the game software as an essential step of utilizing the plaintiff’s video product, then defendant was not indirectly liable. Applying its recent *Vernor* three-part test, the court determined that gamers were not “owners” of the games they

buy and, thus, the § 117 “essential step” defense did not apply. The court also found, however, that the license term forbidding hyped up game play were mere covenants, not conditions. Thus, the games may have breached their licensing agreement but did not infringe the game’s copyright. Consequently, the maker of the enhancement could not be secondarily liable.

- *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175 (9th Cir. 2011)

In charging an eBay seller of CD’s for unauthorized distribution, the defendant predictably claimed the first sale defense. The plaintiff contended, again predictably, that the CD’s were never sold because their initial distribution was for promotional use only. Indeed, the discs were marked “not for sale.” Relying in part on a statute that allowed recipients to keep unordered merchandise, the court found the limitations were not contractually imposed. The recipients of these promotional CD’s were, therefore, owners and the first sale defense applied.

- *HyperQuest, Inc. v. N’Site Solutions, Inc.*, 632 F.3d 377 (7th Cir. 2011)

The court took a restrictive view of what constitutes exclusivity in determining whether a licensee can sue a third party for exceeding its license taken from the original grantor.

- COPYRIGHT CLEANUP, CLARIFICATION, AND CORRECTIONS ACT OF 2010, PL 111-295, December 9, 2010, 124 Stat 3180

Among the technical correction and provisions allowing administrative work to be done from home electronically, there is a substantive change in copyright law making rights transferred presumptively assignable.

- *Righthaven, LLC v. Hoehn*, 2011 WL 2441020 (D. Nev. June 20, 2011)

Righthaven’s claim for copyright infringement is dismissed after a court finds that the firm had no exclusive rights in the article for which it sought statutory damages. The court also holds that when the defendant copied the entire article in question and posted it as a comment to a website, his actions were protected by the fair use doctrine.

Copyrightability and Ownership

- *Nova Design Build, Inc. v. Grace Hotels, LLC*, 2011 WL 3084929 (7th Cir. July 26, 2011)

The court allowed an action where the registration involved a copy that had been reconstructed where the only original resided on a computer that had been stolen. While there could be some discrepancy between the lost original and the extant copy, the difference was a factual question that could not be resolved in the defendant's favor on summary judgment. On the merits, though, the court found the plaintiff's additions to existing architectural plans to be insufficient to warrant copyright protection.

- *Ho v. Tafllove*, 7th Cir., June 6, 2011

Math equations and similar numeric formulations were not protected by copyright. The accompanying text was so basic to the operation of the mathematics that any such literary work merged with the uncopyrightable idea.

- *Saregama India Ltd. v. Mosely*, 635 F.3d 1284 (11th Cir. 2011)

Where a transferee had been granted a time limited period of exclusivity, but that period had expired, the original transferee no longer had standing to sue for infringement. The court was required to apply the law of India to determine the meaning and effect of the limited assignment.

- *Kelley v. Chicago Park Dist.*, 635 F.3d 290 (7th Cir. 2011)

Despite being astounded that the District Court's determination that flower beds constitute paintings or sculptures under the Visual Arts Rights Act of 1990 went unchallenged on appeal, the court held that a constantly growing installation was not "fixed" and, so, could not enjoy copyright protection. In getting to its conclusion, the court stated it did not embrace the First Circuit view that site-specific works were beyond VARA's reach.

- *Design Furnishings, Inc. v. Zen Path, LLC*, 2010 WL 5418893 (E.D. Cal. Dec. 23, 2010)

A company sent a take-down notice to eBay charging that a competitor's postings infringed its furniture designs. The court had earlier ruled that furniture that was allegedly infringed were uncopyrightable useful articles. That being so, the designer sending the take-down notice to eBay may be liable for "misrepresentation" under the DMCA if made knowingly. The fact that the designer's unsuccessful registration at the Copyright Office had characterized bedroom furniture as 3-D artwork inclined the court to view the take-down notice as both false and knowing.

- *Prima Creations, Inc. v. Santa's Best Craft, L.L.C.*, 2011 WL 2982777 (E.D. Pa., July 22, 2011)

Novelty elf hat with large pointy ears attached was not a useful article. And if it were to be so regarded, the focus of substantial similarity was the novelty ears that were clearly separable.

- *Danze & Davis Architects, Inc. v. Legend Classic Homes, Ltd.*, 2011 WL 2940671 (S.D. Tex., July 19, 2011)

The court found that architectural plans for a house were sufficiently original to survive a motion for summary judgment.

