

COPYRIGHT REVIEW

BRYAN
CAVE
LEIGHTON PAISNER **BLP**

STATE SOVEREIGN IMMUNITY

Allen v. Cooper, 589 U.S. ____ (Mar. 23, 2020)

- North Carolina hires Frederick Allen and his company, Nautilus Productions, to document discovery of shipwreck of Blackbeard's Queen Anne's Revenge
 - ran aground at Beaufort, N.C. in 1718
- Allen documents wreck in photos/videos over many years; registers works
- State posts some of the works online without permission.
 - Parties settled. State paid Allen and took works offline.
- State posts them again, and passes law ("Blackbeard's Law") converting works into "public record" materials that it could use freely.

STATE SOVEREIGN IMMUNITY

Allen v. Cooper, 589 U.S. ____ (Mar. 23, 2020)

- Allen argues that Copyright Remedy Clarification Act (“CRCA”) abrogated state sovereign immunity.
 - CRCA defines potential infringers to include “any State, any instrumentality of a State, and any officer of a State or instrumentality of a State acting in . . . official capacity”.
- Trial court agrees. Fourth Circuit reversed.
- Q: Did Congress validly abrogate state sovereign immunity with CRCA?
- Held: No. Congress has no authority to abrogate state sovereign immunity.

STATE SOVEREIGN IMMUNITY

Allen v. Cooper, 589 U.S. ____ (Mar. 23, 2020)

- Intellectual Prop. Clause (art. I § 8, cl. 8) does not allow it.
 - Decided in *Florida Prepaid*, 527 U.S. 627 (1999) (immunity from suits for patent infringement).
- Sec. 5 of the Fourteenth Am. does not allow it in this case.
 - Abrogation must be “congruent and proportional” to the due process injury. Not shown.
- Congress must:
 - (i) show a “pattern of unconstitutional infringement” with no adequate state remedy (negligence not enough; intentional or reckless conduct may be); and
 - (ii) tailor any law to address the due process injury (cannot abrogate immunity in a manner that treats states like everyone else).

COPYRIGHTABILITY – GOVERNMENT EDICTS

Georgia v. Public.Resource.Org, No. 18-1150 (U.S. Apr. 27, 2020)

- State of Georgia Official Code – statute text plus non-binding annotations
- Code Revisions Commission
 - State entity, funded through legislative branch appropriations
 - Made up of state legislators and staff of Office of Legislative Counsel
- Commission hired Matthew Bender to draft annotations
 - Work for hire agreement, State owns any copyright
 - Commission specifies content “in exacting detail”
- Commission sues Public.Resource for posting Code/Annotations online.

COPYRIGHTABILITY – GOVERNMENT EDICTS

Georgia v. Public.Resource.Org, No. 18-1150 (U.S. Apr. 27, 2020)

- Government Edicts Doctrine (“No one can own the law.”) – 19th century cases
 - Judges cannot assert copyright in work performed in capacity as judge.
 - Official reporter cannot hold copyright in opinions of judges.
 - But, reporter may hold copyright in explanatory materials (author’s own work; not law)
- Legislators, like judges, cannot be “authors.”
- Georgia’s annotations “not copyrightable”
 - Commission functions as arm of legislature, is not an “author.”
 - Commission creates annotations in discharge of its legislative duties.
 - Annotations needed to fully understand law.

COPYRIGHTABILITY – GOVERNMENT EDICTS

Georgia v. Public.Resource.Org, No. 18-1150 (U.S. Apr. 27, 2020)

- Dissent (Thomas, Alito, Breyer)
 - 22 States, 2 Territories, and D.C. rely on similar arrangement
 - Annotations are not law; not required to provide “fair notice” of law.
 - Unlike judges and legislators, creators of annotations are incentivized by copyright law to produce the annotations (not obliged to do so as part of their function).
- Dissent (Ginsburg, Breyer)
 - Doctrine applies only to works (i) created by judges/legislators (ii) in the course of their judicial/legislative duties.
 - Annotations not created in legislative capacity, no force of law (descriptive not prescriptive)

SOFTWARE COPYRIGHTABILITY / FAIR USE

Google v. Oracle, No. 18-956 (U.S.)

- “Copyright Case of the Century”
- Java – developed by Sun Microsystems in 1996 –
 - one of most popular computer languages – “write once, run anywhere”
 - programmer can write a Java program on computer using one OS (e.g., IBM using DOS) and run that program on computer using a different OS (e.g., Apple).
- Java Application Programming Interface (API):
 - to function properly, Java language requires use of Java API
 - library of pre-written functions organized into packages which includes declaration code and implementing code.

SOFTWARE COPYRIGHTABILITY / FAIR USE

Google v. Oracle, No. 18-956 (U.S.)

- Google sought license from Sun to use Java API in developing Android OS for use in mobile phones – Sun said, No.
- Google integrated portions of Java declaration code into Android platform (37 Java API packages relevant to mobile devices (11,500 lines of code))
- Google's theory is that Java declaration code is not copyrightable. (Google created its own implementing code)
- Sun praised Google's use of Java at the time. Oracle bought Sun in 2010 – began enforcing rights.
- Fed. Cir. – found infringement by Google and no fair use

SOFTWARE COPYRIGHTABILITY / FAIR USE

Google v. Oracle, No. 18-956 (U.S.)

