Annual Update

Significant Developments in U.S. and European Copyright Law

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Contents

Below are the selections of Covington's Intellectual Property Rights Practice Group for the "Top Ten" most significant and interesting developments in U.S. and European copyright law during 2018.

Federal Circuit nixes Google's trial verdict on fair use in Android software war.

This March, the Federal Circuit reversed the district court in *Oracle America, Inc. v. Google LLC* yet again—ruling that Google's development of Android from Java was not fair use, and sending the case back for another trial on damages.

The case, as many know from its eight-year history, involves Google's creation of its mobile OS, Android. To make Android, Google initially approached Oracle—owner of Sun Microsystems' Java development platform—about licensing Java to develop a mobile platform, which Oracle had not done with much success. (The Java language is free for anyone to write programs in, but using its software development libraries for commercial purposes requires a paid license.) After this negotiation fizzled, Google opted to copy the structure, sequence, and organization (SSO) of several key Java libraries. To do so, Google had to copy various lines of code that called up functions in programming—but Google wrote the functional parts of those programs itself. This let programmers essentially port their Java skills to Android, avoiding having to learn a new language.

In the case's first appeal before the Federal Circuit, the parties disputed the trial court's holding that a software's SSO, and short words or phrases used to call up software functions, was non-copyrightable. The Federal Circuit reversed that holding, and sent the case back down for a new trial on Google's fair use defense. This time, after a jury trial, the jury concluded that Google's use was fair and non-infringing. Oracle appealed again.

At the outset, the Federal Circuit considered its standard of review when presented with a jury verdict. Concluding that fair use is a "mixed question of law and fact," the court wended down a complicated path of caselaw to reach the standard that it applied: (a) whether the lower court applied the correct legal standard to fair use is reviewed de novo, (b) whether findings related to relevant historical facts were correct is reviewed with deference, and (c) whether the use at issue is ultimately fair is reviewed de novo. The court also clarified that the jury's role as to "historical facts" was limited—specifically, the jury was not to consider any inferences or conclusions drawn from those facts, which are matters of law for the court. This standard tightly circumscribes a jury's role in fair use cases.

The court then proceeded to consider the four fair use factors, noting at the beginning of its analysis that neither party argued that fair use was not a jury issue—so the jury was asked not just to find the historical facts, but also to decide those facts' implications. Per the court's conclusion on the standard of review, this gave the court considerable leeway to essentially disregard the jury's findings on the four factors.

First, the court considered the purpose and character of Google's use. Here, the court focused heavily on the fact that Google's use was commercial and very successful—regardless of case law holding that a copy's commercial nature does not necessarily preclude fair use. The court also disregarded any bases the jury may have had for deciding this issue in Google's favor, explaining that there was "no substantial evidentiary support in the record" for the jury to have found Google's use anything other than "overwhelmingly commercial."

Under the first factor, the court also considered whether Android made a transformative use of Java, as transformative uses are very often fair. But the court found otherwise in this case, ruling that Google merely ported Java to smartphones—which did not alter the "expressive content or message" of Java, nor were smartphones a "new context" sufficient to make the use transformative. (In dicta, the court also suggested that a copier's bad faith can be relevant to fair use, contrary to other strands of precedent stating that good or bad faith is irrelevant to fair use.)

Second, the court heavily discounted the "nature of the copyrighted" work factor. The district court had held, considering Oracle's motion for judgment as a matter of law, that the jury could reasonably have concluded that the copied code was more functional than creative, favoring Google. The Federal Circuit explained that this was reasonable, but cabined its analysis by citing law holding the second factor not particularly significant to the fair use analysis.

Third, the court evaluated the amount and substantiality of the Oracle code Google used, versus the parts of code Google did not copy. Here, it was undisputed that Google copied 11,500 lines of code—11,300 more lines than necessary to write code in Java. The court concluded that no reasonable jury would find this to be qualitatively insignificant. Even so, the court concluded that this factor was neutral at best, and arguably weighed against finding fair use because Google wanted to leverage an existing community of Java developers even though it could have written all new code.

Last, the court focused on "undoubtedly the single most important element of fair use"—the effect of Google's copying on the market for Oracle's software. Here, the court focused on Oracle's evidence that it had used Java for smartphones for years—but that when Google debuted its free Android OS, Java was essentially shut out of the smartphone market. Also, the court explained that Google harmed potential markets for Java, as shown by Google's negotiation with Oracle about precisely that: the potential market for expanding Java's use in smartphones. So the court concluded this factor weighed heavily against fair use.