- *Jovani Fashion, Ltd. v. Cinderella Divine, Inc.*, 2011 WL 2671584 (S.D.N.Y., July 7, 2011)

The design of a prom dress was regarded as an uncopyrightable useful article.

- *Marvel Worldwide Inc. v. Kirby*, 777 F. Supp. 2d 720 (S.D.N.Y. 2011)

Comic books created by artist in the stable of an established publishing house were regarded as works for hire under the pre-1978 tests. All of the work was at the order of the publisher following his requirements of story line, etc.

- *Whitmill v. Warner Bros. Entertainment Inc.*, E.D. Mo., No. 4:11CV752, 5/24/11

The tattoo adorning Mike Tyson's face is possibly protected by copyright. And, therefore, a similar tattoo appearing on a character's face in a movie might be the basis for infringement.

- *Aqua Creations USA Inc. v. Hilton Hotels Corp.*, 2011 WL 1239793 (S.D.N.Y. Mar. 28, 2011)

A modern lighting fixture without elaborate ornamentation was a useful article with no separable copyrightable component.

Infringement

- *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011)

In the much publicized, and still ongoing, litigation between the Authors Guild and Google over the Google Books project, the district court rejected the proposed settlement. While settlement had many advantages for authors, especially of out-of-print and "orphan" works, the court determined that the proposed settlement went too far in implementing a marketing scheme that went far beyond the scanning and snippet-displaying complaint. A troubling number of authors were opposing the settlement. Also, the settlement went far in resolving the orphan work problem, at least for printed books; Judge Chin regarded this as more properly a legislative matter. By binding unwilling, but not out-opting authors, the court was troubled by the forced transfer of rights as being prohibited by 17 U.S.C. § 201(e). Finally, the court stated that the Google monopoly over unclaimed works merited the antitrust concerns expressed by the U.S. government over the settlement.

- *MDY Ind., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928 (9th Cir.), as amended on denial of reh'g (Feb. 17, 2011) [opinion amended and superseded on denial of reh'g](#), 2011 WL 538748 (9th Cir. Feb. 17, 2011)

A video game manufacturer sued the maker of a patch that allowed gamers to zip through early stages of game play and to quickly attain higher levels of play. Among

other things, the plaintiff claimed that this device violated the anti-circumvention prohibitions of the DMCA because it allowed gamers to get unauthorized (because premature) access to the higher levels of play. The court then addressed the question of whether the result of access had to be a resulting copyright infringement for there to be anti-circumvention liability. The Federal Circuit in *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178 (Fed. Cir. 2004) had held that without copyright infringement there could be no such DMCA liability. The Ninth Circuit squarely disagreed. While recognizing the validity of the Federal Circuit's concerns in that garage door opener case, the Ninth Circuit held that the DMCA creates no such nexus between copyright infringement and unauthorized access liability. The court went on to find anti-circumvention liability with regard to some of plaintiff's material.

- *United States of America v. American Society of Composers, Authors and Publishers*, 627 F.3d 64 (2nd Cir. 2010)

In its umpire role under existing consent decrees, the district court was required to set a license fee to ASCAP for the public performance of music. The court determined that streaming the music was a public performance but that downloading music files, though obviously a reproduction, was not a performance, public or otherwise. The Second Circuit agreed. The court held that a performance requires the work to be contemporaneously perceptible. Because the downloaded file, unlike the streamed music, could not be heard as it was being transferred, the download was not a performance.

- *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218 (9th Cir. 2011)
- *College Source Inc. v. Academy One*, (9th Cir. 2011)

While an Ohio-based gossip website was not subject to general jurisdiction in a California court, gearing its content to California viewers in California allowed for specific jurisdiction. In the *College Source* case, decided the same day, the court upheld specific jurisdiction based on a similar focus on California clientele, even purchasing Google AdWords with reference to "California."

- *Murphy v. Millennium Radio Group LLC*, 2011 WL 2315128 (3d Cir. June 14, 2011)

The Circuit Court determined that using a protected image and stripping it of the credit line was a violation of the DMCA which, among other things, prohibits the removal of copyright management information. The defendant claimed that this prohibition applied only in the context of computerized content and the electronic alteration of content. The court held that the DMCA was not so limited and even removal of a credit line in an analogue copy would violate the DMCA.

- *Wolk v. Kodak Imaging Network, Inc.*, 2011 WL 940056 (S.D.N.Y. Mar. 17, 2011)

A proprietor of a cloud-based “photobucket” where users could store and share images was within the safe harbor of the DMCA. The court found the site proprietor had little ability and no duty to police the site for infringing works.