- Q: Whether copyright protections extend to a software interface (Java API).
- Q: Whether Google's use of portions of Java API in context of creating new computer program constitutes fair use.
- Dozens of amicus briefs filed.
- Oral argument postponed to October term 2020.

COPYRIGHTABILITY – FICTIONAL CHARACTERS

Daniels v. The Walt Disney Co., No. 18-55635 (9th Mar. 16, 2020)

- Line of fictitious characters, The Moodsters, help children deal with emotions
- Five characters, color-coded anthropomorphic emotions
 - each representing a different emotion: pink (love); yellow (happiness); blue (sadness); red (anger); and green (fear).
 - Initial names: Oolvia, Zip, Sniff, Roary, and Shake (changed over time)
- Pitched to Disney in 2008; Disney begins development of *Inside Out* in 2010.
- Disney movie centers on five anthropomorphized emotions that live inside the mind of a child (joy, fear, sadness, disgust, and anger)
- Disney argues Daniels failed to meet the legal standard for copyright in a character. Court agrees.

COPYRIGHTABILITY – FICTIONAL CHARACTERS

Daniels v. The Walt Disney Co., No. 18-55635 (9th Mar. 16, 2020)

- Character entitled to copyright protection if:
 - (1) has “physical as well as conceptual qualities”;
 - (2) is “sufficiently delineated to be recognizable as the same character whenever it appears” and “display[s] consistent, identifiable character traits and attributes”; and
 - (3) is “especially distinctive” and “contain[s] some unique elements of expression.”
- First factor: Met.
 - each Moodster has physical as well as conceptual qualities
- Second Factor: Not met.

COPYRIGHTABILITY – FICTIONAL CHARACTERS

Daniels v. The Walt Disney Co., No. 18-55635 (9th Mar. 16, 2020)
("Ooo, Inside Out.")



- Characters changed over time, from initial “insect-like appearance” to “small lovable bears”
- Using color to represent mood/emotion is unprotectable idea (“Color psychology” well known/used)
- Other than the idea of color and emotions, The Moodsters had few identifiable character traits; few attributes that are consistent over the various iterations.
- Compare to Godzilla, James Bond, and Batmobile: may change but are recognizable because they display consistent, identifiable character traits

COPYRIGHTABILITY 17 U.S.C. § 101 – Useful Article

Town & Country Linen v. Ingenious Designs, 18-cv-5075 (S.D.N.Y. Jan. 29, 2020)

- T&C designed products for Ingenious, including a portable clothes dryer system (“CloseDrier”)
- T&C obtained registration covering the “CloseDrier” Control Panel Design:
- Registration “constitute[s] prima facie evidence of the validity of the copyright.” 17 U.S.C. § 410(c)
- Creates rebuttable presumption that the work is copyrightable.
- Can be overcome by evidence that the work is “a non-copyrightable utilitarian article.”

COPYRIGHTABILITY 17 U.S.C. § 101 – Useful Article

Town & Country Linen v. Ingenious Designs, 18-cv-5075 (S.D.N.Y. Jan. 29, 2020)

- A “useful article” is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a “useful article”.
- The design of a useful article, . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

COPYRIGHTABILITY 17 U.S.C. § 101 – Useful Article

Town & Country Linen v. Ingenious Designs, 18-cv-5075 (S.D.N.Y. Jan. 29, 2020)

PLAINTIFF'S CONTROL PANEL



COPYRIGHTABILITY 17 U.S.C. § 101 – Useful Article

Town & Country Linen v. Ingenious Designs, 18-cv-5075 (S.D.N.Y. Jan. 29, 2020)

- Separability Test: Passed - control panel “can be identified separately from” the CloseDrier
- Independence Test: Failed - control panel is not “capable of existing independently of” “the utilitarian aspects” of the CloseDrier because the control panel itself is a utilitarian aspect of the CloseDrier
- Comparisons:
 - Menu command screens of computer program: screens are methods of operation by which the user tells the computer what to do
 - VCR buttons – how buttons are arranged and labeled does not make them a “literary work” or some “abstract expression” - buttons are themselves the “method of operating” the VCR

STATUTE OF LIMITATIONS – 17 U.S.C. § 507(b)

Webster v. Dean Guitars, No. 19-10013 (11th Cir. April 16, 2020)

- 1980s, Buddy Webster modifies a Dean ML guitar and hires an artist to paint a lightning bolt design
- 1987, Webster gifts it to Darrell Abbott, guitarist for heavy-metal band Pantera – dubs it “Dean From Hell”
- 2004, Abbott is killed, Dean starts selling “Dean From Hell,” pays royalties to Abbott’s estate, Webster complains
- 2016 – Webster “had enough,” registered the work and then sued
- District Court dismisses suit as time-barred – 11th Cir. affirms

STATUTE OF LIMITATIONS - 17 U.S.C. § 507(b)

Webster v. Dean Guitars, No. 19-10013 (11th Cir. April 16, 2020)

Section 507(b) - "No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued."

Claim of ownership or infringement? Different accrual standard?

- Ownership is "the only disputed issue."
 - No dispute estate had made copies. Estate disputed Webster's ownership from beginning.
 - Registration here confers no presumption of ownership of valid copyright. 17 U.S.C. § 410(c) (registration made within five years after first publication constitutes *prima facie* evidence of validity). – Thus, Webster must prove ownership.
- Different accrual standards:
 - Accrual for infringement: *Petrella*, 572 U.S. 663 (2014) - for infringement claims, each separate act of infringement triggers a new three-year limitations period.
 - Accrual for ownership: different standard – claims of ownership accrue only once.

