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# Significant Developments in U.S. and European Copyright Law 2008

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## CONTENTS

1. Cablevision’s Proposed “Remote Storage” Digital Video Recorder System Would Not Directly Infringe Rights of Program Content Owners, Second Circuit Rules.....	1
2. Federal Circuit Holds Copyright Remedies Available for Breach of Open Source Copyright License. ....	2
3. Online Video Service Provider Held Eligible for DMCA Safe Harbor Protection from Damages for Copyright Infringement.....	3
4. Copyright Owners Must Consider Fair Use Before Sending DMCA Take-Down Notices, District Court Holds. ....	4
5. Tenth Circuit Holds That Digital Models of Real Cars Are Insufficiently Creative to Be Protectable.....	4
6. Ninth Circuit Affirms That the First Sale Doctrine Is Inapplicable to Products Produced and First Sold Outside the United States.....	5
7. Courts Still Split on Whether “Making Available” Digital Files on Peer-to-Peer File-Sharing Service Is Infringement Absent Proof of Further Copying by Others. ....	5
8. Eleventh Circuit Finds CD-ROM Collection of Magazines Is a “Revision” That Does Not Infringe Photographer’s Copyrights in Photographs. ....	6
9. New Obligations for Online Intermediaries Under Consideration in Europe. ....	7
10. New EU Talks on Copyright Levies Started While Court Battles Continue in Various Member States. ....	8
Recent Publications by Covington Lawyers.....	8
Primary Contacts in the Copyright Practice .....	9

## SIGNIFICANT DEVELOPMENTS IN U.S. AND EUROPEAN COPYRIGHT LAW 2008

Below are the selections of Covington's Trademark/Copyright Group for the ten most significant and interesting developments in U.S. and European copyright law during 2008.

### 1. CABLEVISION'S PROPOSED "REMOTE STORAGE" DIGITAL VIDEO RECORDER SYSTEM WOULD NOT DIRECTLY INFRINGE RIGHTS OF PROGRAM CONTENT OWNERS, SECOND CIRCUIT RULES.

Unlike "conventional" digital video recorders, which record programming on the hard drive of a device in the subscriber's home, Cablevision's proposed "remote storage" digital video recorder ("RS-DVR") would allow subscribers to request that programs be recorded on servers under Cablevision's control. To supply its viewers, Cablevision receives programming streamed to it by content owners throughout the day. Cablevision's RS-DVR system would split this incoming stream in two, directing one stream through a series of buffers for purposes of making multiple distinct copies, one for each subscriber requesting a recording of the program. Each portion of an incoming program would remain in the buffers for this purpose for only 1.2 seconds, and each subscriber-specific copy would be made onto a separately allocated portion of a server's hard drive. When the subscriber later initiated playback, the subscriber's specific copy would be retrieved from the server at Cablevision's facility and transmitted to that subscriber for viewing. Various companies that produce copyrighted movies and television programs filed suit to enjoin Cablevision's introduction of the RS-DVR. In 2007, the district court, holding that Cablevision would directly infringe on the plaintiffs' copyrights, enjoined the RS-DVR. In a much-awaited ruling, the Second Circuit reversed. *The Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

The Second Circuit found each of the Plaintiffs' infringement theories defective. First, it held that the data in the buffer stream, held for up to 1.2 seconds, would not itself constitute a "copy" of any work because it was too transitory to be considered "fixed" under the Copyright Act. 17 U.S.C. §101. Second, the court held that the subscriber, not Cablevision, would be making the copies stored on Cablevision's servers. Although all such copying would occur on Cablevision's equipment, the Second Circuit reasoned that the "volitional conduct" that would cause the creation of the copy would be that of the subscriber, so Cablevision could not be liable for direct infringement. Third, the transmission of the playback copy to a subscriber when he or she decides to watch it would not be a public performance of the work by Cablevision that could infringe the copyright holder's rights under Section 106 of the Act because the RS-DVR system would retrieve a unique copy for each subscriber and transmit it only to that single subscriber. The Second Circuit did not reach the issue of whether the subscriber or Cablevision would be responsible for the playback transmission.

Under an unusual agreement reached in the district court, the Plaintiffs had only alleged theories of direct infringement and did not claim Cablevision would be contributorily liable for copying by subscribers; Cablevision, in turn waived any fair use defense. It is therefore unsettled, at least in theory, whether operation of a system analogous to the RS-DVR could constitute contributory infringement—and, if it could, whether the fair use defense would be available against such a claim. As of press time, the content owners' petition for certiorari was pending, and the Supreme Court had called for the views of the Solicitor General. So stay tuned.