A question hangs over the Federal Circuit's conclusion that Google's use was not fair as a matter of law. After all, if that was the case, why did the court remand the fair use issue for a jury trial after the first appeal? As the case heads almost inevitably toward a cert petition, we may learn the answer in the future. But if the Supreme Court does not take up the case and clarify the issues, the Federal Circuit's ruling arguably makes it much harder for software fair uses to exist.

No first sale doctrine for digital files.

In *Capitol Records v. ReDigi*, the Second Circuit rejected a digital music resale company's argument that its service did not infringe because its digital file copies were protected by the first sale doctrine.

ReDigi was a computer service meant to enable the resale of digital music files. Before a user could sell a file, ReDigi verified that the file had been lawfully purchased through iTunes and that there were no duplicate files on the user's computer. ReDigi then transferred the file to its server, using a process that transferred and deleted portions of the file piecemeal. As a result, and unlike typical file transfer processes, the entire file never existed at the same time on both the user's computer and ReDigi's server. Once the file had been transferred, the owner could stream it from ReDigi's server and sell it to another user. The purchaser could then either stream the file or download it, which deleted the file from the server through the same piecemeal transmission process.

A number of record labels sued, alleging that ReDigi infringed their copyrights by reproducing and distributing their works without authorization. The district court found infringement of both rights, and granted partial summary judgment in the plaintiffs' favor.

ReDigi's arguments centered on the first sale doctrine, which permits the owner of a "particular copy or phonorecord lawfully made" to distribute that copy without the rightsholder's permission. (A digital music file fixed in a material object for a non-transitory period—such as in computer memory—qualifies as a "phonorecord.") Under the first sale doctrine, one who purchases a book or CD, for example, may re-sell that work without violating the right of distribution. Yet unlike a book or CD, a purchased digital music file could theoretically be sold without the original file changing hands. Bearing this in mind, the district court held that ReDigi's file transfer violated the right of reproduction because, regardless of the fact that the original file never existed in full at the same time as the copy, ReDigi still made a copy without permission. Because any phonorecord resulting from this copying process would not be "lawfully made," ReDigi also violated the right of distribution.

The parties eventually stipulated to a final judgment, under which ReDigi paid $3.5 million and was enjoined from operating its services. But ReDigi reserved the right to appeal the ruling on infringement. It did so, and the Second Circuit affirmed in an opinion written by Judge Pierre Leval.

ReDigi again argued that the first sale doctrine made its service permissible because its file transfer process never involved two copies of the same file existing at the same time. The Second Circuit rejected this argument. It ruled that whenever ReDigi transferred a digital music file from a user's computer to its own server, or from its server to a purchaser's computer, it fixed that file anew—thus creating a new copy, separate from the original. Because the first sale doctrine permits only the distribution, and not the reproduction, of phonorecords, ReDigi's service violated the right of reproduction. The court thus dismissed ReDigi's first sale arguments.

The court also rejected ReDigi's fair use argument. First, the purpose and character of the use favored the record labels. ReDigi did not make any change to the works, or provide commentary or information—it simply provided a market for resale. And because the use was not transformative, ReDigi's commercial nature also counted against fair use. The second factor, nature of the work, did not favor either side, as is typical. The third, the amount and substantiality of the work used, favored the record labels as well, because ReDigi replicated entire song recordings. And the fourth factor, the impact on the market for the original, weighed strongly against fair use because ReDigi directly competed with sales of the "original" sound recordings. For the court, this substantial market impact decisively negated any finding of fair use.

The court did take care to narrow its ruling. It only affirmed the district court's ruling that the right of reproduction was violated, and did not address the ruling on right of distribution. The court also noted in a footnote that a copy made solely for cloud storage—not to facilitate resale—would likely be fair use.

The long-awaited opinion in ReDigi will provide helpful guidance for the video game industry as it addresses novel issues of digital content distribution.

Annotations to state code not copyrightable.

In *Code Revision Commission v. Public.Resource.Org*, the Eleventh Circuit held that the official, annotated version of Georgia's state code is not copyrightable. The court offered a unifying principle for a long history of case law dealing with copyright in government works: no work that is effectively authored by the public can be copyrighted.

The official, published laws of Georgia are published in the Official Code of Georgia Annotated ("OCGA"). Along with the text of the law, the OCGA contains history and repeal notes, cross references, summaries of cases and articles, and other similar references. Per the OCGA itself, these annotations are part of the official, published version of Georgia's laws. But they do not, in themselves, have the force of law.