STATUTE OF LIMITATIONS – 17 U.S.C. § 507(b)

Webster v. Dean Guitars, No. 19-10013 (11th Cir. April 16, 2020)

- Ownership claims accrue when there is a “plain and express repudiation” of ownership by one party as against the other. (Sixth and Ninth Circuits)
- Ownership claims accrue when “the plaintiff learns, or should as a reasonable person have learned, that the defendant was violating his rights.” (First, Second, Fifth, Seventh Circuits)
- Eleventh Circuit follows First, Second, Fifth, and Seventh Circuits
 - 2004 – Webster knew Dean was producing the guitars without his permission
 - 2007 – Dean’s CEO responds by email, “the consensus concerning [the lightning storm graphic] is that [Abbott’s] estate is the legal owner of it.”
 - Webster was on notice of claim of ownership in 2004 (2007 at latest), sued long after limitations period expired.
- Because ownership claim is barred, all claims that logically follow are also barred (*i.e.*, infringement).

INFRINGEMENT

Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. Mar. 9, 2020)

- Led Zeppelin accused of stealing intro to “Stairway to Heaven” from 1967 instrumental ballad called “Taurus” by the band Spirit.
- En banc court affirmed district court’s judgment after a jury trial in favor of Led Zeppelin.
- Decision quotes from dissent in the *Blurred Lines* case, *Williams v. Gaye*, 885 F. 3d 1150 (9th Cir. 2018).

INFRINGEMENT

Skidmore v. Led Zeppelin, 952 F.3d 1051 (9th Cir. Mar. 9, 2020)

- Under 1909 Act, deposit copy defines the four corners of the copyright.
 - Under 1909 Act, had to submit sheet music to claim copyright protection
 - Under current Act, can submit sound recording as deposit copy for musical composition
- District court did not commit error in denying Plaintiff's request to play sound recordings of Taurus performance.
- Performed version contained embellishments that Plaintiff thought were probative of copying.

INFRINGEMENT

Skidmore v. Led Zeppelin, 952 F.3d 1051 (Mar. 9, 2020)

- Abrogates “Inverse Ratio” rule
- In the absence of direct evidence of copying, Plaintiff can attempt to prove copying circumstantially by showing:
 - D had access to P’s work; and
 - The two works share similarities probative of copying.
- Inverse Ratio rule required “a lower standard of proof of substantial similarity when a high degree of access is shown.” – Highly criticized.
- Court: “Access does not obviate the requirement that the plaintiff must demonstrate that the defendant actually copied the work.”

BENEFITS OF REGISTRATION – 17 U.S.C. § 412

Southern Credentialing v. Hammond Surgical Hosp. 946 F.3d 780 (5th 2020)

- 17 U.S.C. § 412 - cannot recover statutory damages or fees for “any infringement” a defendant commences before effective date of registration.
 - Encourage authors to register works quickly.
- What if the defendant engages in different types of infringement before after registration? E.g., copying pre-registration vs. distribution post registration
- Facts:
 - Southern Credentialing provided forms to hospitals for credentialing doctors.
 - Hammond copied the forms without authorization pre-registration.
 - Hammond started distributing the forms after Southern Credentialing had registered the forms with the Copyright Office.

BENEFITS OF REGISTRATION – 17 U.S.C. § 412

Southern Credentialing v. Hammond Surgical Hosp., 946 F.3d 780 (5th Cir. 2020)

- But First: Are “forms” copyrightable?
 - “Although laws and hospital policies dictate the contents of the credentialing forms, Southern Credentialing’s unique selection and arrangement of information exhibit creative expression.” (Hammond’s verbatim copying = infringement)
- Held: “Section 412 bars statutory damage awards when a defendant violates one of the six exclusive rights of a copyright holder preregistration and violates a different right in the same work after registration.”
- Consistent with Section 504 – allows “*an award* of statutory damages for *all infringements* involved in the action, with respect to any one work”

BENEFITS OF REGISTRATION – 17 U.S.C. § 412

Southern Credentialing v. Hammond Surgical Hosp., 946 F.3d 780 (5th Cir. 2020)

- What about an extended time period between pre- and post-registration infringement?
 - Did not decide issue
 - No extended time period between Hammond’s pre- and post-registration infringing conduct.
- *Troll Co. v. Uneeda Doll Co.*, 483 F.3d 150 (2d Cir. 2007) (dicta suggesting possibility of statutory damages when defendant ceased infringing for ten years, during which time the plaintiff registered its copyright)
- *NIMMER ON COPYRIGHT* § 7.16(c) (2019) (gap in time could be basis for permitting statutory damages for a post-registration infringement)

IMPLIED SUBLICENSE

Photographic Illust'rs Corp. v. Orgill, Inc., No. 19-1452 (1st Cir. Mar. 13, 2020)

- Sylvania paid \$3 million to license Plaintiff's images of Sylvania's lightbulbs:
 - may “freely use, sub-license use, and permit [using]” thousands of photos.
 - required “attribution” to extent reasonably possible.
- Orgill used Plaintiff's photos in electronic and paper catalogs.
 - Orgill asked for the photos it wanted.
 - Sylvania sent them to Orgill or told Orgill to pull them from Sylvania's website.
 - No attribution given.
- Plaintiff sued claiming no permission and no written sublicense.