## 2. FEDERAL CIRCUIT HOLDS COPYRIGHT REMEDIES AVAILABLE FOR BREACH OF OPEN SOURCE COPYRIGHT LICENSE.

In the first major U.S. decision finding that copyright remedies are available for breach of an open source copyright license, the Federal Circuit held that the developer of a computer program who posted the source code online could pursue injunctive relief under the Copyright Act against a defendant who did not comply with the terms of the open source license. *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008). The availability of copyright remedies, rather than contract remedies, is important to the open source community because the non-commercial nature of its distribution model often will make it difficult to prove actual monetary damages. The case has accordingly been followed closely by proponents of the GNU General Public License (“GPL”).

Plaintiff Jacobsen made his source code available free of charge for public download and use by posting it on a website pursuant to the Artistic License, a commonly used open source license. The source code files contained copyright notices and referred users to the Artistic License, which allowed users to copy, modify, and distribute the copyrighted software “provided that” users (among other things) described how the code had been changed from the original source code and referenced the authors’ names and the copyright notices. Jacobsen claimed that the defendant, a developer of competing software distributed under a proprietary license, copied, modified, and distributed parts of Jacobsen’s open source software in ways that did not comply with these provisions of the Artistic License. The district court found that the Artistic License granted the defendant a broad, non-exclusive license to create copies and derivative works, and that the defendant’s breach of the relevant provisions created liability for breach of contract, but not for copyright infringement.

The Federal Circuit reversed, holding that because the attribution and notice requirements of the Artistic License were properly integrated into the license grant language, they were enforceable copyright conditions—not merely covenants governed by contract law—the violation of which placed the defendant outside the scope of the license. The Federal Circuit went on to recognize that the breach could be harmful because the “attribution and modification transparency requirements” of the license “directly serve to drive traffic to the open source [web]page and to inform downstream users of the project, which is a significant economic goal of the copyright holder that the law will enforce.” Consequently, the Federal Circuit remanded to the district court to consider the plaintiff’s plea for injunctive relief.

The district court, however, again denied injunctive relief on remand, holding that an intervening decision of the U.S. Supreme Court, *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008), undercut the presumption of irreparable harm in copyright infringement cases. Because Jacobsen had relied on this presumption, he offered no specific evidence of actual harm. This denial of injunctive relief is now on appeal to the Federal Circuit. While the easy availability of injunctive relief to open source plaintiffs thus remains in suspense, the first ruling does at least give open source licensors access to statutory damages as a potential tool through which to enforce properly drafted conditions of their licenses.

### 3. ONLINE VIDEO SERVICE PROVIDER HELD ELIGIBLE FOR DMCA SAFE HARBOR PROTECTION FROM DAMAGES FOR COPYRIGHT INFRINGEMENT.

In a decision that could foreshadow the outcome of some issues in Viacom's closely watched lawsuit against YouTube, the United States District Court for the Northern District of California held that an online video service provider was eligible for safe harbor protection under the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(c), from damages related to alleged copyright infringement of a company's adult films. *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132 (N.D. Cal. 2008). Veoh provides software and a website where users can post video content over the Internet. Io argued that Veoh could not claim DMCA protection because it did not satisfy the DMCA's precondition that service providers post and reasonably implement a repeat infringer policy. The court rejected this argument, holding that Veoh reasonably implemented its repeat infringer policy because it had a working notification system and a procedure for dealing with copyright infringement notices. Specifically, Veoh identified a Copyright Agent to receive infringement notices, responded to infringement notices on the same day or within a few days, terminated infringers' accounts and blocked their email addresses after one warning, and generated a "hash," or digital fingerprint, for each video file that enabled Veoh to prevent infringing videos from ever being uploaded by any user. The court rejected Io's argument that Veoh must prevent repeat infringers from reappearing under a different user name or email address, finding that the DMCA does not require service providers to track users by their actual names or by Internet Protocol ("IP") addresses. Citing *The Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, No. 1 on this year's Top 10, the court also held that Flash files created automatically by Veoh to facilitate access to user-submitted videos did not make Veoh ineligible for the DMCA safe harbor because Veoh "does not itself actively participate or supervise the uploading" of the videos, which was initiated entirely at the volition of users. Finally, the court held that Veoh did not have the right and ability to control infringing activity because it could not review the hundreds of thousands of videos uploaded by users, and because its system (unlike Napster's) did not exist solely to facilitate copyright infringement.