- *HarperCollins Publishers L.L.C. v. Gawker Media LLC*, 721 F. Supp. 2d 303 (S.D.N.Y. 2010)

The court found that the unauthorized publication of 21 pages from Sarah Palin’s book AMERICA BY HEART before the books release was not faire use. The court found this attempt to scoop a notable political author was even more egregious than the excerpt from President Ford’s memoirs condemned by the U.S. Supreme Court in *Harper & Row Publishers Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

- *Brownmark Films, LLC v. Comedy Partners*, 2011 WL 2648600 (E.D. Wis. July 6, 2011)

The court determined that a South Park cartoon character’s singing a segment of the novelty song “what, what (In the Butt)” was clearly fair use.

- *LaChapelle v. Fenty*, 2011 WL 2947007 (S.D.N.Y. July 20, 2011)

During the production of the video, Rihanna indicated her intent to make a “LaChapelle-esque music video,” and the producers used prints of LaChapelle works in creating a storyboard for the video. According to LaChapelle, the video copied protected elements of his works, including eight specific photographs. LaChapelle sufficiently

alleged actual copying by the producers of the video of protectable elements of his photographs, and there was enough evidence of substantial similarity to establish a prima facie case of infringement.

- *Alexander v. Murdoch*, 2011 WL 2802923 (S.D.N.Y. July 14, 2011)

The court held that the plot, characters, setting, format and pace, and total concept and feel of a treatment and pilot script do not warrant copyright protection, there was no substantial similarity between these works and the television show *Modern Family*.

- *Disney Enterprises, Inc. v. Hotfile Corp.*, 2011 WL 2899374 (S.D. Fla. July 8, 2011)

The proprietor of a digital “storage locker box” where users could post, and were paid by defendants to post, infringing content were not directly liable for infringement. Despite finding the site proprietor easily liable for indirect infringement, the operation of the locker itself lacked the volitional element (because all posting were done through the computer set up) necessary for direct infringement.

- *Cariou v. Prince*, 2011 WL 1044915 (S.D.N.Y. Mar. 18, 2011)

The court found that an “appropriation artist” who gave photographs in its collages a painter overlay was not making a transformative fair use of the protected works. The defendant and his gallery also used the resulting images for catalogue sold to promote the defendant’s exhibit.

- *TMTV, Corp. v. Mass Productions, Inc.*, 645 F.3d 464 (1st Cir. 2011)

The First Circuit affirmed a district court ruling that the star of a Puerto Rican TV sitcom and his company were liable for copyright infringement by developing a new sitcom featuring the same characters, story, and setting as the original sitcom because the plaintiff’s predecessor retained the copyrights in the scripts and stories of the original sitcom as works-for-hire, and the new show was substantially similar to the old show.

- *Penguin Group (USA) Inc. v. Am. Buddha*, 946 N.E. 2d 159 (N.Y. 2011)

Under New York state law, when a copyright holder seeks to bring an infringement claim against an entity that uploaded allegedly infringing material to the internet, the location of the alleged harm is the location of the copyright holder, not the location of the defendant's principal place of business,, nor the location of the server to which the material was upgraded.

- *Shropshire v. Canning*, 2011 WL 3667492 (N.D. Cal. Aug. 22, 2011)

The court found that uploading an allegedly infringing video onto YouTube's U.S. servers from Canada constituted an act of infringement not wholly extraterritorial to the United States. The court held that extraterritoriality must be decided as an element of a claim for copyright infringement rather than an issue of subject matter jurisdiction.

- *Castorina v. Spike Cable Networks, Inc.*, 2011 WL 1118429 (E.D.N.Y. Mar. 24, 2011)

The court ruled that both the Spike television show, "Pros. vs. Joes," and the pitched show, "Two Left Feet," contained the basic idea of amateur athletes trying to prove their worth against professionals. However, even though "Two Left Feet" expresses the idea in a protectable fashion, its expression does not remotely resemble the expression found in "Pros vs. Joes." The court added that the plaintiffs' treatment consists largely of stock concepts and "scènes à faire," which are not subject to copyright, even if they can be trademarked.

- *Allen v. Scholastic Inc.*, 739 F. Supp. 2d 642 (S.D.N.Y. 2011)

The court found that the author of the Harry Potter books could not possibly be regarded as having infringed the 1987 book, THE ADVENTURES OF WILLY THE WIZARD. While both books are about young wizards, the court found that otherwise the books were not substantially similar.