IMPLIED SUBLICENSE

Photographic Illust'rs Corp. v. Orgill, Inc., No. 19-1452 (1st Cir. Mar. 13, 2020)

- Held: Where a licensor grants “the unrestricted right to sublicense and permit others to use a copyrighted work, a sublicense may be implied by the conduct of the sublicensor and sublicensee.”
- If licensor wants sublicenses in writing, it can require that in the license.
- Arbitrator in separate action:
 - Found that attribution requirement in Sylvania’s license is a “covenant,” not a “condition.”
 - Violation of condition: licensee cannot claim “license” as defense to infringement.
 - Violation of covenant: licensor’s “only remedy is for breach of contract.”
 - Awarded Plaintiff \$8.5 million for Sylvania’s breach of the agreement.

CREATIVE COMMONS LICENSE

Great Minds v. Office Depot, Inc., No. 18-55331 (9th Cir. Dec. 27, 2019)

- Great Minds publishes math curriculum “Eureka Math” - sells in print form
- Certain materials available to public as free digital download under a Creative Commons license (Attribution—Non Commercial)
 - No commercial use allowed; downstream recipients bound by terms
- School Districts Hired Office Depot to make copies
- Office Depot not bound by license - did not itself become a direct licensee
- Office Depot did not infringe - acted as agent for school district

VISUAL ARTISTS RIGHTS ACT (VARA) 17 U.S.C. § 106A

Castillo V. G&M Realty, No. 18-538-cv (2d Cir. Feb. 20, 2020)

- VARA (1990) added two “moral rights” to U.S. copyright law for works of visual art:
 - right of attribution – to claim authorship and prevent incorrect attributions (§106A(a))
 - right of integrity – to prevent intentional distortion or destruction of works (§106A(a)(3))
- Rights are independent of ownership of the work (belong to artist and exist regardless of who owns the work)

VISUAL ARTISTS RIGHTS ACT (VARA) 17 U.S.C. § 106A

Castillo V. G&M Realty, No. 18-538-cv (2d Cir. Feb. 20, 2020)

- Rights provide same damages as other rights – actual and statutory damages (§ 501(a))
- No registration requirement, for suit or for statutory damages and fees (§§ 411, 412)
 - *Fourth Estate Public Benefit Corp. v. Wall-Street.com*, No. 17-571, 585 U.S. ___ (2019) (“A copyright owner cannot file an infringement lawsuit until the Copyright Office has registered the work at issue.”) – does not apply to VARA rights
- To prevent destruction, must be “a work of recognized stature” (§ 106A(a)(3)(B))

VISUAL ARTISTS RIGHTS ACT (VARA) 17 U.S.C. § 106A

Castillo V. G&M Realty, No. 18-538-cv (2d Cir. Feb. 20, 2020)

- 2002 - Jonathan Cohen and Jeffry Wolkoff agree that Cohen would curate artwork to be sprayed onto dilapidated warehouse buildings
 - Cohen is distinguished aerosol artist aka “Meres One”
 - Wolkoff owns the buildings (located in Long Island City, New York, known as “5Pointz”)
- Many artists, many works, some change over time
- 2013 Wolkoff receives permission from City to start planning new housing project. Several artists sue to prevent destruction of their works.
 - Court refuses preliminary injunction from bench with order to follow.
 - Wolkoff paints over the works “under cover of night” without waiting for the order.

VISUAL ARTISTS RIGHTS ACT (VARA) 17 U.S.C. § 106A

Castillo V. G&M Realty, No. 18-538-cv (2d Cir. Feb. 20, 2020)



VISUAL ARTISTS RIGHTS ACT (VARA) 17 U.S.C. § 106A

Castillo V. G&M Realty, No. 18-538-cv (2d Cir. Feb. 20, 2020)

- Trial Judge: 45 of 49 works qualified as “works of recognized stature”
 - curated by Cohen, person of recognized stature;
 - had become major global center for aerosol art with thousands of visitors, extensive media coverage;
 - recognized by art experts, members of artistic community
- Trial Judge: \$150,000 per work (\$6.75 million)
 - Wolkoff acted willfully;
 - knowingly misled court as to when demolition would begin;
 - did not give artists time to salvage works;
 - vindicate and deter

VISUAL ARTISTS RIGHTS ACT (VARA) 17 U.S.C. § 106A

Castillo V. G&M Realty, No. 18-538-cv (2d Cir. Feb. 20, 2020)

Can impermanent aerosol works be “works of recognized stature”? What legal framework?

- Recognized stature: focus on “artistic quality” – work of high quality, status, or caliber that has been acknowledged as such by a relevant community
- Relevant community: includes art historians, critics, museum curators, prominent artists, other experts
- Lack of permanence – does not prohibit status as “works of recognized stature”
- Affirmed statutory damages:
 - Factors: (1) infringer’s state of mind; (2) expenses saved/profits earned by infringer; (3) revenue lost by the copyright holder; (4) deterrent effect; (5) infringer’s cooperation; and (6) the conduct and attitude of the parties.”
 - Wolkoff “rings the bell” on each factor.

