



Recent Developments in Copyright Law

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Topics Today

- Supreme Court
- Streaming
- Fair Use
- Pre-1972 Recordings



Stairway to Copyright Infringement?

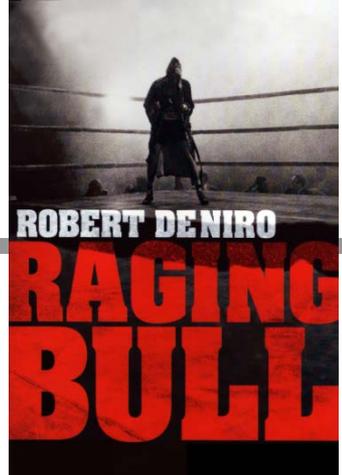
- Spirit sued Led Zeppelin for copying a guitar riff for Stairway to Heaven
- After 43 years, how can Spirit sue now?



Supreme Court



Raging Circuit Split - Laches v. Statute of Limitations



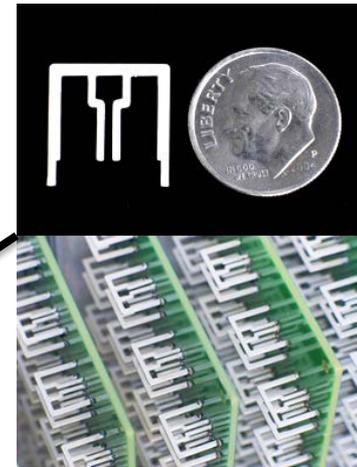
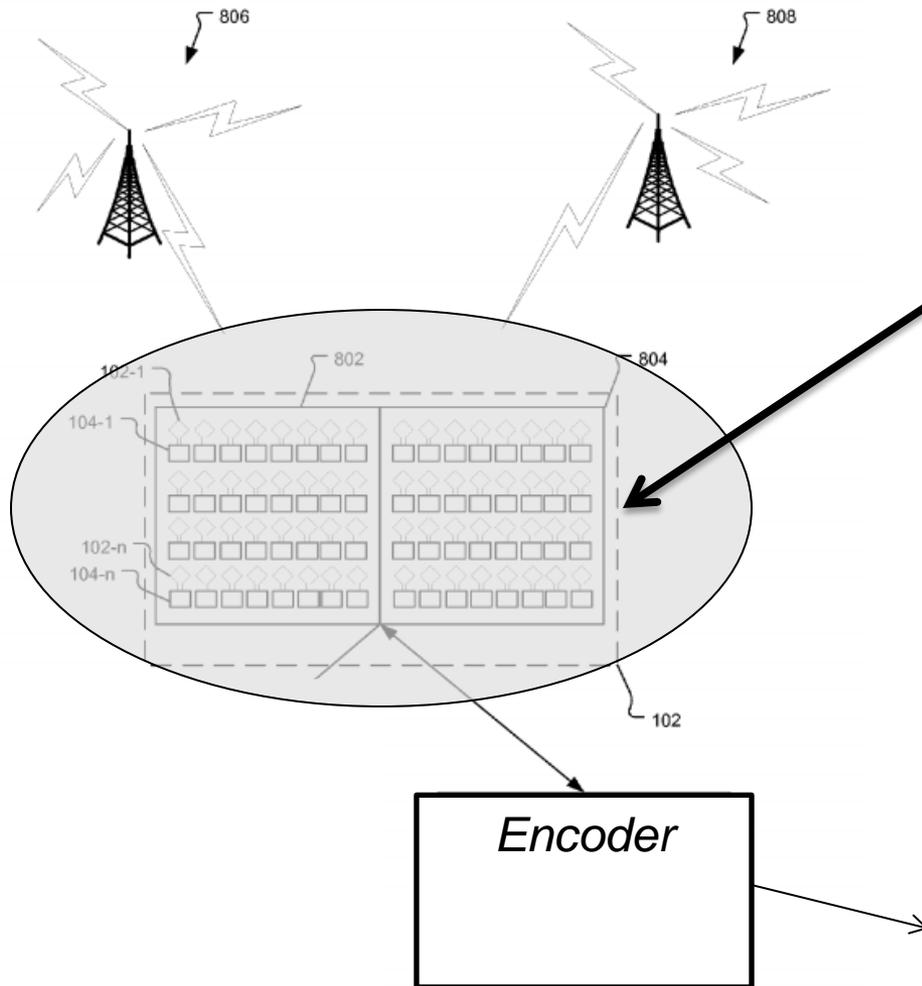
- 17 U.S.C. § 507(b) prescribes a three-year statute of limitations for copyright claims
- Circuit split over whether the defense of laches can bar a copyright claim filed within copyright law's three-year statute of limitations.
 - Three circuits: No laches defense available
 - Two circuits: Laches restricted to exceptional circumstances only
 - One circuit: Presumption in favor of applying laches to continuing copyright infringements
- Supreme Court heard arguments in January, and the decision is...

