Your Inside Track Newsletter

Description

First Edition

News and Noteworthy:

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Recent Developments in Music and Copyright

By Don Franzen



Is Embedding a Copyright Violation?

In August this year, a federal judge in New York took issue with the Ninth Circuitâ??s so-called â??server rule.â?• Under that rule, a website publisher displays an image by using a computer to fill a computer screen with a copy of the photographic image fixed in the computerâ??s memory and so â??because the image remains on a third-partyâ??s server and is not fixed in the memory of the infringerâ??s computer embedding is not display.â?• *Perfect 10, Inc. v. Amazon.com, Inc.*,

508 F.3d 1146, 1160 (9th Cir. 2007). However, in *Nicklen etc. v. Sinclair Broadcast Group* (S.D.N.Y 2021) 20-cv-10300 (JSR), Judge Rakoff took issue with the Ninth Circuitâ??s holding, concluding instead that â??The server rule is contrary to the text and legislative history of the Copyright Act.â?• What does this mean for embedding music? If the Server Rule is not accepted nationwide, embedding a music file from another site may be an infringement. This is an issue that calls out for statutory or Supreme Court clarification!

Can AI be an Author?

So far, the courts have been unwilling to treat animals as authors (*See Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018), holding that a monkey is not the author of a photograph, or AI as an investor (See *In re Application of Application No.: 16/524,350* Filed: July 29, 2019 Attorney Docket Number: 50567-3-01-US For: DEVICES AND METHODS FOR ATTRACTING ENHANCED ATTENTION). However, recently an Australian federal judge and South Africaâ??s patent office opened the door for artificial intelligence to secure patent protection. *See* https://www.lexology.com/library/detail.aspx?g=5d182a90-fddc-4f1d-826d-fe51a0a59e1e&l=9J3E7PD. These decisions turn on the exact language of the countriesâ?? statutes. Time for Congress to tackle this issue?

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Bare Necessities End in Bare Results.

The adult children of songwriter Terry Gilkyson sued Disney back in 2013 claiming that Disney had failed to pay them royalties on the hit song â??The Bare Necessitiesâ?• in the animated feature *The Jungle Book*. Gilkysonâ??s case was at first thrown out on a statute of limitations defense, but this was reversed on appeal and the case allowed to proceed. *Gilkyson v. Disney Enter*. 244 Cal.App.4th 1336 (2016). After trial, the heirs were awarded over $1,000,000.00 in damages. But now the heirsâ?? suit has hit a snag: Californiaâ??s Second Appellate District ruled that the â??plain languageâ?• of the Disney agreement limited their rights to a 50% share of the net amount received by Disney Enterprises Inc.â??s music publisher for licensing or â??other disposition of the mechanical production rights to the material.â?• Because, the appellate court concluded, Disney did not receive any such revenue within the relevant statute of limitations, it reversed the trial court judgment. *Editorâ??s Note*: Division 7 of the Second Appellate District is noteworthy for its strict adherence to â??**plain meaning**â?• contract interpretation! *Gilkyson v. Disney Enter*, B300971 (Los Angeles County Super. Ct. No. EC061586), decided July 7, 2021. (The full opinion can be read here: https://law.justia.com/cases/california/ court-of-appeal/2021/b300971.html.)

DÃ©jÃ vu All Over Again?

In another example of singer/songwriter infringement claims, Olivia Rodrigo and her main collaborator, songwriter-producer Daniel Nigro, have given Taylor Swift, Jack Antonoff, and St. Vincent songwriting credits on Rodrigoâ??s hit â??Deja Vuâ?• â?? the second song from Rodrigoâ??s blockbuster debut album â??Sour.â?• The matter was apparently settled quietly and while Rodrigo has acknowledged Swiftâ??s â??influenceâ?• on her, no infringement was publicly admitted. https://variety.com/2021/music/news/olivia-rodrigo-taylor-swift-songwriting-credit-deja-vu-1235015769/ But the settlement on credits will not get Swift up to the podium if â??Sourâ?• wins for album of the year. In a last-minute move, the Recording Academy removed Swift and Antonoff as nominees for the album. (https:// variety.com/2021/music/awards/taylor-swift-olivia- rodrigo-grammys-nominations-interpolations- removed-1235126714/)

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Your NFT May Not Be Yours!

Acclaimed film director Quentin Tarantino set out to sell NFTs of excerpts from his screenplay for the now-iconic film *Pulp Fiction*. However, according to Miramax, the filmâ??s studio, nearly all the rights to the film belong to Miramax, which filed suit against Tarantino in November 2021. *Miramax LLC v. Tarantino et al.,* case number 2:21-cv-08979, U.S. District Court for the Central District of California (*See* complaint here). Meantime, Tarantino has fired back a strong response: calling the lawsuit â??outrageousâ?• and â??ill-conceived,â?• he argues the pages of his original screenplay belong to him and are his to sell as NFTs (*See* answer here). The outcome of the case will likely turn on the exact wording of the Miramax/Tarantino agreement. ***Warning to musicians who want to cash in on the NFT boom***: Be sure you own or control all the rights in the master recording you use for your NFTs! Clearances for the music, the masters, all artists, arrangers, producers, the artwork, and anyone else who contributed to the recording.

How Do Songwriters Get Paid for Performances of their Music?

Co-Editor Don Franzen explains songwriter performance royalties for NPRâ??s Marketplace: https://www.marketplace.org/2021/09/30/how-do-song-royalties-for-live-performances-work/

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Don Franzenâ??s legal practice covers the spectrum of the entertainment industry, including recording, television, film, live entertainment, copyright, trademarks, endorsements, corporate, tax and visa issues, and non-profit organizations. His clients include composers, producers, vocal and instrumental artists, as well as performing arts organizations. In addition to providing business and legal advice, he has acted an as a producer on recording, video and theatrical projects. He also has established an expertise in commercial civil litigation, including appellate practice (State and Federal). He has lectured on entertainment law for Eastman School of Music, the Santa Monica College Academy of Entertainment, the Colburn School of Music, the California Institute of the Arts, and is a visiting professor at the Berklee School of Music (Valencia, Spain). Since 2009 he has taught courses on music and the law at the Herb Albert School of Music, University of California Los Angeles, and effective 2016 has been appointed as an adjunct professor as part of its Music Industry Program. Since 1997 he has been chosen as a Fellow of the Institute for the Humanities at the University of Southern California. He serves as the Legal Affairs Editor for the Los Angeles Review of Books, and has authored various essays and book reviews on legal topics. He is a founding director of the Los Angeles Opera, and a director of Heyday Books. In addition to his native English, he speaks Spanish, Italian and conversational German. He is married to Dale Franzen and proud father of three children. He may be reached by e-mail at donfranzen@yourinsidetrack.net.

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