VISUAL ARTISTS RIGHTS ACT (VARA) 17 U.S.C. § 106A

Castillo V. G&M Realty, No. 18-538-cv (2d Cir. Feb. 20, 2020)

What do to? Get a waiver - VARA rights are waivable. (106A(e)(1))

- For artwork incorporated in such a way that removing it would cause destruction, distortion, mutilation, modification of work – must get written, signed waiver.
- For works that can be removed without destruction, distortion, mutilation, modification
 - (i) must make diligent, good faith attempt to notify artist of intended action, or
 - (ii) if such notice has been provided in writing, allow person 90 days after receiving such notice to remove work or pay for its removal.

VISUAL ARTISTS RIGHTS ACT (VARA) 17 U.S.C. § 106A

Baird v. Town of Normal, No. 19-cv-1141 (C.D. Ill. Jan. 15, 2020)

- Different artists contribute to mural on downtown building
- Town owns the building and plans demolition (redevelopment of downtown)
- 13 artists sue to stop demolition
- More than a year later, case dismissed as not ripe (no jurisdiction)
 - Town backed off from destruction
 - Town planned to remove and relocate mural at cost of \$100,000
- Artists suffered no damages because mural not moved or destroyed
- Town plans to preserve/relocate mural; no showing Town's plan is deficient.

VISUAL ARTISTS RIGHTS ACT (VARA) 17 U.S.C. § 106A

Baird v. Town of Normal, No. 19-cv-1141 (C.D. Ill. Jan. 15, 2020)

- Joint Ownership – In case of joint work prepared by two or more authors, one waiver waives rights of all authors (§ 106A(e)(1))
- Town obtained waiver from one artist; impact of waiver not decided



STATUTORY DAMAGES 17 U.S.C. § 504 and § 1203

Energy Intel. Group v. Kayne Anderson Capital Advisors, (5th Cir. Jan. 15, 2020)

- EIG publishes investment intelligence newsletters (*Oil Daily*).
- Defendant willfully infringed by sharing works beyond what was allowed under subscription agreement; intentionally removed CMI in violation of DMCA.
- EIG knew this was going on but did nothing – “wait don’t warn” business model – higher revenue through litigation
- Jury found EIG could have avoided almost all of the alleged copyright and DMCA violations through real-time investigations and enforcement efforts
- Awarded no damages for those works (1,646 works infringed; 425 DMCA violations) – awarded approx. \$500,000 in statutory damages (39 works)

STATUTORY DAMAGES 17 U.S.C. § 504 and § 1203

Energy Intel. Group v. Kayne Anderson Capital Advisors, (5th Cir. Jan. 15, 2020)

- Held: Failure to mitigate is not a complete defense to copyright or DMCA statutory damages claims.
- Proper to instruct jury to consider mitigation efforts (or lack thereof) in determining amount of statutory damages, but not a complete bar.
- Remand for determination of damages.

STATUTORY DAMAGES 17 U.S.C. § 504

Sony Music Entn't v. Cox Communications, No. 18-cv-0950-LO-JFA (E.D. Va.)

- RIAA hires MarkMonitor to police Internet for P2P infringement of sound recordings and send take-down notices to Cox's "Abuse Tracking System"
- Sends hundreds of thousands of notices.
- Cox had "13 strikes" policy; did not follow policy; refused/blocked notices; emails showing disdain for DMCA / copyright
- Jury found willful contributory and vicarious infringement (10,017 recordings)
- Section 504:
 - \$750 to \$30,000 "as the court considers just"
 - If willful, "the court in its discretion may increase" the award to \$150,000

STATUTORY DAMAGES 17 U.S.C. § 504

Sony Music Entm't v. Cox Communications, No. 18-cv-0950-LO-JFA (E.D. Va.)

- Factors considered:
 - (1) Cox's profits or expenses saved because of the infringement,
 - (2) Revenues Plaintiffs lost
 - (3) The difficulty of proving Plaintiffs' actual damages
 - (4) The circumstances of the infringement,
 - (5) Whether Cox acted willfully or intentionally in infringing plaintiffs' copyrights,
 - (6) The need for deterrence of future infringement, and
 - (7) In the case of willfulness, the need to punish Cox.
- Jury awards \$99,830.29 for each work infringed; Verdict = \$1 Billion

STATUTORY DAMAGES 17 U.S.C. § 504

Sony Music Entm't v. Cox Communications, No. 18-cv-0950-LO-JFA (E.D. Va.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

SONY MUSIC ENTERTAINMENT, *et al.*,
Plaintiffs

v.

COX COMMUNICATIONS, *et al.*,
Defendants.

Civil Case No. 1:18-cv-950
Hon. Liam O'Grady

VERDICT FORM

We, the jury in the above-captioned action, answer the questions submitted to us as follows:

LIABILITY: CONTRIBUTORY AND VICARIOUS INFRINGEMENT

1. Did Plaintiffs prove by a preponderance of the evidence that Cox was contributorily liable for infringement?
Answer: Yes No

2. Did Plaintiffs prove by a preponderance of the evidence that Cox was vicariously liable for infringement?
Answer: Yes No

If you answered "NO" to both Question 1 and Question 2, DO NOT answer any more questions.

3. Plaintiffs have asserted infringement claims for 10,017 works. How many of the works did Cox vicariously or contributorily infringe?
Answer: 10,017 works (up to 10,017)

FILED
IN OPEN COURT
DEC 19 2018
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

If you answered "YES" to either Question 1 or Question 2, and filled in the blank in Question 3, please proceed to Question 4.