Supreme Court gives laches a KO punch

- **Holding: Laches cannot be used to override the statute of limitations in the Copyright Act**
 - Congress established uniformity courts that should not disrupt.
 - Statute of limitations already bars a plaintiff from recovering for infringement too far in the past.
 - Delay may be considered in determining the appropriate relief.
- **Dissent:**
 - Inequitable to know about infringement and not sue until defendant is making money.
 - Key witnesses may become unavailable.
- **Next fight in the Federal Circuit:**
 - How will all of this apply to patents?



Aereo Streaming TV Service



Different circuits - different results



Aereo™

- **Second Circuit**
 - No preliminary injunction: Not a public performance - unique copies, copies only visible to a particular subscriber
- **Ninth Circuit (C.D. Cal.)**
 - Preliminary injunction: Transmissions are public performances.
- **Tenth Circuit (C.D. Utah)**
 - Preliminary injunction: Falls under the Transmit Clause and is engaging in a public performance when intercepting and retransmitting copyrighted programs.

Supreme Court, 6 to 3: Aereo performs publicly

- Copyright Act language unclear, so Congressional purpose must be considered.



- Congressional purpose was to overrule the Court: cable providers "perform."



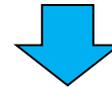
- From POV of broadcasters and viewers, Aereo acts like a cable provider



- **Aereo "performs"**



- Identical performance transmitted to various individuals.



- The individuals are unrelated and unknown to each other, and it does not matter to them whether they get their own transmission.



- **Aereo's performance is to the "public."**

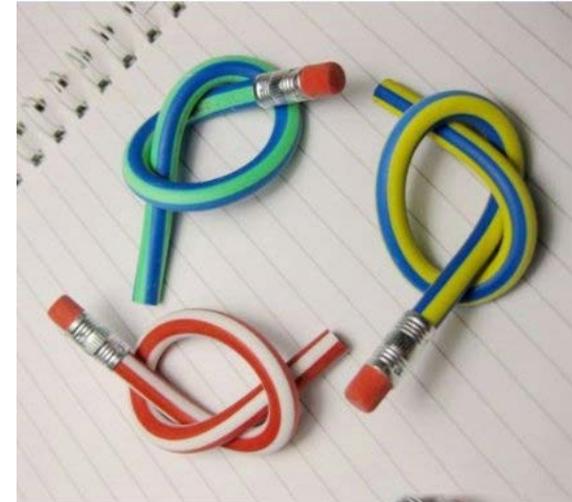
Aereo: A "Narrow Holding"

- **Justice Breyer reassures that holding will not escape the television context:**
 - 1. Reliance on history of cable broadcasts
 - 2. Audiovisual contemporaneous communication requirement
 - 3. Owners not included in "public"
 - 4. Transmission of copyrighted works only
 - 5. Transmission outside of family or social circles only
 - 6. Interpreting highly general language calls for statutory purpose
 - 7. Fair use will prevent inappropriate applications of the Clause



Aereo dissent: No need to "bend and twist the Act's terms" to produce a just outcome

- Typical claims against equipment manufacturers are for secondary liability
- To prove primary liability requires showing volitional conduct
- Volition comes down to who selects the copyrighted content, and here it is the customer
- The problems with "guilt by resemblance" and relying on legislative history



Aereo Aftermath

- **Aereo suspended service three days after Supreme Court ruling**
- **"No Plan B" → "Far from done"**
- **Supporters and rivals stepping in to fill the gap**
- **Emergency motion: If we look so much like a cable company, then we'd like to pay statutory royalties, please.**
- **District Court: No. "Defendant has jumped the gun in filing, without authorization, its motion."**
- **Appeal to FCC to become an MVPD like the cable companies**



Streaming

twitch

vimeo



Spotify®



beats**MUSIC**



Grooves*shark*

NETFLIX

PANDORA

internet radio

Pandora - Royalty rates

- Pandora streams music based on the "Music Genome Project"
- Licensing fees
 - AM/FM radio does not pay royalties for the performance of the song while Pandora has to pay performance royalties.
 - Music composition royalty rates are higher for online than radio
 - Pandora attempted to acquire a SD radio station to obtain more favorable licensing terms.