- *Harris v. Winfrey*, 2011 WL 1003807 (E.D. Pa. Mar. 18, 2011)

The court granted Oprah Winfrey's motion to dismiss a copyright infringement action, stating that she did not infringe the copyright in the plaintiff's booklet by

referring to the historical fact of President Taft's weight. Oprah's use of facts from the plaintiff's booklet, on her own show, did not amount to copyright infringement because historical facts are not copyrightable.

- *Peters v. West*, 776 F. Supp. 2d 742 (N.D. Ill. 2011)

Rapper Kanye West did not infringe another artist's song, "Stronger," because the title and hook of that song were unprotectable elements, as was the use of model Kate Moss's name. The songs both had the same title, which the court found titles by themselves are not subject to copyright protection. Since facts include names and aren't protectable, the reference to Kate Moss is not protectable. The phrase "that which does not kill us makes us stronger" is unprotectable as well because maxims that enjoy a robust existence in the public domain long before being employed in song lyrics lack the requisite originality to warrant protection.

- *Hassett v. Hasselbeck*, 757 F. Supp. 2d 73 (D. Mass. 2010)

The author of a book on how to live with celiac disease lost her copyright infringement battle against television personality Elisabeth Hasselbeck after the court ruled that Hasselbeck's book, also about living with celiac disease, was not substantially similar to the author's book. Even though the books were very similar in that they both contain lists of foods and other products likely to contain gluten, offer ideas to avoid contact with gluten in everyday life, and discuss problems related to children with celiac disease; the similarities original from elements that are not copyrightable.

Secondary Liability

- *Klein & Heuchan, Inc. v. CoStar Realty Info., Inc.*, 425 F. App'x. 833 (11th Cir. 2011)

An employer was not indirectly liable for an ex-employee's continuing to use his password to access material which he infringed. The court found that the company could not be said to have enjoyed a direct financial benefit.

- *Capitol Records, Inc. v. MP3tunes, LLC*, 2011 WL 3667335 (S.D.N.Y. Aug. 22, 2011)

In an early test of cloud player liability, a music locker proprietor was determined to be within the safe harbor of the DMCA when providing virtual space from which users could play uploaded they had stored there. Even the feature at a related site allowing users to find on the web, and then shift to their “lockers” songs posted elsewhere by others was regarded as not infringing. The court rejected any liability based on “red flag” notice from words like “free” and “file-sharing” connected with the sites from which users posted music files. Once, however, the site proprietor was notified of specific infringing content it was, consistent with notice-and-takedown, generally required to remove the identified material. Where such material had not been removed, the court found the defendant liable for contributory infringement.

Remedies

- *Sony BMG Music Entertainment v. Tenenbaum*, 1st Cir., No. 10-1883, Sept. 16, 2011

The court reinstated the \$675,000 statutory damages verdict that had been struck down by the district court as so excessive as to violate the Due Process Clause of the Constitution. The First Circuit Court of Appeals held that it was an error for the court to reach the constitutional issue without first issuing remittitur. The district court had considered remittitur, but concluded that the case would come back either on retrial or otherwise. The Circuit Court stated that the district court could not properly make this assumption. The Circuit Court did not confront the merits of the constitutional argument.

- *Capitol Records, Inc. v. Thomas-Rasset*, 491 2011 LEXIS 85662 (D. Minn. July 22, 2011)

The court found a \$1.5 million statutory damages award to violate the due process rights of the defendant who infringed by downloading 24 songs. The court stated it found the (now reversed) *Tenenbaum* district court decision most persuasive.

- *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 2011 WL 3659315 (9th Cir. Aug. 22, 2011)

Applying the Supreme Court's eBay patent decision to copyright law, the court reaffirmed that irreparable harm will not be assumed from a prima facie case in a copyright case. This reversed long-standing precedent in the Ninth Circuit, but the court emphasized that "Elvis has left the building."

- *Perfect 10 v. Google, Inc.*, 9th Cir. (Aug. 3, 2011)

In the first of two major pronouncements on the availability of injunctive relief, the court, applying *eBay*, stated that even being forced into bankruptcy (which might have happened anyway) would allow the presumption of irreparable harm.

- *National Association of Boards of Pharmacy v. Board of Regents of the University System of Georgia*, 633 F.3d 1297 (11th Cir. 2011)

States are immune from monetary damage claims notwithstanding language in the Copyright Statute that authorizes such actions. Nor could the claimant show that such a damages claim could be supported under the Fourteenth Amendment to the Constitution. The copyright proprietor was, however, entitled to injunctive relief.

