Kluwer Copyright Blog

US—Copyright Round-Up

Paul Goldstein (Lillick Professor of Law, Stanford Law School) · Tuesday, November 15th, 2022

Recent appellate decisions in the United States have recognized expanded grounds for personal jurisdiction in cases of internet-based copyright infringements; divided on the extent to which the three-year statute of limitations limits damage recoveries; and increased the occasions for motions to dismiss on the ground of fair use. Also, in a rebuff to claims of copyright in AI-created works, the US Copyright Office has reaffirmed its position that human authorship is a requirement for copyright protection.

Personal Jurisdiction. As a rule, the mere transmission of copyright-infringing content on the internet will not subject the infringer to personal jurisdiction in every state where the content is received, and courts will instead apply some variant of a formula requiring the infringer to have specifically directed its activities toward the forum state with the intention of doing business there. But, what if the allegedly infringing activities are *not* directed at the forum state? Under Federal Rules of Civil Procedure 4(k)(2) personal jurisdiction will nonetheless lie "(A) if the claim at issue arises from federal law and the plaintiff can show that the defendant is not subject to jurisdiction in any state's court of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws."

In *Lang Van, Inc. v. VNG Corp*.[1] the Ninth Circuit Court of Appeals upheld personal jurisdiction in California over an offshore internet music distributor where the nature of the claim—copyright infringement—manifestly met Rule 4(k)(2)'s first prong and defendant's failure to concede that any other state had jurisdiction met the second. Further, the defendant had not borne the burden of showing that "application of jurisdiction would be unreasonable." Among other facts bearing on reasonableness were that defendant's app was downloaded more than 320,000 times in the US and defendant made no effort to geoblock plaintiff's copyrighted content from the US.

Limitations on damages. Most American courts apply a "discovery rule" to the Copyright Act's three-year statute of limitations and count the limitations period not from the time the infringement occurred, but from the time "the plaintiff learned or by reasonable diligence could have learned that he had a cause of action."[2] Courts divide, however, on the discovery rule's implications for recovery of damages: should the successful claimant be allowed to recover damages only for infringements that occurred within three years before it filed its lawsuit, or should it be entitled to recover damages back to when the undiscovered infringement first occurred? In *Sohm v. Scholastic Inc*.[3] the Second Circuit Court of Appeals read the Supreme Court's decision in *Petrella v. MGM*[4] to require the first result. More recently, however, the Ninth Circuit in *Starz Entertainment, LLC v. MGM Domestic Television Distribution, LLC*[5] ruled that *Petrella* "did not

create a damages bar separate from the statute of limitations," and held for the second result: "the discovery rule for accrual allows copyright holders to recover damages for all infringing acts that occurred before they knew or reasonably should have known of the infringement."[6]

Fair use motions to dismiss. The US Supreme Court recently endorsed the general view that fair use is a mixed question of law and fact: "reviewing courts should appropriately defer to the jury's findings of underlying facts; but…the ultimate question whether those facts showed a 'fair use' is a legal question for judges to decide *de novo*."[7] Reflecting the current dominance in fair use cases of the essentially legal, rather than factual, "transformative use" doctrine, courts since the mid-1990s have shown an increased willingness to resolve fair use cases on summary judgment and, more recently, on motions to dismiss.[8] The transformative use doctrine is presently front and center before the Supreme Court[9] and the Court's eventual opinion should be watched for any reduction in the doctrine's scope, as this could in turn reduce grants of fair use motions to dismiss.

Copyright for AI Products? In a 2022 Copyright Review Board decision[10] the US Copyright Office rejected a second request for reconsideration of a refusal to register a two-dimensional work of art described by the applicant as "autonomously created by a computer algorithm running on a machine." (The applicant disclaimed any element of human authorship, but asserted ownership by reason of ownership of the "Creativity Machine.") Rejecting the applicant's argument that "the human authorship requirement is unconstitutional and unsupported by either statute or case law," the Board observed that "[t]he Office is compelled to follow Supreme Court precedent, which makes human authorship an essential element of copyright protection." The Board also rejected claimant's argument "that artificial intelligence can be an author under copyright law because the work made for hire doctrine allows for 'non-human, artificial persons such as companies' to be authors." In the Board's view "the work-for-hire doctrine only speaks to the identity of a work's owner, not whether a work is protected by copyright."

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[1] 40 F. 4th 1034 (9th Cir. 2022).

[2] Taylor v. Meirick, 712 F.2d 1112, 1117 (7th Cir. 1983).

[3] 959 F.3d 39 (2d Cir. 2020).

[4] 572U.S. 663 (2014).

[5] 39 F. 4th 1236 (9th Cir. 2022).

[6] 39 F. 4th at 1244.

[7] Google LLC v. Oracle America, Inc., 141 S. Ct. 1183. 1199 (2021).

[8] *See, e.g.*, Monsarrat v. Newman, 28 F.4th 314, 321 (1st Cir. 2022)("Simply by looking at the copyrighted work, its purpose as alleged in the complaint, and what Monsarrat concedes to be the circumstances and nature of its copying, we can see no plausible argument that Newman has not established fair use."); Bell v. Eagle Mountain Saginaw Independent School District, 27 F. 4th 313,

320-21 (5th Cir. 2022)("While the fair use defense is usually teed up at summary judgment, we can resolve it on the pleadings if the complaint contains 'facts sufficient to evaluate each of the statutory factors.").

[9] Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 142 S.Ct. 1412 (2022)(cert. granted).

[10] Correspondence ID 1-3ZPC6C3; SR#1-7100387071.

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