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Substantial Similarity in Literary Infringement Cases: A Chart for Turbid Waters

Robert F. Helging.....1

As home to that fictional piece of real estate known as Hollywood, the Ninth Circuit has dealt with the copyright law issue of substantial similarity more than any other jurisdiction, yet it has not developed useful principles for analyzing it. This article examines the history of the Ninth Circuit's two-step test for substantial similarity in literary infringement cases, showing how a quirk in the evolution of the test has created a confusing and ineffectual body of law on the subject. The article argues that courts have underestimated the complexity of the issue and have given too much credit to their own judgment, unaided by expert input. The absence of a genuine understanding of the issue has led courts to look for substantial similarity where it cannot be found: in the individual elements of literary works. The article presents a proposed rule to re-direct the court's inquiry from the individual elements of the work, where copyright protection cannot be found, to the artistic structure of the work, where it must be found if it exists at all.

Unresolved Textual Tension: *Capitol Records v. ReDigi* and a Digital First Sale Doctrine

B. Makoa Kawabata 33

In *Capitol Records v. ReDigi*, the District Court for the Southern District of New York ruled that the first sale doctrine does not apply when consumers resell copyrighted goods by digital distribution, even if they use “forward-and-delete” software that ensures that the seller’s copy is deleted during the transaction. This ruling hinged on the court’s interpretation of the word “particular” in § 109 of the Copyright Act. The court reasoned that when copyrighted music is downloaded, the specific location on the disk to which it is downloaded is a “phonorecord.” According to the court, a digital copy is made anywhere else constitutes a reproduction for the purposes of copyright infringement. Because it is impossible for that physical piece of the disk to be transferred via digital transmission, and every digital transmission thus necessarily requires a reproduction, there can be no first sale protection for the distribution of digital goods.

Because of the metaphysical differences between physical and digital media, this comment argues that the fair use doctrine cannot be applied in a media-neutral fashion. Digital goods cannot be moved from place to place in the same way that physical goods can be moved, even though the use of forward-and-delete technology (such as the kind ReDigi utilizes) can cause the functional result to be the same: one copy before the transmission, one copy after the transmission. The court’s strict demand that the physical substrate where a copyrighted work is fixed must remain identical in order to be considered the same “particular” copy (and thus eligible for first sale protection) is at odds with earlier courts’ rulings that repaired and restored works are eligible for first sale protection. The court’s demand is also at odds with its own conclusion that iPods and other mobile devices containing music can be legally resold. These inconsistencies demonstrate that the phrase “particular copy or phonorecord” in 17 U.S.C. § 109 (which codifies the first sale doctrine) makes the statute unable to account for digital media and thus unable to apply in a media-neutral fashion. A specific carve-out for digital media is necessary for the law to keep up

with the development of technology. Such a change is preferable because media-neutral application of the first sale doctrine permits a secondary market for digital goods to exist, which better serves both ends of copyright—the instrumental goal of rewarding authors and the ultimate goal of providing the public access to creative works—by promoting economic efficiency.

“An Offer California Can’t Refuse”: How an Efficient and Adaptable Framework Can Improve Remedies Under the Talent Agency Act and Correct Issues With its Interpretation

Keith Warren and Ryan Wechsler 79

California has a longstanding issue with the Talent Agency Act, which states that only a licensed agent may seek out, or procure, employment for an artist. The TAA has caused major headaches for Hollywood’s personal managers, who find their contracts with artists voided for engaging in even minor acts of procurement. Many commentators initially believed that *Marathon Entertainment Inc. v. Blasi* solved the dilemma. However, it turns out that the Labor Commissioner, who has exclusive jurisdiction to hear claims arising under the TAA, continues to void contracts between California’s personal managers and their clients at an alarming rate. Personal managers disapprove of the Labor Commissioner’s failure to employ the doctrine of severability, as advised by the *Blasi* court, to these contracts. In response, the personal managers recently filed a challenge to the constitutionality of the TAA. The United States District Court for the Central District of California, however, dismissed the claim and upheld the constitutionality of the controversial Act. Because this debate spans over one hundred years, and the constitutional challenge was unsuccessful, the authors of this comment advocate a two-fold approach to correcting the dilemma: (1) place the burden of production in Labor Commissioner hearings on the artist to prove that the entire manager contract should be voided, and (2) assess statutory civil penalties to those personal managers who willfully violate the TAA by procuring employment. The authors of this

Comment argue that the California legislature should consider applying this approach because it is not only easily adaptable, but also in line with the true purpose of the TAA.

**Section 230 of the Communications Decency Act:
A “Good Samaritan” Law Without the
Requirement of Acting as a Good Samaritan**

Andrew M. Sevanian.....121

When Congress enacted Section 230 of the Communications Decency Act, it made an implicit deal with every Interactive Computer Service (ICS): at least attempt to clean your website of defamatory or otherwise illegal third-party content in exchange for immunity from vicarious liability. However, the majority of courts applying Section 230 have since construed this aptly-titled “good Samaritan” law as a grant of blanket ICS immunity, offering protection regardless of whether an ICS actually regulates or edits its website. This piece analyzes an aparent split among the circuit courts, and explains that blanket ICS immunity does not square with Congress’ underlying intent of encouraging ICS self-regulation. In the end, this article highlights four potential scenarios in which an ICS could lose its Section 230 “good Samaritan” immunity status when it does not act like a “good Samaritan.”