MP3Tunes - Storage Lockers

- **MP3Tunes offered personal storage lockers for music**
- **EMI sent a takedown notice**
 - MP3Tunes removed unauthorized websites from its search results but did not remove songs from user's lockers.
- **EMI sued**
 - The trial court found MP3Tunes liable for infringement for not removing songs from user's lockers
 - Founder was found vicariously liable



Is a compilation original?



Spotify - Compilation Playlists

- Spotify allows users to stream music and create playlists
- UK entertainment company sued over user's creating playlists containing the same songs in the same order as on the company's compilation albums
- What if this was in the US?
 - *Feist* found that a listing can be copyrightable when it contains a minimal degree of creativity



Fair Use

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Fair Use as a Defense

- **Statutory Factors - 17 U.S.C. § 107**
 1. Purpose and Character of Use
 - Second most important
 2. Nature of the Copyrighted Work
 3. Substantiality of the Portion Used
 4. Effect on the Potential Market
 - Most important



GoldieBlox

- **GoldieBlox sells books and games designed to inspire girls to become engineers and scientists**
- **In November, the company released a commercial set to music from the Beastie Boys song "Girls"**
 - The original song included derogatory lyrics about females.
 - GoldieBlox changed almost all lyrics except for the word "girls" used throughout the song.



Beastie Boys v. GoldieBlox

Girls
to do the dishes
Girls
to clean up my room
Girls
to do the laundry
Girls
and in the bathroom



Result

- **GoldieBlox filed to receive a declaratory judgment that their use was fair.**
- **Beastie Boys wrote an open letter stating that they do not allow their music to be used in ads.**
 - The band then lodged counterclaims for infringement.
- **Parties settled with GoldieBlox agreeing to donate \$1 million to a charity selected by the Beastie Boys that supports STEM education for girls.**



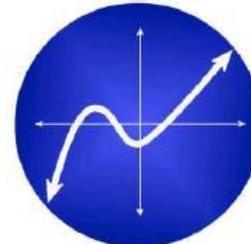
Science



Technology



Engineering



Mathematics

Was GoldieBlox's use fair?

- Parody?
- Commercial use?
- **Twist: Deceased Beastie Boys member left a will explicitly banning the use of his music in ads.**
 - Should a court give weight to this?



YouTube & "Innocence of Muslims" video

- **Actress agreed to appear in a film called "Desert Warrior" and was told it was a nonreligious, historical adventure movie set in the Arabian Desert**
- **In post production, the producer changed the actress's dialogue into an attack on Muhammad**
- **Film became a catalyst for mass protests; actress has received credible death threats**
- **Actress sued YouTube seeking to get Google to remove the video**





Preliminary Injunction?

- **District Court refused to enter a preliminary injunction.**
- **Ninth Circuit reversed. Actress demonstrated a reasonable likelihood of success.**
 - Actress likely has an independent copyrightable performance in the film
 - Film's producer did not own an interest in her performance as a work for hire.
 - She took action when she learned of the death threats.
- **While *en banc* review is pending, Ninth Circuit panel revisited and actually doubled down on the original ruling, resulting in much uproar and head-scratching**
- **Copyright Office has refused to register a copyright for the actress's performance**

Impacts of the 9th Circuit Decision

- Right of publicity
- Use of the DMCA to protect a reputation
- Creates uncertainty for any filming of an actor's performance
- First Amendment



Pre-1972 Sound Recordings

- Before 1972 sound recordings were not covered by federal copyright law
- Current issues:
 - DMCA applicability
 - Compulsory licensing scheme



DMCA Safe Harbor Refresher

- **Online service providers (OSP) are protected for copyright infringement if they comply with the notice and takedown regime**
- **The copyright holder provides notice of infringement**
- **The OSP must remove the infringing work.**