The annotations are prepared by Lexis, which has the exclusive right of publication of the OCGA in Georgia. But the state of Georgia itself holds the copyright in the annotations, provides detailed directions to Lexis, and makes the OCGA freely available to the public at certain government-run institutions, such as universities and libraries. And the Code Revision Commission, comprised mostly of elected Georgia officials (including the lieutenant governor and state legislators) oversees and has final authority over Lexis's work. The Commission also receives royalties from sales of the OCGA.

Public.Resource.Org ("PRO") is a nonprofit dedicated to improving public access to government and legal materials, including appellate court decisions and state codes. It purchased print versions of the OCGA and made scans freely available on its website. The Commission, on behalf of the State and General Assembly of Georgia, sued. PRO argued that Georgia's copyright in the OCGA was unenforceable, and that its use was fair. The district court granted the Commission partial summary judgment, reasoning that because the annotations did not have the force of law, they were copyrightable and not in the public domain. The district court ordered PRO to remove the OCGA from its website. PRO appealed, and the Eleventh Circuit reversed.

Since Georgia had a registered copyright in the OCGA, and PRO had copied the entire work, PRO had to demonstrate that the copyright was invalid to avoid a finding of infringement. The court noted that extensive authority holds that because the author of certain government works is the general public, such works are inherently in the public domain and uncopyrightable. After carefully considering these many decisions, the court concluded that this rule reflects a fundamental principle about "the nature of law in our democracy": the public is sovereign, self-governing through its representatives, and the ultimate source of all law. Representatives, in the court's eyes, are the law's drafters, while "the People" are its true authors. Because the public authors the law, it also owns it, and there can be no copyright in it.

The validity of the copyright in the OCGA thus turned on whether the OCGA was created by agents of "the People" in the exercise of sovereign authority, and therefore attributable to the constructive authorship of the public. The court rejected the district court's bright-line rule, under which only that which has the force of law is uncopyrightable, because some government works may implicate these policy concerns without being "law" per se.

Instead, the court identified three factors indicating that the OCGA was authored by the public: the identity of the public officials involved, the authority of the annotations, and the process of their creation. First, it observed that it the Georgia General Assembly was the authoritative power behind the annotations. The Commission was simply an arm of the Assembly, as the majority of its members were sitting members of the Assembly. It was also funded by legislative branch appropriations and staffed by a legislative agency. And while Lexis drafted the annotations, it did so pursuant to the Commission's "punctiliously specific" instructions, which left little to Lexis's independent judgment. Because the duties of state legislators "peculiarly include the direct exercise of direct sovereign power," this control indicated that the People were the ultimate authors of the annotations.

Second, the court found that although the annotations did not have the force of law, they were authoritative sources of the meaning of Georgia's laws. The law itself provided that the annotations would be "merged" with the statutory text into the authoritative publication of the laws of Georgia. Indeed, the OCGA contains the "official" annotations to the code, which Georgia courts often treat as conclusive.

Finally, the court observed that the process by which the annotations are created is closely related to the passage of statutory Georgia law. The General Assembly also votes to approve bills as they appear in the OCGA, and reenacts the entire OCGA annually.

Based on these factors, the court concluded that the annotations in the OCGA were constructively authored by the public, through its agents in the Assembly, and were therefore uncopyrightable. It reversed the grant of summary judgment and vacated the injunction.

Searchable catalog of TV clips not a fair use.

In February, the Second Circuit in *Fox News Network, LLC v. TVEyes, Inc.* held that a service that allowed users to watch clips from 1,400 television stations was not a fair use.

TVEyes offered a service that allowed subscribers to search for clips of television content. To provide this service, TVEyes continuously recorded nearly all broadcast television. It used closed-captioned text and text-to-speech software to create transcripts of these recordings. Users could enter a search term to view a list of all clips—which could be up to ten minutes long—in which that term was used. These clips could then be watched directly through the TVEyes platform. TVEyes also offered ancillary functions such as archiving and downloading clips, which would otherwise be deleted from TVEyes' service after about a month.

Fox unsuccessfully demanded that TVEyes

stop using its programming, and sued for copyright infringement. The district court found that some of TVEyes's ancillary functions were not fair uses, such as downloading. But the court found that others, including the search and watch functions, were fair. Fox appealed with respect to the watch function and certain others (but not the search function).

The Second Circuit reversed, finding that the watch function was not a fair use and that its inclusion rendered TVEyes's entire package of functions infringing.

Under the first factor, the "purpose and character" of TVEyes, the court determined that the service was at least somewhat transformative: it communicated something new and different from the original broadcasts, and expanded their utility. The court compared TVEyes to Google Books, examined in the seminal fair use case *Authors Guild v. Google Books*. Like Google Books, TVEyes enabled users to quickly and precisely search an otherwise prohibitively vast "ocean of programming." Enhancing efficiency in this way made TVEyes somewhat transformative—but only modestly so, because it provided no new meaning or message to the republished content. Because TVEyes was also a commercial service, the court weighed the first factor only slightly in favor of TVEyes. (A concurrence disagreed strenuously with the idea that enhancing efficiency can be transformative at all.)