In a related decision this year, another court held that three automated functions performed by Veoh—the reproduction of works through the creation of 256-kilobyte "chunks" of videos, the public performance of works when users access videos via streaming, and the distribution of works when users access videos via downloading—did not remove Veoh from the DMCA's safe harbor protection because these automated measures were performed by Veoh "to facilitate access to materials stored at the direction of users." *UMG Recordings, Inc. v. Veoh Networks, Inc.*, No. CV 07-5744 AHM (AJWx), 2008 WL 5423841 (C.D. Cal. Dec. 29, 2008). Together, the decisions demonstrate these courts' reluctance to accept copyright holders' arguments for shifting more of the burden of policing copyright infringement onto service providers, a theme continued in the next decision in this year's Top 10.

#### 4. COPYRIGHT OWNERS MUST CONSIDER FAIR USE BEFORE SENDING DMCA TAKE-DOWN NOTICES, DISTRICT COURT HOLDS.

Plaintiff Stephanie Lenz created a video of her child dancing to the song "Let's Go Crazy" by Prince and posted the video on YouTube. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008). When the song's copyright owner, Universal Music Corp., became aware of the video, it sent YouTube a take-down notice pursuant to the DMCA, 17 U.S.C. § 512, demanding that the video be removed. Lenz responded with a counter-notification under Section 512(g), asserting that the video was a fair use of Universal's copyright, and then, with legal support from the Electronic Frontier Foundation, filed suit against Universal alleging that Universal's take-down notice materially misrepresented that her video was infringing, exposing Universal to damages under Section 512(f). Universal moved to dismiss, arguing that fair use is a defense that may excuse liability but does not need to be considered in sending a take-down notice.

The court sided with Lenz, holding that fair use of a copyright is a use "authorized by law" because the Copyright Act specifically states that "the fair use of a copyrighted work . . . is not an infringement of copyright." 17 U.S.C. § 107. "Accordingly, in order for a copyright owner to proceed under the DMCA with 'a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law,' the owner must evaluate whether the material makes fair use of the copyright." The court acknowledged the fact-specific nature of the fair use inquiry and the increased burden its ruling would place on copyright owners, but it offered copyright owners some comfort by opining that "there are likely to be few [cases] in which a copyright owner's determination that a particular use is not fair use will meet the requisite standard of subjective bad faith required to prevail in an action for misrepresentation under 17 U.S.C. § 512(f)." In fact, while the court denied Universal's motion to dismiss because Lenz's complaint adequately alleged that Universal had deliberately ignored fair use, the court expressed its doubt that Lenz would ultimately be able to prove that Universal acted with the requisite bad faith.

#### 5. TENTH CIRCUIT HOLDS THAT DIGITAL MODELS OF REAL CARS ARE INSUFFICIENTLY CREATIVE TO BE PROTECTABLE.

How much creativity is necessary when rendering a work in a new medium? At least some, held the Tenth Circuit, in an intriguing case involving digital models of cars. *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F. 3d 1258 (10th Cir. 2008). Meshwerks was hired to create digital models of certain Toyota automobiles, for use in advertisements. Meshwerks's employees applied tape to actual cars to create a grid pattern and then used a mechanical arm attached to a computer to create a file of data points. They then altered some ninety percent of the data points in order to create digital models that appeared as close as possible to the original cars. Each digital model required eighty to ninety hours of work. The customary parting of the ways followed, and Meshwerks sued Toyota for using the digital models in a television advertisement, allegedly beyond the scope of their agreement. The Tenth Circuit affirmed summary judgment for Toyota, holding that the models did not contain protectable expression that could be infringed because they were "not so much independent creations as (very good) copies of Toyota's vehicles." Analogizing digital modeling to photography, the Court emphasized that Meshwerks had not posed the

## SIGNIFICANT DEVELOPMENTS IN U.S. AND EUROPEAN COPYRIGHT LAW 2008

cars, added lighting or background elements, or selected a particular perspective. Rather, because the models “depict nothing more than unadorned Toyota vehicles, the car *as car*,” there was no “expression apart from the raw facts in the world.” Meshwerks’s objective—which it had achieved—was to copy the cars accurately, and a change in medium by itself does not equal creativity.