Compulsory Licensing Refresher

- **The 1976 Copyright Act provides compulsory licenses in musical compositions**
 - License covers copying and distributing musical compositions
 - The owner of the copyright can still control public performance of the work
 - Music must have been previously distributed to the public under the authority of the owner
 - The royalty rate is set by three judges.
 - Sound recordings are not covered



Cases lining up to answer big questions

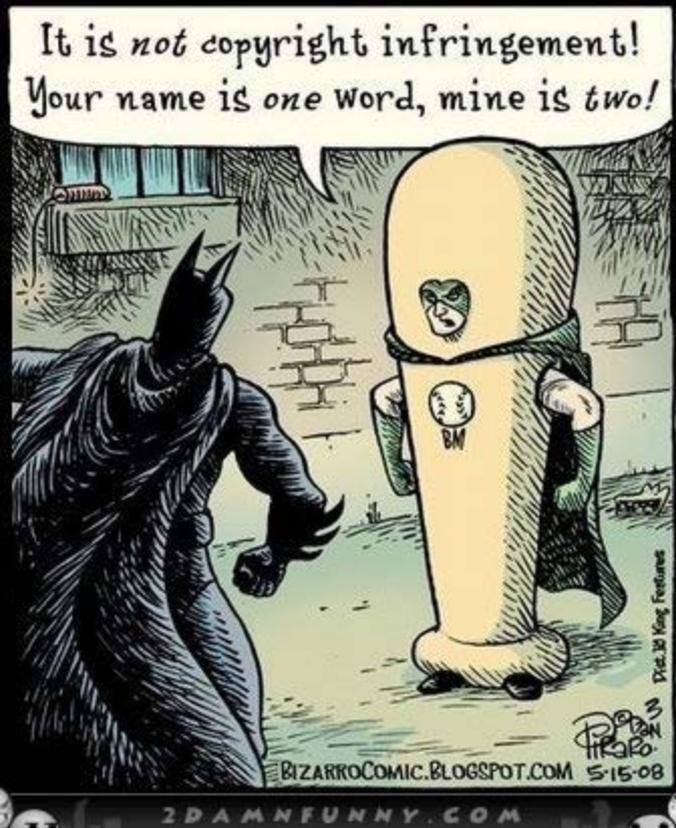
- **Does the DMCA apply to pre-1972 recordings?**
 - Capital Records v. Vimeo - on appeal at the 2nd Circuit
- **How should compulsory licenses work with pre-1972 recordings and online radio?**
 - Capital Records v. Pandora - New York (state court)
 - Capital Records v. Sirius XM - California (state court)
 - Flo & Eddie v. Sirius XM - S.D. Florida
 - Flo & Eddie v. Sirius XM - S.D. New York
 - Flo & Eddie v. Pandora - C.D. California



Flo & Eddie v. Sirius XM - C.D. California

- **The first case in the lineup decided: a big win for older artists and a big loss for online radio**
- **Judge Gutierrez grants summary judgment based on plain language of state law: "exclusive ownership . . . as against all persons"**
- **Will broad holding have unintended effects for post-1972 recordings and other types of music broadcasters?**
- **How will other courts decide? How will the RESPECT Act factor in?**



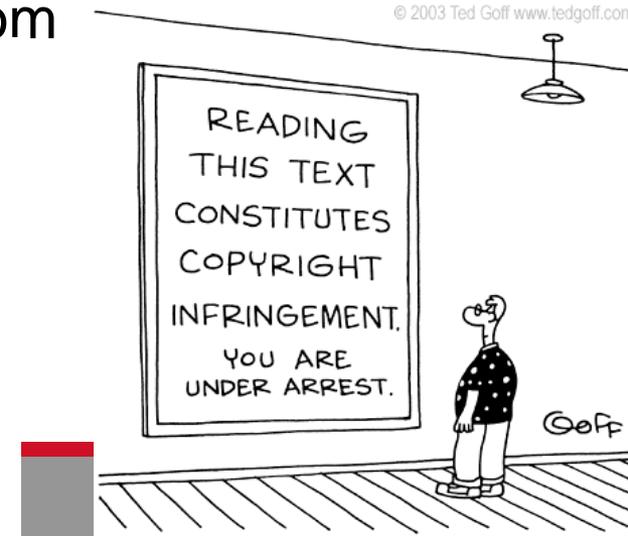


"I'm suing you. Your dream last night was an infringement on our intellectual property."

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