The second fair use factor, "the nature of the copyrighted work," was only minimally significant in the court's analysis, as is generally the case—although facts reported in news are not copyrightable, news reporting itself can be, so the factor weighed for Fox.

The court found that the third factor, "the amount and substantiality" of the portion of the work used, clearly favored Fox. TVEyes's clips were both "extensive," up to ten minutes long, and copied everything "important," because news clips are generally quite short. Unlike Google Books, which makes only a small portion of a book's contents available, TVEyes let users watch entire segments of programming.

The fourth factor, and one with great weight, is the effect of the secondary use on the market for the original. TVEyes's success demonstrated that there is a plausible and valuable market for searchable access to televised content. Because consumers could gain such access through TVEyes without paying Fox, TVEyes deprived Fox of licensing revenues it could permissibly demand. The court therefore accepted Fox's argument that TVEyes undercut Fox's ability to profitably license searchable access to its works. TVEyes argued that Google Books, too, compiled a searchable database of entire works—but the court observed that that service did not provide unrestricted access to the entirety of a work, so it did not have the same effect on the market for the original.

Weighing all of the factors together, the court concluded that TVEyes's watch and related functions were not fair uses. The service commercially redistributed everything a user could want from another's work, without any license or compensation. Because the district court had held that certain of TVEyes's functions were fair uses, the Second Circuit remanded so that the district court could amend its injunction.

This case illustrates just how context specific the standard for fair use is. Even though the majority found that TVEyes was somewhat transformative—one of the most significant elements of the fair use test—the court had no difficulty in concluding that, as a whole, the service was not a fair use.

Court enjoins download code sales based on new license language.

A federal judge in California entered a preliminary injunction prohibiting the stand-alone sale of certain download codes included with DVDs in *Disney Enterprises, Inc. v. Redbox Automated Retail, LLC*.

Disney distributes its films on physical discs as well as through streaming and download services. Disney also sells "Combo Packs," which include a film on a physical disc and as a code. Users can enter this code on Disney's websites to stream or download the same film. The Combo Packs include a license, and the websites include terms of use, stating that codes cannot be sold or transferred.

Redbox rents and sells films in both physical and digital formats. For several years, it has purchased and disassembled Disney Combo Packs, and rented and sold the physical discs. In 2017, it began to sell Combo Pack download codes as well.

Disney sued Redbox, alleging contributory copyright infringement, contract claims, and unfair competition. It also sought a preliminary injunction, which the court denied. Analyzing the language of Disney's license and terms of use, the court concluded that Disney was unlikely to succeed on the merits of its copyright claim.

In response, Disney began distributing new releases under an updated license and packaging, and changed its terms of use. New Combo Packs state that redemption of the code requires prior acceptance of the license, that the code is only for personal or family use by the purchaser, and that the code may not be sold separately. The download websites began to feature pop-ups with similar language, and stating that purchase of a code does not create any ownership interest in the film at issue.

Disney amended its complaint, now claiming only copyright infringement based on the sale of download codes from Combo Packs with the new license language. Resting its arguments on the new language, it moved again for a preliminary injunction.

This time, the court granted the motion. First, it determined that Disney's new copyright claim was likely to succeed, largely based on the new Combo Pack language. Disney argued that the website pop-up language created an enforceable restrictive license. And because assent to the pop-up requires a user to represent that they did not receive the code separately from the complete Combo Pack, Disney asserted that Redbox contributed to infringement of the license by selling the code separately. Redbox, on the other hand, argued that the pop-up language did not constitute an enforceable license.

The court, however, noted that Disney was likely to succeed irrespective of whether the pop-ups created a license. Instead, it found that the language on the physical Combo Pack packaging likely created a license and prevented purchasers from obtaining any ownership interest in the codes. The "relatively visible" language set restrictions on use of the codes, and provided information on the website terms and conditions. Crucially, Disney represented that a purchaser who did not agree to the license terms could return the Combo Pack (though the court was somewhat skeptical, given that the pop-up licenses did not mention or were ambiguous on the subject of returns).

The court did not firmly decide whether any of Disney's purported licenses were in fact enforceable agreements, or what their terms may have been. But it did find that no Combo Pack purchaser could reasonably believe that it had unrestricted ownership rights in any of Disney's digital content—and so Disney was likely to succeed on its infringement claim.