- *William A. Graham Co. v. Haughey*, 646 F.3d 138 (3rd Cir. 2011)

The court affirmed that prejudgment interest was available to a successful copyright plaintiff. The court also held that for limitations purposes it is the reasonable discovery of the cause of action, not its accrual that is determinative. Further, the interest is available from that earlier accrual date.

- *United States v. HQ-Streams.com*, S.D.N.Y., No. 11 MAG 262, affidavit unsealed 2/2/11

The government issued seizure warrants for 10 domain names allegedly involved in illegally streaming content, including sites that merely linked to other sites where pirated pay-per-view content could be found.

- *Arista Records LLC v. Lime Group LLC*, 532 F. Supp.2d 556, S.D.N.Y.

The record company's successfully sued the file-sharing site Limewire as secondarily liable for thousands of individuals' direct infringement. The plaintiff's claimed a statutory damage award from Limewire for each song per client. The court limited the award to an amount per song without individual users as an additional multiplier. Although the court acknowledged that the statutory language was not clear on this calculation, to do otherwise would produce an award in the trillions of dollars and be "absurd." The number of individuals downloading the song could, however, properly be considered in setting the award within the statutory parameters. The court recognized that there was Ninth Circuit authority (as well as a Nimmer treatise hypothetical) to the contrary.

- *IO Group, Inc. v. Does 1-435*, 2011 WL 445043 (N.D. Cal. Feb. 3, 2011)

IO Group filed suit alleging that 435 unknown defendants had illegally shared its copyrighted works on the peer-to-peer network eDonkey2000. The court ruled that neither the use of the same internet service provider and the same peer-to-peer network, nor the possibility of potential conspirator liability, can form the basis for a joinder of 435 defendants that did not directly exchange copyrighted works with each other.

Foreign

- *LucasFilm Ltd. v. Ainsworth*, [2009] EWCA (Civ.) 1328

The United Kingdom's Supreme Court determined that under U.K. law the storm trooper's helmet from Star Wars was not a protectable "sculpture," as claimed, but merely utilitarian. More notable perhaps, at least for U.S. practitioners, was the Court's stating that in appropriate cases there was no reason a British court could not hear a claim, assuming personal jurisdiction over the defendant, based on acts in, and the law of, another country.

- *Newspaper Licensing Agency Ltd. v. Meltwater Holdings Ltd.*, EWCA (Civ.), No. A3/2010/2888/CHANF, 7/27/11

The court held that merely reading the contents of a website provided by a news clipping service constituted actionable copying and might result in liability without a license to read the clips. This expansive reading of copyright law in the U.K. will be reviewed by the Copyright Tribunal.

Preemption

- *Montz v. Pilgri Films & Television, Inc.*, 2011 WL 1663119 (9th Cir. May 4, 2011)

In a 7-4 decision by the en banc Ninth Circuit Court of Appeals, a plaintiff's claim of an "implied agreement" to compensate him for the use of his work is not preempted by federal copyright law. The court stated that either a breach of confidence by the user or the implied promise to compensate, supplied the extra element that made the state claim not equivalent to copyright. The dissenters argued that the only thing that gave the plaintiff an expectation of being compensated was the control he had as a copyright proprietor.

- *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 2011 WL 2437554 (2d Cir. June 20, 2011)

Where defendant had distributed the plaintiff's investment tips, the district court had found misappropriation of this "hot news." The Second Circuit said the "hot news" tort was preempted in this case because the defendant was not the "free rider" envisioned in earlier formulations of the New York tort. Defendant should not be regarded as a free rider, although possibly a copyright infringer, because of the added value he provided in collecting, collating, and disseminating the news that plaintiff had offered such investment advice, an incident newsworthy in itself.

- *Harrell v. St. John*, 2011 WL 2144414 (S.D. Miss. May 31, 2011)

A food entrepreneur was sued by his former business partner and accused of a wide variety of tort claims. The district court dismissed them all in broad strokes saying, without particularizing their elements, that all such claims were equivalent to copyright and all were preempted.

- *Ho v. Tafllove*

Although a researcher's equations and figures were not copyrightable, the plaintiff's conversion claim based on the uncredited use of those materials was preempted by copyright. The plaintiff's trade secret claim was not preempted (although it was also not successful).

- *Karls v. Wachovia Trust Co. of California*, 2010 WL 4233047 (Cal. Ct. App. Oct. 27, 2010), review denied (Jan. 26, 2011), unpublished/noncitable (Oct. 27, 2010)

The California court held there could be no conversion claim based on the use of a tax planning idea, at least where such a plan was reduced to a report from which the tax scheme could be readily discerned.