

The 2010 Copyright Year in Review

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What We'll Cover

- Music sampling & mashups
- Update on song-sharing cases
- Bookends: Two secondary liability cases
- Portent of change? *Omega* and overseas “first sales”
- Must've seemed like a good idea at the time
- Other notable cases

Music sampling and mashups

A few milestones in music sampling:

- 1996: “*Endtroducing...*” (DJ Shadow)
 - The first entirely sampled album
 - Time’s 100 All-Time Best Albums; Guinness Book
- 2004: “*The Grey Album*” (Danger Mouse)
 - Mashup of Beatles’ *White Album*, Jay-Z’s *Black Album*
 - Entertainment Weekly’s Best Album of 2004
 - “Homemade disc . . . the most talked-about and listened-to underground recording of all time.”

Music sampling and mashups

- 2005: *Bridgeport Music v. Dimension Films* (6th Cir.)
 - Unauth'd use of 2-second guitar chord from Funkadelic song
 - Looped repeatedly into D's song "*100 Miles and Runnin'*"
 - About 40 seconds used within 4.5 minute song
 - Trial court: De minimis use, granted D's MSJ
 - 6th Circuit reversed. "Get a license or do not sample."

Music sampling and mashups

- 2010: *Urband & Lazar Music Publ'g v. Carter* (E.D. La.)
 - D's "I Feel Like Dying" sampled P's song "Once"
 - Sued by P, D sued his producer for failure to license
 - "I Feel Like Dying" never commercially released
 - Leaked onto internet before license secured
 - Shared via peer-to-peer websites
 - P claimed 16,000,000 downloads from D's MySpace page
 - Settled in May 2010

Music sampling and mashups

Music sampling:

- **Steadily increasing**
- **Internet leaks of tracks made before license secured**
- **Where no comm'l release, damages still may be measurable**
 - **Live performances of accused song**
 - **Internet buzz may drive sales of D's latest album**
- **Suits may be tempered by reluctance of some musicians to sue each other**
 - **E.g., “I champion any form of creativity” (Jay-Z)**

Update on Song-Sharing Cases:

Thomas-Rassett and Tenenbaum

Capitol Records, Inc. v. Thomas-Rassett (D. Minn.)

(Previously) Juries twice found willful infringement of 24 songs

1st Verdict (vacated): \$222,000 (\$9,250 per song)

2nd Verdict (2009): \$1.92 million (\$80,000 per song)

Remitted (Jan. 2010): \$54,000 (\$2,250 per song)

Plaintiffs declined remittitur, opted for new trial on damages

3rd Verdict (Nov. 2010): \$1.5 million (\$62,500 per song)

Plaintiffs currently seeking injunctive relief

Update on Song-Sharing Cases: *Thomas-Rassett and Tenenbaum*

Sony BMG Music Ent'm't v. Tenenbaum (D. Mass.)

(Previously) Court directed verdict for P's on infringement

Jury found infringement to be willful

Verdict (2009): \$675,000 (\$22,500 per song)

Reduced (July 2010): \$67,500 (\$2,250 per song)

Judge Gertner deemed the original award violative of the Due Process Clause, and reduced it to treble the statutory minimum per work. See 721 F.Supp.2d 85

Cross-appeals are pending

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Bookends: Two Secondary Liability Cases

Secondary liability: When D is not a direct infringer

Vicarious liability:

D has (1) right and ability to supervise infringing conduct, and
(2) direct financial interest in infringing conduct

Contributory infringement:

D (1) knows of infringement and (2) materially contributes to, or induces, such infringement.

Bookends: Two Secondary Liability Cases

Mob Music Publ'g v. Zanzibar on the Waterfront (D. D.C.)

D is nightclub in Wash. D.C. where live music is performed

ASCAP heard six of its songs on two visits to Zanzibar

Court grants P's motion for summary judgment, awards:

- \$30,000 (\$6,000 per song) for five songs performed pre-suit**
- \$10,000 for one song performed after suit was filed**
- \$74,000 for attorney fees and costs**

Court notes that it is no defense for proprietor:

- to instruct band not to perform CR'ed music, or**
- to contract with band not to perform CR'ed music, or**
- that the band members select songs they ultimately perform**

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Bookends: Two Secondary Liability Cases

Sony Discos v. E.J.C. Family P'ship (S.D. Tex. 2010)

P.I.s saw sales of counterfeit tapes, CDs at D's flea market

P's wrote six letters to D, asking him to stop infringement, offering training

Police arrested twelve vendors and seized 2,200 counterfeit tapes, CDs

Summary judgment awarded to flea market

No contributory infringement because no knowledge of specific infringing sales

No vicarious liability, as court decided no ability to control, and that counterfeit sales did not draw customers to flea market