The court rejected Redbox's argument that the first sale doctrine barred Disney's claims. That rule allows the owner of a particular lawful copy of a work to freely re-sell the copy. But the doctrine only applies to particular, fixed physical copies, so while it would block restrictions on resale of the physical discs, it cannot apply to digital copies that are streamed or downloaded. The court also rejected a related claim that Disney misused its copyright in the digital copies to try to control downstream distribution of the physical discs.

The court entered a preliminary injunction preventing Redbox from selling codes, subject to a two key restrictions. First, only codes included in Combo Packs featuring the new license terms were covered. Second, the injunction would expire after ninety days unless Disney showed that it "clearly and prominently indicates" that anyone who does not agree to its license may return codes or Combo Packs for a refund.

Claim that "Stairway to Heaven" infringed set for new trial.

In *Skidmore v. Led Zeppelin*, the Ninth Circuit ordered a new trial on a claim that the band copied key elements of the classic song from another band. In doing so, it determined that the scope of copyrights in musical works protected under the Copyright Act of 1909 is dictated by the deposit copy that was filed with the Copyright Office at registration—an issue of first impression in the federal circuit courts.

In 1966, Randy Wolfe of the band Spirit wrote an instrumental song called "Taurus," which was featured on the band's eponymous first album, released in 1967-68. A deposit copy was filed with the Copyright Office in 1967, as part of the registration.

Spirit and Led Zeppelin, which was formed in 1968, performed at several of the same concerns in the late 1960s and early 1970s, and Led Zeppelin occasionally covered a different Spirit song on tour. There was evidence that Robert Plant attended a Spirit performance in 1970, and Jimmy Page owned a copy of the album Spirit. Spirit members also testified that they played "Taurus" at some of the concerts both bands performed at, but there was no direct evidence that members of Led Zeppelin had heard them.

In 1971, Led Zeppelin released its fourth album, featuring "Stairway to Heaven," written by Page and Plant. Wolfe died in 1998, and his copyright interest in "Taurus" passed into a trust. Skidmore became the trustee and, in 2014, sued Led Zeppelin and its members and producers, alleging that the opening notes of "Stairway to Heaven" are substantially similar to those of "Taurus."

The district court determined that, "Taurus" was protected under the 1909 Copyright Act, which does not protect sound recordings. The court then concluded that the composition embodied in the deposit copy determined the scope of Wolfe's rights in "Taurus," and that Skidmore could not rely on a recording of the song to prove similarity. Before trial, the district court excluded recordings of Spirit playing "Taurus" as well as plaintiff's expert testimony based on these recordings.

At trial, the court did permit Page to listen to Spirit recordings outside the presence of the jury in order for plaintiffs to attempt to demonstrate his access to the recordings, while preventing prejudice to the jury. Plaintiffs also produced a guitarist, who played recordings of his versions of "Stairway to Heaven" and the bass clef notes of "Taurus" for the jury. During deliberations, the jury requested these recordings, and the district court asked whether it wanted to hear the full version of "Taurus" or just the bass clef. The foreperson requested the full version, and the court directed that the full version be played.

The jury determined that Led Zeppelin had access to "Taurus," but that the songs were not substantially similar, and the district court entered an amended judgment in the defendants' favor. Skidmore appealed, challenging various jury instructions and the evidentiary and procedural rulings noted above.

The Ninth Circuit accepted some of Skidmore's arguments, and vacated the judgment and remanded for a new trial. To begin, the court noted that a copyright plaintiff must show copying and unlawful appropriation. Where there is no direct evidence of copying, a plaintiff can attempt to demonstrate that the defendant had access to the plaintiff's work and that the two works are similar. To show unlawful appropriation, the plaintiff must show substantially similarity to original, protectable elements of the plaintiff's work. There are two tests for substantial similarity. Under the extrinsic test, the works are broken down into their protectable elements and compared objectively. If the works are extrinsically similar, the fact finder proceeds to the intrinsic test, under which the "total concept and feel" of the works as a whole are compared.

Skidmore challenged a trio of jury instructions related to the extrinsic test. First, he argued that the district court erroneously failed to instruct the jury that the selection and arrangement of unprotectable elements is itself protectable. The panel agreed, finding this instruction essential to proper application of the extrinsic test. It also noted that plaintiffs relied on a theory that the songs had similar selections and arrangements, presenting expert evidence to that effect. As a result, failure to include an instruction on selection and arrangement was prejudicial error.