WILLFUL INFRINGEMENT

4. Do you find by a preponderance of the evidence that Cox's contributory or vicarious infringement was willful?
Answer: Yes No

AMOUNT OF DAMAGES

Answer Questions 5 and 6 only if you answered "YES" to Question 1 or 2.

If Not Willful	You must award damages between \$750 and \$30,000 per work infringed
If Willful	You must award damages between \$750 and \$150,000 per work infringed

5. What amount of statutory damages do you award for each work contributorily or vicariously infringed?
Answer: \$99,830.29 per work

6. What is the total amount of damages you award to Plaintiffs in this case?

a. Calculate the total damages, if any, by multiplying the number of infringed works in your answer to Question 3 times the damages per work in Question 5.

Number of works infringed	<u>10,017</u>
X Damages per work	<u>\$99,830.29</u>
TOTAL DAMAGES	<u>\$1,000,000,000</u>

Please sign and return the verdict form.

Jury Foreperson [REDACTED] Date 12/19/19

VICARIOUS LIABILITY

Warner Records v. Charter Commc'ns, 19-cv-00874 (D. Colo. Apr. 15, 2020)

- “Big 3” record companies assert similar allegations against Charter as they asserted against Cox in E.D. Va.
- Charter moves to dismiss – “allegations do not show vicarious liability”
- Elements of Vicarious Liability: Must show:
 - (1) There was direct infringement;
 - (2) Defendant had the right and ability to supervise or control the infringing activity; and
 - (3) Defendant had a direct financial interest in the infringing activity.

VICARIOUS LIABILITY

Warner Records v. Charter Commc'ns, 19-cv-00874 (D. Colo. Apr. 15, 2020)

- Supervise or Control: Charter argued it had no practical ability to police its vast network of internet users.
- Held: Supervision or control prong is met where defendant has ability “to stop or limit the directly infringing conduct.”
- Financial Benefit: Charter argued ability to infringe must be “*the* attracting factor” for subscribers to join network.
- Held: “financial benefit exists where the availability of infringing material acts as a draw for customers”; “the size of the ‘draw’ relative to a defendant’s overall business is immaterial.”

FAIR USE - 17 U.S.C. § 107

Estate of Smith v. Graham, No. 19-28 (2d Cir. Feb. 3, 2020)

- Summary Order (non-precedential)
- Drake's song Pound Cake opens with an altered but clear sample of Jimmy Smith's Jimmy Smith Rap

<https://www.youtube.com/watch?v=VAwWdK7b2zE> -

<https://www.youtube.com/watch?v=pdbvOqeBkq8>

- Drake licensed the sound recording, but not the composition
- Estate registers copyright in composition 31 years after it was released
- Summary Judgment for Defendant – Fair Use

FAIR USE - 17 U.S.C. § 107

Estate of Smith v. Graham, No. 19-28 (2d Cir. Feb. 3, 2020)

- Fair Use Factors – non-exclusive factors that should be considered:
 - (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - (2) the nature of the copyrighted work;
 - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - (4) the effect of the use upon the potential market for or value of the copyrighted work.

FAIR USE - 17 U.S.C. § 107

Estate of Smith v. Graham, No. 19-28 (2d Cir. Feb. 3, 2020)

- Purpose/Character:
 - Transformative = “uses the copyrighted material itself for a purpose, or imbues it with a character, different from that for which it was created.”
 - Message in “Jimmy Smith Rap” is about supremacy of jazz over other types of music,
 - “Pound Cake” sends counter message: not jazz music that reigns supreme but, rather, all “real music” regardless of genre. Song criticizes the jazz-elitism of Jimmy Smith Rap
- Nature of copyrighted work: This factor “has rarely played a significant role”
- Amount and substantiality : “law does not require that secondary artist take no more than is necessary in relation to the copyrighted work as a whole”
- Effect: No evidence Pound Cake usurps demand.

FAIR USE - 17 U.S.C. § 107

Hughes v. Benjamin, No. 17-cv-6493 (RJS) (S.D.N.Y. Feb. 3, 2020)

- Hughes is content creator:
 - Filmed Hillary Clinton campaign party on night of election.
 - Posted 9’50” video on YouTube titled, *We Thought She Would Win* - <https://www.youtube.com/watch?v=2IY9iAINbPE>
- Benjamin is British YouTuber:
 - Posted two-minute video titled “SJW Levels of Awareness” (“Social Justice Warrior”).
 - Post consists entirely of six clips from *We Thought She Would Win*. <https://www.youtube.com/watch?v=vor1wjDSn88>.

FAIR USE - 17 U.S.C. § 107

Hughes v. Benjamin, No. 17-cv-6493 (RJS) (S.D.N.Y. Feb. 3, 2020)

- Purpose/Character: “clear” Benjamin copied Hughes’s film “for the transformative purposes of criticism and commentary”
 - Benjamin selected and edited the clips “to depict the specific moments he felt exemplified Hughes’s political identity and lack of awareness” and to “maximize his criticism of Hughes’s liberal viewpoint”
 - Fact that Benjamin profited from ad revenues pales in comparison to transformative use
- Nature of work: “little relevance” when transformative use is present
- Amount and Substantiality: used 20%; used portions that made his point
- Effect: No danger to market for Hughes work; different audiences

FAIR USE - 17 U.S.C. § 107

Solid Oak Sketches v. 2K Games, 16-cv-724 (S.D.N.Y. Mar. 26, 2020)

- NBA players LeBron James, Kenyon Martin, and Eric Bledsoe have tattoos done by various artists.
- Tattoos appear in video games created by Defendants.
- Solid Oak buys rights to tattoos, registers, sues.
- Court grants summary judgment for Defendants.