Bookends: Two Secondary Liability Cases

Observations:

Sony Discos defined “right and ability to control,” “financial benefit,” “knowledge” and “material contribution” restrictively

No liability in *Zanzibar* under the *Sony Discos* interpretations

Fonovisa v. Cherry Auction (E.D. Cal. 1994) distinguished:

- 2,200 counterfeit copies (*Sony Discos*) vs. 38,000 (*Fonovisa*);
- Sale of counterfeits a draw in *Fonovisa*, no such evidence in *Sony*

“Sony . . . [is] welcome to hire full-time investigators at Cole’s flea market to increase enforcement of their copyrights. What they may not do is hold [D] liable for illicit sales by third-party, unsupervised vendors—from whom he profits indirectly, if at all—simply because the sales occurred on his land.”

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Portent of Change? Omega and Overseas First Sales

17 U.S.C. 602:

Copyright holders may stop unauth. importation into U.S. of copies of their works acquired outside U.S.

17 U.S.C. 109 (first-sale doctrine):

Once a copy of a work is sold, the copyright holder may not further restrict sale/disposition of that work

Query the result when D imports into U.S. a copy:

- Made in U.S. and bought by D overseas**
- Made overseas and bought by D overseas**

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Portent of Change? Omega and Overseas First Sales

Quality King v. L'Anza (U.S. 1998):

- (1) Copies made in U.S., first sold abroad, are covered by first-sale doctrine (P can't prevent re-importation)
- (2) Expressly excluded application to copies made and sold outside U.S.
- (3) Dicta: Court theorized that first-sale doctrine might not apply to copies made outside U.S.

Most district courts considering issue followed *Quality King* dicta. See *John Wiley & Sons v. Kirtsaeng*, 2009 WL 3364037 (S.D. N.Y. 2009) and cases cited therein

Portent of Change? Omega and Overseas First Sales

Omega, S.A. v. Costco Wholesale Corp. (9th Cir. 2008):

Omega made watches in Switzerland, with CR'ed design

Third parties bought them, sold them to NY company,
who sold them to Costco

Omega hadn't authorized importation into U.S.; sued.

Trial court dismissed, under first-sale doctrine

Ninth Circuit reversed, holding it inapplicable to copies
made outside U.S.

Supreme Court granted cert, but split 4-4 in Dec. 2010.

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Portent of Change? Omega and Overseas First Sales

Observations:

Noteworthy that the Court was evenly divided

Do 4 votes exist to reverse the 9th Circuit decision?

What result when Justice Kagan can participate?

Who benefits most from application of the first-sale doctrine to imported goods?

Must've seemed like a good idea at the time

Murphy v. Millennium Radio Group (D. N.J.):

- Murphy took photo of N.J. shock jocks for magazine
- Radio station put photo on website
- Fans created modified versions of photo; station posted
- Station took down photos at Murphy's request
- Murphy sued; Court found fair use, granted D's MSJ
 - Transformative use, no impact on (non-existent) market for photo
 - Murphy's defamation claims also dismissed

Other Cases of Note

U.S. v. Cassim, 693 F.Supp. 2d 697 (S.D. Tex. 2010) (declining to
limine out “music piracy”)

MDY Indus. v. Blizzard Ent’m’t, 2011 WL 538748 (9th Cir. 2011)
(vacating and remanding trial court’s award of SJ under DMCA
to Blizzard, makers of World of Warcraft game)

(MDY distributes the Glider, which disables certain controls
Blizzard instituted into WoW to prevent automated game play)

Vernor v. AutoDesk, 621 F.3d 1102 (9th Cir. 2010) (deciding
computer software customer was licensee, not owner, of a
copy, and not entitled to assert first sale defense)

Other Cases of Note

Mattel v. MGA Ent'm't, 616 F.3d 904 (9th Cir. 2010) (Bratz dolls case) (vacating and remanding injunction and \$10 million award to plaintiff)

RIAA v. Librarian of Congress, 608 F.3d 861 (D.C. Cir. 2010) (upholding Copyright Royalty Board order instituting 1.5% per month late fee for royalty payments and “penny rate” royalty structure awarding 24 cents per ringtone sold)

Gaylord v. U.S., 595 F.3d 1364 (Fed. Cir. 2010) (vacating-in-part Claims Court decision that government stamp made fair use of Korean War Memorial sculptor's sculpture; remanding for damages determination)

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