Second, the panel held that the jury instructions on originality were erroneous, because they wrongly implied that common or public domain elements cannot be original even if modified or included in an original selection or arrangement. Third, the panel found that it was harmless error to not instruct the jury that there as evidence of access increases, less evidence of similarity is needed, and vice versa—the "inverse ratio" rule. But it instructed the district court to consider whether such an instruction might be appropriate on remand.

Next, the panel turned to Skidmore's appeals of evidentiary rulings. It first affirmed the ruling that the deposit copy defined the scope of Wolfe's rights in "Taurus"—a issue of first impression, and one a different panel declined to consider earlier this year in Williams v. Gaye. It held that the deposit copy was not purely archival in nature, but that reduction of a work to some manuscript was essential to claim copyright in an unpublished work under the 1909 Act.

The court was more receptive to Skidmore's argument that the district court should have allowed Spirit recordings to be played in the presence of the jury to prove access. It found that the jury would have been able to observe Page's reactions to the recordings, and that any risk of prejudice could be avoided with proper instruction.

Line between inspiration and infringement remains "Blurred."

The Ninth Circuit affirmed a court's refusal to overturn a controversial jury verdict in *Williams v. Gaye*, in which a "constellation" of specific similarities between two songs was sufficient to support a verdict of copyright infringement.

In 1976, Marvin Gaye recorded the hit song "Got to Give It Up," and his three children inherited the copyrights in that composition. In 2012, Robin Thicke and Pharrell Williams wrote and recorded the song "Blurred Lines," and Clifford Harris, Jr. (known as T.I.) separately wrote and recorded a verse that was included in the song. Thicke, Williams, and Harris co-own the musical composition copyright for "Blurred Lines," while the sound recording rights are co-owned by Star Trak and Interscope Records.

After the Gayes made an infringement demand and negotiations broke down, Thicke, Williams, and Harris filed for a declaratory judgment of non-infringement. The Gayes counterclaimed for copyright infringement against both the composition and sound recording holders. Thicke, Williams, and Harris moved for summary judgment because none of the songs' similar elements was protectable. The district court disagreed. That court also ruled that because "Got to Give It Up" was recorded before the 1978 Copyright Act gave sound recordings copyright protection, the Gayes' rights were limited only to song's composition—and not determined by the sound recording.

At trial, the parties' expert musicologists were front and center. The Gayes' experts identified a "constellation" of similarities the two songs share: signature hooks and phrases in main and backup melodies, as well as certain bass, keyboard, and percussion parts. One of the Gayes' experts found many of the similarities from the "constellation" to be in the deposit copy. Gaye's experts, forbidden from playing the sound recording, used edited versions meant to emphasize the "compatibility" of the two songs, and their structural similarities.

The jury agreed with the Gayes, concluding that Williams and Thicke had infringed the Gayes' copyright, awarding about $7.3 million in damages and infringers' profits. But the jury found Harris and the sound recording holders had not infringed. After trial, the court remitted the jury award to about $5.3 million, overturned the jury verdict for Harris and the sound recording holders, and awarded the Gayes a 50 percent running royalty in "Blurred Lines" and prejudgment interest. The court declined to award the Gayes attorneys' fees or costs.

Thicke and Williams appealed alternatively for reversal of the court's initial denials of summary judgment, a new trial, or vacatur of the awards of damages, profits, and a running royalty. Harris and the sound recording holders appealed the court's overturning of the favorable verdict. The Gayes appealed the denial of fees and costs, as well as the court's limitation of their rights to the deposit copy rather than the commercial recording.

The Ninth Circuit discussed substantive copyright questions only briefly. It rejected Thicke and Williams' arguments that "Got To Give It Up" enjoyed only "thin" protection, because of the range of possible musical expression is broad and varied. As a result, the Gayes only needed to show that the two songs were "substantially similar," rather than meet the higher burden of "virtual identity." The court also declined to settle whether sound recordings are admissible to illustrate the scope of rights in compositions protected under the 1909 Act.

The remainder of the majority opinion resolved the parties' appeals on procedural terms. As to Thicke and Williams' arguments, as well as the Gayes' contentions, the court generally cited principles of appellate deference toward trial court discretion and jury verdicts. It found that the appellants had not met the high standards necessary to prevail on appeal. But the court agreed with Harris and the sound recording owners' argument that the Gayes had waived their right to challenge what the Gayes had argued was an inconsistent jury verdict. The majority also ruled that Harris was not vicariously liable for Thicke and Williams' infringement—Harris wrote his verse independently and no evidence suggested he had either the right or ability to control Thicke and Williams.

Addressing the Gayes' appeal, the majority ruled that the district court did not abuse its discretion in denying them fees or in apportioning costs among the parties.