FAIR USE - 17 U.S.C. § 107

Solid Oak Sketches v. 2K Games, 16-cv-724 (S.D.N.Y. Mar. 26, 2020)

- Purpose/Character: Transformative
 - Tattoos created “as a means for players to express themselves through body art.”
 - Here, used for “transformative purpose of creating a realistic game experience”; a “factual depiction of actual likeness, not creative expression.”
- Nature of Work: Not a factor
- Amount and Substantiality:
 - Factor usually focuses on portion of work used
 - Court focused on small size (<10% of actual), and “miniscule” portion of game as whole
- Effect: Video games are not a substitute for the Tattoos.
 - No evidence of market for licensing tattoos for video games/other media; or that such market is likely to develop.

DE MINIMIS USE

Solid Oak Sketches v. 2K Games, 16-cv-724 (S.D.N.Y. Mar. 26, 2020)

- *De Minimis* – analysis concerns
 - (i) “the amount of the copyrighted work that is copied”;
 - (ii) “observability” – length of time work is observable in the alleged infringing work”; and
 - (iii) factors such as “focus, lighting, camera angles, and prominence.”
- “Observability” is fundamental to a determination of whether the “quantitative threshold” of substantial similarity has been crossed.
- Here, D used Tattoos in their entirety, but the Tattoos
 - were *de minimis* (“miniscule”) portion of video games as a whole (3 of 400 players);
 - not the focus, often blurred or blocked from view, and depicted <10% of actual size
 - Did not cross threshold of “substantial similarity.”

IMPLIED LICENSE

Solid Oak Sketches v. 2K Games, 16-cv-724 (S.D.N.Y. Mar. 26, 2020)

- Implied License – implied, non-exclusive license exists “where one party created a work at the other’s request and handed it over, intending that the other copy and distribute it.” *Weinstein*, 664 F. Supp. 2d 332 (S.D.N.Y. 2009).
- Here, artists knew and intended
 - Tattoos would be publicly displayed on famous NBA players as part of their likenesses.
 - Players “likely to appear in public, on television, in commercials, or in other forms of media.”
- Artists granted players an implied, non-exclusive license to use and display the Tattoos as part of their own likenesses.
- Transferred to NBA and to Defendants when they licensed players’ likenesses.

FAIR USE 17 U.S.C. § 107

Cruz v. Cox Media Group, No. 18-cv-01041 (E.D.N.Y. Mar. 13, 2020)

- Cruz took photo of suspect Sayfullo Saipov being taken into custody after October 2017 vehicle-ramming attack in Manhattan (killed eight people).
- CNN/NBC licensed image from Cruz for news articles. Not Cox.
- Copyrightability:
 - Only minimal degree of creativity required; decision to snap when he did was enough.
- Fair Use:
 - Copyright Act lists “news reporting”; but this does not guarantee fair use.
 - “Cox’s article accompanying photograph “did not serve to illustrate criticism, commentary, or a news story *about* the photograph.” – No transformative use.
 - Use for “illustrative purposes” is not fair use.

FAIR USE 17 U.S.C. § 107

Tresóna Multimedia v. Burbank H.S. Vocal Music Assoc., 2020 WL 1429318 (9th Mar. 24, 2020)

- H.S. students participate in competitive choir performances (inspired “Glee”).
- H.S. Music Director commissioned music arranger to create custom sheet music.
- Tresóna sues for infringement of several musical works:
 - “(I’ve Had) The Time of My Life,” “Hotel California,” and “Don’t Phunk With My Heart”
- Threshold Standing Issue (Co-ownership):
 - Only “[t]he legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner.”
 - Tresóna received its copyright interests in the songs as a license from one individual co-owner without consent of other co-owners. Thus, not exclusive, no right to sue.

FAIR USE 17 U.S.C. § 107

Tresóna Multimedia v. Burbank H.S. Vocal Music Assoc., 2020 WL 1429318 (9th Mar. 24, 2020)

- Tresóna held rights to “Magic,” performed by Olivia Newton-John in “Xanadu”
- Purpose/Character: Use for educational purposes alone is not dispositive.
 - The arrangement used a portion of Magic and added “new expression, meaning, [and] message.”
 - Xanadu used original song to inspire pursuit of one’s dreams
 - New song and arrangement used as a celebration of faith
- Nature of Work: Not a factor
- Amount and Substantiality:
 - Took only 22” of a 4’20” song, but took the “the central element of the musical work”
 - because use was small, not verbatim, and transformative, this factor “does not weigh against of fair use”
- Effect on Market/Value: Limited use for education; not a substitute for original work

ATTORNEY'S FEES 17 U.S.C. § 505

Tresóna Multimedia v. Burbank H.S. Vocal Music Assoc., 2020 WL 1429318 (9th Mar. 24, 2020)

- District Court denied Defendants' motion for fees. Ninth Circuit reversed.
- “[D]efendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement.” *Fogerty*, 510 U.S. 517 (1994).
- Touchstone of decision to award fees is whether the successful defense, and circumstances surrounding it, further the Copyright Act's “essential goals.” *Kirtsaeng*, 136 S. Ct. 1979 (2016).
- Courts may consider five non-exclusive factors: (1) degree of success obtained, (2) frivolousness, (3) motivation, (4) objective reasonableness of the losing party's legal and factual arguments, and (5) need to advance considerations of compensation and deterrence.
- Abuse of discretion to deny Defendants' motion. Defendants prevailed across the board. Tresóna filed claims without standing and pursued weak fair use denial.