The decision is significant in holding that accurate digital reproductions of three-dimensional objects are not, by themselves, independently copyrightable, no matter how much time and effort is required to create them.

### 6. NINTH CIRCUIT AFFIRMS THAT THE FIRST SALE DOCTRINE IS INAPPLICABLE TO PRODUCTS PRODUCED AND FIRST SOLD OUTSIDE THE UNITED STATES.

In *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982 (9th Cir. 2008), watch-maker Omega accused wholesaler Costco of infringing distribution and importation under 17 U.S.C. §§ 106(3) and 602(a) for selling authentic, but “gray market,” Omega watches that were produced and sold overseas but were then shipped to and sold in the U.S. without Omega’s authorization. Costco raised the first sale doctrine, 17 U.S.C. § 109(a), arguing that Omega’s initial foreign sale of the watches precluded its infringement claim based on the subsequent, unauthorized sales. But the court sided with Omega, holding that defendants accused of copyright infringement can rely on the first sale doctrine as a defense only where the copies were either made or previously sold in the United States with the authority of the copyright owners. Because the watches sold by Costco were “gray market” watches first produced and sold abroad, Costco could not use the first sale doctrine as a defense to infringement. In so holding, the Ninth Circuit found that its past cases in this area were not overruled by the Supreme Court’s decision in *Quality King Distributors, Inc. v. L’anza Research International, Inc.*, 523 U.S. 135 (1998), which dealt with products produced in the U.S.

For further discussion of gray market issues and the first sale doctrine, please refer to: *Combat Grey Market Goods in the US*, MANAGING INTELLECTUAL PROPERTY, Nov. 2008, at 58, written by Covington attorneys Ron Dove and Hope Hamilton.

### 7. COURTS STILL SPLIT ON WHETHER “MAKING AVAILABLE” DIGITAL FILES ON PEER-TO-PEER FILE-SHARING SERVICE IS INFRINGEMENT ABSENT PROOF OF FURTHER COPYING BY OTHERS.

When an individual participates in a peer-to-peer (“P2P”) file-sharing service and places a copy of a copyrighted song in a shared folder on her hard drive, thus making it available for copying by other P2P participants, has she infringed the exclusive right of the copyright holder to “distribute” copies of the song? The recording industry’s campaign of suing individual users of P2P file-sharing services has led to a deepening divide among the courts on whether such conduct constitutes infringing distribution under the Copyright Act. The recording industry faces an evidentiary dilemma, insofar as it is relatively easy to record evidence of what songs are being made available in a shared folder, but considerably more difficult and expensive to obtain and preserve

## SIGNIFICANT DEVELOPMENTS IN U.S. AND EUROPEAN COPYRIGHT LAW 2008

evidence that others have downloaded copies of such song files. In 2008, the judicial tide appeared to lean toward an answer that such “making available” conduct by itself does not equal infringement. In several cases last year, district courts held that the mere act of placing a copy of a work in a shared folder—where it would be available for unfettered copying by other participants in the P2P file-sharing service—did not constitute “distribution” of the work under Section 106(3) of the Copyright Act. *See, e.g., Atlantic Recording Corp. v. Brennan*, 534 F. Supp. 2d 278 (D. Conn. 2008); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153 (D. Mass. 2008); *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008); *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008). While the term “distribute” in Section 106 is not defined, these courts reasoned that it must require an “actual dissemination” of copies, so that merely making a copy available by placing it in a shared file is not a distribution, which only occurs when an unauthorized copy of the work is actually distributed to a member of the public. Nor does an “offer to distribute”—such as might be inferred from placing a copy in a shared folder—constitute infringement when a copy has not actually changed hands.

On the other side of the divide, *Elektra Entertainment Group, Inc. v. Barker*, 551 F. Supp. 2d 234 (S.D.N.Y. 2008), held on a motion to dismiss that making a copy available for copying—without a copy actually being made—could itself violate Section 106. However, even the *Barker* court noted that the plaintiffs would have to prove the defendant “offer[ed] to distribute copies or phonorecords to a group of persons for purposes of further distribution.” The “making available” issue awaits a definitive appellate ruling in the file-sharing context, although it is unclear if that will happen soon, given the recording industry’s recent retreat from its campaign against individual file sharers.

### 8. ELEVENTH CIRCUIT FINDS CD-ROM COLLECTION OF MAGAZINES IS A “REVISION” THAT DOES NOT INFRINGE PHOTOGRAPHER’S COPYRIGHTS IN PHOTOGRAPHS.