The lengthy dissent denied that any material facts about the similarity of the songs were at issue at trial. Rather, the dissent maintained that all parties accepted that the songs were superficially similar, sharing certain chord progressions, melodic devices, and other "building blocks." The dissent would have found that—based mainly on elements of music theory from the parties' experts—there was insufficient evidence to support the verdict.

The Ninth Circuit's decision in this case was long awaited as a ruling on just how similar two songs must be for one to infringe. But in ruling mainly on procedural grounds and deferring to the finders of fact below, the Ninth Circuit did not shed much light on that copyright question.

Another district court rules that framing content can infringe copyright.

Following a Texas court's decision from last quarter, a New York federal court ruled in *Goldman v. Breitbart News Network, LLC* that framing (also called in-line linking or embedding) content on a website can infringe the content owner's copyright. In general, framing content has been almost categorically held to be non-infringing, until now.

The plaintiff in *Goldman*, a photographer, owns the copyright in a picture he took of New England Patriots quarterback Tom Brady. The photo went viral and was widely shared on Twitter. Several news outlets embedded tweets featuring the photo in news stories about Brady. Technically speaking, the "embed Tweet" function creates a frame on the embedder's website that shows content hosted on Twitter's servers—not the embedder's computers. Goldman sued the news outlets for infringing his display right in his photo, claiming that embedding the photo displayed it to the public without his permission, violating his exclusive right to display his work.

In such cases, courts and litigants have long looked to the Ninth Circuit's *Perfect 10 v. Amazon* and the Seventh Circuit's *Flava Works v. Gunter*. Those courts adopt what is usually called the "server test," meaning that embedding content is non-infringing so long as the content stays on another party's server, not the defendant's computers. These two cases have been widely followed and adopted by district courts around the country. The *Goldman* defendants cited this precedent in moving for summary judgment as to infringement, explaining that embedding could not infringe Goldman's copyright as a matter of law.

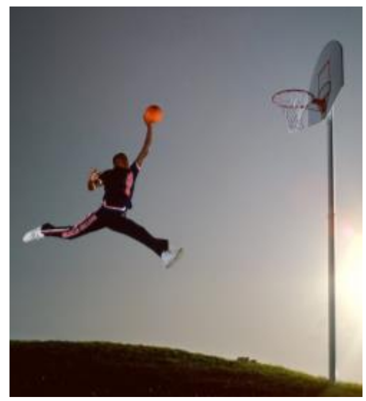
But the *Goldman* court disagreed. It pointed to the language of the Copyright Act, which the court explained defined "public display" broadly, requiring only that a work be displayed to the public—not that the work has to be in the possession of the entity displaying it. So, the court reasoned, any defendant that took active steps to put in place a process that transmitted Goldman's photos to the public infringed Goldman's display right.

The *Goldman* court also joined a trend that has grown since the Supreme Court's *Aereo* decision. In *Aereo*, the Court examined whether Aereo infringed TV networks' display rights by transmitting broadcasts to users via the Internet, giving each user her own antenna and server space rather than sharing one copy of a work to many users. There, the Court focused more on how Aereo's broadcasts *looked* to viewers, as opposed how they operated on the back end. Citing *Aereo*, the *Goldman* court explained that "liability should not hinge on invisible, technical processes imperceptible to the viewer."

The court has certified its decision for an interlocutory appeal. If the Second Circuit takes up the issue now, it could find itself faced with creating a split with its sister circuits—or taking up an interpretation of the display right that some see as being at odds with the Copyright Act's plain meaning. Either outcome could tee up the issue for Supreme Court consideration, giving the high court a chance to clarify whether *Aereo* really does urge courts to focus on how technology appears to consumers, as to how it actually works on the back-end.

Ninth Circuit affirms dismissal of photographer's "Jumpman" case.

In Rentmeester v. Nike, the Ninth Circuit upheld a district court's decision to dismiss a photographer's infringement action against Nike. The photograph alleged that Nike's famous "Jumpman" logo infringed his photograph of a leaping Michael Jordan.



Plaintiff's photograph.

Nike's photograph.

Nike's Jumpman Logo.

The photographer, Jacob Rentmeester, photographed Michael Jordan in 1984. He brought in the basketball hoop as a prop and instructed Jordan on the precise pose to assume—a variant on a ballet leap, not a typical jump for a basketball player to make. Not long afterward, Nike hired its own photographer to make a photograph "obviously inspired by Rentmeester's," featuring Jordan doing the same pose but wearing different clothes and in a different setting. Rentmeester saw the poster and was upset, so he and Nike entered a limited license for Nike to continue using its photo, but only for two years on posters and billboards in North America. In 1987, Nike debuted the Jumpman logo pictured above. In 2015, Rentmeester sued Nike, alleging that the Jumpman logo was derived from Nike's earlier, purportedly infringing photograph—and that with respect to that photograph, Nike exceeded its license. Rentmeester alleged that both the logo and Nike's photograph copied protected aspects of his photograph. Nike moved to dismiss the complaint, and the district court granted the motion.