ATTORNEY'S FEES / COSTS 17 U.S.C. § 505

UM Corp. v. Tsuburaya Prods. Co., 793 Fed.Appx. 511 (9th Cir. Dec. 5, 2019)

- TPC created superhero Ultraman in 1960s
- Lengthy battle over license agreement to UMC
- Jury finds agreement void; Court awards fees to TPC
- Ninth Cir. affirms \$3.9 Million fee award
- Ninth Cir. vacated \$567,000 in non-taxable costs
- *Rimini Street Inc. v. Oracle USA Inc.*, 586 U.S. ____ (2019)
 - Sec. 505 award of "full costs" to prevailing party limited to taxable costs defined by statute, 28 U.S.C. §§ 1821 and 1920.
 - Sec. 505 does not authorize award for expenses such as expert witness fees, e-discovery expenses, jury consultant fees, etc.



ATTORNEY'S FEES 17 U.S.C. § 505

Colwell v. Eleven Creative Servs., 2020 WL 417573 (D. Colo. Jan 26, 2020)

- P took photos of event that D had put on; D posts photos to its website
- P sues; D asserts affirmative defense “P agreed to give me ownership of photos in exchange for access to my event”
- Nine months later, D produces copy of agreement; P dismisses 3 days later
- Court: No fees.
 - Possible P should have known.
 - But D “failed to produce timely documentary evidence of the relevant license, which raises the question of whether Defendant intended to ‘rack up its legal fees through needless discovery.’”

ATTORNEY'S FEES 17 U.S.C. § 505

Craig v. Popmatters Media, No. 19 C 5596 (N. D. Ill. Mar. 23, 2020)

- D posted P's photo of Miles Davis on D's website w/o permission
- P dismissed first action; filed another, and dismissed it.
- Court: Awards \$24,040.45 in fees to D
 - D presented P with evidence early on that its use was licensed
 - D presented evidence that P's motivation was to obtain settlement proceeds rather than to protect against infringement.

PERSONAL JURISDICTION

Lang Van, Inc. v. VNG Corp., No. 14cv100 (C.D. Cal. Nov. 21, 2019)

- Lang Van is leading producer/distributor of Vietnamese music/entertainment
- VNG launched Zinn Music Website (www.zing.vn) to make “massive amounts of music available for download to site visitors.”
 - VNG has HQ in Ho Chi Minh City
 - Website has 20 million users; one of most popular in Vietnam
- Lang Van sues VNG.
- VNG moves to dismiss for lack of personal jurisdiction.

PERSONAL JURISDICTION

Lang Van, Inc. v. VNG Corp., No. 14cv100 (C.D. Cal. Nov. 21, 2019)

- *Calder* effects test (*Calder v. Jones*, 465 U.S. 783 (1984)):
 - (i) D committed intentional tort; (ii) Expressly aimed at forum state; and (iii) Causing harm D knows is likely to be suffered in forum state
- *Walden v. Fiore*, 134 S. Ct. 1115 (2014)
 - Knowledge of harm to someone in forum not enough; focus on D's connection with forum
- No Jurisdiction (Motion to dismiss granted):
 - General allegations of U.S. users connecting to Zing not enough;
 - Must link acts of infringement to the forum; P failed to identify specific allegations that U.S. users used Zing to download P's recordings.

INTERNET LINKING

Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007)

- Search engine page provides “in-line links to or frames the electronic information”
- HTML instructions linking to third-party content; did not store, transmit, or otherwise provide a copy
- HTML is just an address that links to computer that stores the image; Image is not stored on Defendant’s servers.
- Linking “does not constitute direct infringement of the copyright owner’s display rights.”

INTERNET LINKING

Goldman v. Breitbart News Network, 302 F. Supp. 3d 585 (S.D.N.Y. 2018)

- Photograph of Tom Brady posted on Twitter – Embedded into multiple articles
- Held: any process “result[ing] in a transmission of the photos so that they could be visibly shown” is a display – no actual “possession” of the work is required.

INTERNET LINKING

Free Speech Systems v. Menzel, 390 F. Supp. 3d 1162 (N.D. Cal. 2019)

- FSS operates Info Wars “news and opinion website”
- FSS post featured 9 photos with HTML pointers to the images hosted on the photographer’s own server.
- Held: *Perfect 10* does not apply – has no application beyond search engines
– refused to apply *Perfect 10* outside search engine context

INTERNET LINKING

Sinclair v. Ziff Davis, LLC, No. 18-CV-790 (KMW) (S.D.N.Y. Apr. 13, 2020).

- Mashable sought to license photo for \$50; Sinclair refused
- Sinclair had posted photo on Instagram – TOUs grant Instagram a “sub-licensable, worldwide license to use, subject to [Instagram’s] Privacy Policy.”
- Privacy Policy - content designated “public” can be used via Instagram’s API, which allows embedding.
- Court: Mashable had valid sublicense from Instagram. Did not “need not reach the question, addressed in *Goldman* but unsettled in this Circuit, of whether embedding an image constitutes “display” that is capable of infringing a copyright in the image.”