A decade-long dispute over the definition of a “revision” under the Copyright Act finally came to an end in 2008. *Greenberg v. National Geographic Society*, 533 F.3d 1244 (11th Cir. 2008). From 1962 to 1990, National Geographic magazine featured several photographs taken by freelance photographer Jerry Greenberg, with ownership of the copyrights reverting to Greenberg. In 1997, National Geographic produced a 30-CD library of all issues of the magazine, including Greenberg’s photographs. Greenberg objected to the reuse of his photographs in the CD-ROM collection and sued for copyright infringement, claiming that the CD-ROM was a new infringing collective work. But the Eleventh Circuit, after initially agreeing with Greenberg, later reversed course following the Supreme Court’s decision in *New York Times Co., Inc. v. Tasini*, 533 U.S. 483 (2001), siding with National Geographic and holding that the CD-ROM collection was a privileged revision of the original collective work under 17 U.S.C. § 201(c). The court reasoned that the original print magazines were themselves “collective works” in which National Geographic held the “privilege of reproducing and distributing the [photographic] contribution” to the collective work as part of “any revision of that collective work” under Section 201(c). Although the CD-ROMs reproduced the magazines in a different medium, they were exact digital replicas of the magazines as originally published, and therefore were revisions of the collective work and not a new collective work. Features of the CD-ROMs that were not part of

## SIGNIFICANT DEVELOPMENTS IN U.S. AND EUROPEAN COPYRIGHT LAW 2008

the original print magazines—including search and zoom functions, indices, and an introductory sequence—did not “destroy the original context of the collective work in which Greenberg’s photographs appear,” and therefore did not “deprive National Geographic of its § 201(c) privilege.” This case was different than *Tasini*, the majority reasoned, because in that case, when newspaper articles were entered into a computer database, none of the original character of each collective work remained.

Four judges dissented from the en banc decision, arguing that the CD-ROM collection was a “new, entirely different” collective work, and that the majority’s reliance on the “revision” element was misplaced because no revisions were made to the magazines.

### 9. NEW OBLIGATIONS FOR ONLINE INTERMEDIARIES UNDER CONSIDERATION IN EUROPE.

Over the past year, European regulators displayed a willingness to impose new obligations on Internet Service Providers (“ISPs”). In France, a June 2008 draft law that codifies an agreement between the recording and motion picture industry, and the French ISPs, has been submitted to the Parliament and is expected to be adopted in 2009. Under this law, a new anti-piracy body will administer a “three strikes and you’re out” system aimed at repeated infringers. ISPs will have to collaborate by sharing some data with the anti-piracy body, by sending warnings to subscribers, and by eventually terminating the subscribers’ accounts. The new system will require a more active involvement of ISPs and thus departs from the traditional “notice and take-down” approach. In the UK, similar regulation is under consideration following the 2008 consultation on legislative options to address illicit peer-to-peer (“P2P”) file-sharing.

Meanwhile, various court cases have applied the existing liability rules. In *Sabam v. Scarlet*, the Court of First Instance in Brussels, Belgium held that it is not impossible for an ISP whose services are used to exchange music through a P2P system to implement an injunction order through filtering measures. In France, several first-instance courts have ruled on the liability of user-generated-content platforms, although with mixed results. See, e.g., High Instance Court of Paris decisions in *Lafesse v. YouTube*, *Zadig v. Google Video*, *Martinez v. Bloobox*, and *Omar and Fred v. Dailymotion*. In early 2008, the European Court of Justice (“ECJ”) decided, in a P2P case involving a Spanish ISP, that the rules on data privacy do not preclude the possibility of a Member State imposing an obligation to release personal data in the context of civil proceedings for copyright infringement—but also that Member States are not required to lay down such an obligation. *Productores de Música de España (Promusicae) v. Telefonica de España*, No. C-275/06 (Court of Justice of the European Communities, Jan. 29, 2008). Covington has been advocating the point of view of the technology industry in this debate, in particular in France, and has been advising some copyright owners on the data protection issue raised by the ECJ case.