Reviewing Nike's motion to dismiss de novo, the Ninth Circuit focused on whether Nike had copied enough protected expression from Rentmeester's photo for Nike's logo to be "substantially similar" to Rentmeester's photo. The court explained that elements of photographs can, when combined, be protectable expression, despite the fact that they reflect real factual elements that are unprotectable in themselves. For instance, choices related to subject matter, pose, lighting, camera angle, depth of field, and the like can be protectable. So, the court continued, Rentmeester could not protect Jordan's pose even though he directed it—but the particular expression of the pose in his photograph could be protectable.

On this point, the court rejected Nike's argument that photographs only have "thin" copyright protection because they reflect facts. Rather, the court reasoned, photographs like Rentmeester's—as opposed to photographs whose elements are tightly constrained—have broader copyright protection because they are constructed from a wide array of elements. For instance, instead of having Jordan making a standard shot on a basketball court, Rentmeester had him outside, doing a ballet leap. This, the court said, was protectable.

Unfortunately for Rentmeester, though, the court held that Nike had not copied any of the photograph's expressive elements. For both Nike's photograph and the Jumpman logo, the court concluded that the only similar element was subject matter and pose—neither of which can be copyrightable in itself. As to Nike's photograph, the court pointed out that although the fundamental idea was the same, Nike expressed it in different ways through Jordan's clothes, the setting, and the lighting and camera angle. As to the Jumpman logo, this simple black silhouette had even less in common with Rentmeester's photo than Nike's dissimilar photo did. So the court affirmed the district court's dismissal.

Violation of website terms of use is not computer fraud.

In *Oracle USA v. Rimini Street*, the Ninth Circuit ruled that although a company offering third party software support infringed copyright by downloading updates from the software owner's site, it did not commit computer fraud by violating the site's terms of use.

Oracle licenses several enterprise software products to users for a one-time fee. It also sells annual maintenance contracts, which include software updates available through Oracle's website. Rimini offered third party support for Oracle software. This support required Rimini to provide Oracle software updates to its customers, which required Rimini to copy Oracle's software. As part of this work, Rimini used automated tools to download updates from Oracle's website. Rimini's use of these tools was contrary to Oracle's website terms of use.

Oracle sued Rimini, alleging copyright infringement and violation of analogous California and Nevada computer fraud laws. The district court granted Oracle summary judgment on portions of its infringement claim, and a jury found for Oracle on the computer fraud claims. The jury awarded Oracle $50 million in damages, and the judge awarded prejudgment interest, fees, and costs—bringing Oracle's total recovery to about $124 million—and entered an injunction against Rimini. Rimini appealed.

The Ninth Circuit began by noting that because Rimini necessarily copied Oracle's software, it could not be disputed that Rimini committed copyright infringement—unless its acts were authorized by an express license. Evaluating those licenses, the Ninth Circuit found that despite having slightly different terms, each license ultimately prohibited "use" of Oracle's software for any entity other than the licensee. In doing so, the court rejected Rimini's argument that it could "cross-use" Oracle's software by using one licensee's software to service another licensee. Reading the straightforward language of the license, the court found that Oracle's licenses prohibited Rimini's purported "cross-use."

The court then turned to the computer fraud rulings, taking the California law as representative of the Nevada law as well. The California Comprehensive Data Access and Fraud Act (CDAFA) makes knowing access and use of a computer system "without permission" a public offense, and provides a private cause of action to the system's owner. The parties' dispute focused on the meaning of "without permission." Rimini, and the Electronic Frontier Foundation as amici, claimed that a bare violation of a website's terms of use when a user has permission and authorization to both access and use the system is not covered by the statute. Oracle, on the other hand, argued that whether access was initially authorized is irrelevant—it contended that the key question was whether the terms forbade what Rimini did with its access.

The Ninth Circuit accepted Rimini's argument, and reversed the jury verdict on the computer access claims. It explained that the statute focuses on whether access was authorized in the first place—not the method by which the system was ultimately accessed. And when Rimini first used its automated tools to access Oracle's website, it indisputably had authorization to do so.

The precise reach of computer fraud laws has been a subject of frequent dispute—especially the question of whether violation of terms of service also violates the law. At least with respect to the state laws at issue here, that question appears to be settled.

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