## 10. NEW EU TALKS ON COPYRIGHT LEVIES STARTED WHILE COURT BATTLES CONTINUE IN VARIOUS MEMBER STATES.

The copyright levies that collective management societies receive and redistribute to authors and artists as a counterpart for the statutory private copying exemptions have been disputed for many years. The information technology and consumer electronics industries, which pay the bulk of the levies imposed on their products (CD/DVD recorders, blank media, printers, copiers, mobile phones, etc.), have long complained about the lack of harmonization and the divergence between the levy tariffs, which impede the functioning of the internal market. The reform of this levy system is now back on the agenda. Pursuant to a European Commission consultation that culminated in a public hearing on May 7, 2008, a stakeholder forum on copyright levies has been set up by the Commission, which acts as a facilitator. The confidential negotiations, which are expected to last throughout the first half of 2009, aim at addressing four issues: the grey market caused by price differentials, the system of reimbursement when products cross borders, the levy rates, and the fight against piracy. Meanwhile, court battles continue. In Spain, a court has asked the European Court of Justice for a preliminary ruling on how to determine the levy rate. *Sociedad General de Autores y Editores de España v. Padawan* (Audiencia Provincial de Barcelona Oct. 31, 2008). In Germany, France, Belgium, and the Netherlands, various tribunals have ruled on whether certain equipment should be levied and how to calculate the harm that levies are supposed to compensate—with mostly diverging outcomes. See, e.g., *SIMAVELEC v. French State* (Council of State, France); *ACI and alii v. Stichting Thuiskopie* (Rechtbank 's-Gravenhage, NL). Covington has helped a major technology firm shape its levy campaign at the EU level.

## RECENT PUBLICATIONS BY COVINGTON LAWYERS

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Ron Dove & Hope Hamilton, *Combat Grey Market Goods in the US*, MANAGING INTELLECTUAL PROPERTY, Nov. 2008, at 58.

Ron Dove, *Heirs' Claim Is Kryptonite to DC Comics: Creator's Relatives Recapture a Portion of Superman Copyright*, COPYRIGHT WORLD, Sept. 2008, at 14 (discussing *Siegel v. Warner Bros. Entertainment, Inc.*, 542 F. Supp. 2d 1098 (C.D. Cal. 2008)).

Simon J. Frankel, *Music to Their Ears: First Sale, or First License, and Why It Matters Under US Law*, COPYRIGHT WORLD, Feb. 2008, at 21.

SIGNIFICANT DEVELOPMENTS IN U.S. AND  
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**PRIMARY CONTACTS IN THE COPYRIGHT PRACTICE**

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**BRUSSELS**

Kunstlaan 44 /  
44 Avenue des Arts  
1040 Brussels

Alain Strowel  
+32.2.549.5269  
[astrowel@cov.com](mailto:astrowel@cov.com)

**LONDON**

265 Strand  
London WC2R 1BH

Lisa Peets  
+44.(0)20.7067.2031  
[lpeets@cov.com](mailto:lpeets@cov.com)

**NEW YORK**

The New York Times Building  
620 Eighth Avenue  
New York, NY 10018

Albert L. Wells  
212.841.1074  
[bwells@cov.com](mailto:bwells@cov.com)

**SAN FRANCISCO**

One Front Street  
San Francisco, CA 94111

Evan Cox  
415.591.7073  
[ecox@cov.com](mailto:ecox@cov.com)

Simon J. Frankel  
415.591.7052  
[sfrankel@cov.com](mailto:sfrankel@cov.com)

**WASHINGTON**

1201 Pennsylvania Ave., NW  
Washington, DC 20004

Ronald G. Dove Jr.  
202.662.5685  
[rdove@cov.com](mailto:rdove@cov.com)

Kathleen T. Gallagher-Duff  
202.662.5299  
[kgallagher-duff@cov.com](mailto:kgallagher-duff@cov.com)

Marie A. Lavalleye  
202.662.5439  
[mlavalleye@cov.com](mailto:mlavalleye@cov.com)

Bingham B. Leverich  
202.662.5188  
[bleverich@cov.com](mailto:bleverich@cov.com)

Neil K. Roman  
202.662.5695  
[nroman@cov.com](mailto:nroman@cov.com)

Kristina Rosette  
202.662.5173  
[krosette@cov.com](mailto:krosette@cov.com)

Laurie Self  
202.662.5458  
[lself@cov.com](mailto:lself@cov.com)

Individual biographies  
and additional  
information about the  
firm and its practice  
appear on the firm's  
website, [www.cov.com](http://www.cov.com).

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SAN DIEGO SAN FRANCISCO SILICON VALLEY WASHINGTON

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