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THE UMBRELLA[®]. AN INTELLECTUAL PROPERTY LAW UPDATE.

INSIDE THIS ISSUE:

Right to Repair.....	1
Everyone Copied My Code!!	2
Monkey Can Selfie But Can He Copyright?.....	2
Disgorgement of Defendant’s Profits as Damages for Trade Secret Misappropriation.....	3
Firm Updates.....	3
Professional Profile.....	4

Right to Repair



Samie Leigh

Associate

The two decade old Digital Millennium Copyright Act (“DMCA”) was intended to prevent circumvention of protective measures placed on copyrighted material such as movies and music. In the absence, or perhaps scant presence, of legislative updates, the same laws used to govern movies and music have been extended to new technologies brought by the internet age. To keep pace with emerging technology, section 1201 of the DMCA calls for triennial proceedings to determine the types of activity that are temporarily exempt from anti-circumvention laws. The proceedings are meant, in part, to prevent overreach of the DMCA into activities that should remain fair use.

At the same time, software is quickly becoming ubiquitous and more vulnerable to reverse engineering, necessitating intellectual property protection outside of trade secrecy. The issue of increasing importance is determining what

types of protection will continue to be available to copyrighted software and how “impermissible circumvention” could affect your ability to tinker with copyrighted software associated with hardware for those who are neither software copyright owners or licensees.

In the seventh triennial section 1201 proceedings, interested parties have been given the opportunity to submit.....

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Everyone Copied My Code!!



Andrew Reed

Associate

Over 75% of Americans use a smartphone today according to the Pew Research Center. As a result of the large number of people utilizing smartphones, smartphone operating systems and applications are being developed at an ever-increasing pace. For software developers, one question that is not often considered until it is too late, is what can I do to protect

my developments?

One way software can be protected is through copyright. Even the largest of companies, Google Inc., could not avoid a copyright infringement suit by Oracle. While the case is ongoing, it has the potential to change the direction of copyright caselaw for software related cases.

Oracle America, Inc. (“Oracle”) is the copyright owner of the JAVA operating system and development platform. Oracle sued Google, LLC, after Google copied portions of the JAVA application programming interface (“JAVA API”). More specifically, the lawsuit has resulted in a long and drawn out case that has been heard by two different juries, been appealed twice, and is currently being appealed for a third time. The two decided appeals have focused on whether API’s, and more particularly the declaration code, and structure, sequence and organization (“SSO”) is copyrightable, and the question of fair use of copyrighted works. In the first appeal, the Federal Circuit held that API’s, declaration code, and SSO are copyrightable, remanding the case back to the district court for a determination on Google’s fair use defense. Fair use is a defense to copyright infringement that allows for the use of a copyrighted work often when the work is transformed into a parody, commented on, or critiqued. While Google won on its fair use defense at the district court level, the decision was reversed upon Oracle’s second appeal to the Federal Circuit.

Both Oracle and Google stipulated to the fact that Google had copied the declaration code and SSO for 37 JAVA APIs, amounting to 11,500 lines of code that was copied. The main focus was whether Google was entitled to the.....

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Monkey Can Selfie But Can He Copyright?



Shaukat Karjeker

Partner

What do whales, dolphins and porpoises have in common with a monkey of the Celebes crested macaques-type from Northern Sulawesi (Indonesia)? And how does that in turn connect with the concept of “next friend” in the context of “standing”? In fact, what is “standing”? All of these are brought together in a tale that starts in Sulawesi with a monkey named Naruto and a photographer named David John Slater, who contrived to leave his photographic equipment unattended in the hope monkeys would activate it. Seeing his opportunity, Naruto approached and took several selfies.

Slater and Wildlife Personalities Ltd. (Wildlife”) published the selfies, and the rest is, as they say, history. The selfies went viral on the Internet. Slater and Wildlife claimed ownership of copyrights in the selfies. Naruto brought suit claiming copyrights as the author of the selfies. After all, it was undeniable, and Slater admitted, that Naruto pushed the button to take the selfies. As a result of that button-pushing act, was Naruto the “author and owner of the copyrights”? Of course, Naruto needed some help to bring this suit, and People for the Ethical Treatment of Animals (“PETA”) stepped in to provide that assistance in filing the complaint in the Federal District Court for the Northern District of California.

As a prelude to asserting rights in a suit, the plaintiff must have standing. The district court dismissed the suit for lack of standing, and Naruto through his next friend, PETA, appealed to the Ninth Circuit Court of Appeals. The court analyzed Naruto’s standing, which can be simplified as “a right to bring suit,” under three standards. The first issue on appeal is whether Naruto has standing to bring suit based on the status of PETA as a “next friend.” The next is whether Naruto has standing under Article III of the US Constitution. And the third is whether Naruto has standing under the Copyright Act (“statutory standing”).

As to the first issue, the appellate court found that PETA did not qualify as a next friend. PETA’s next friend status requires (a) that Naruto be unable to litigate his own cause due to mental incapacity, lack of access to court, or some...

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Disgorgement of Defendant's Profits as Damages for Trade Secret Misappropriation....



Ted Baroody

Partner

Analyzing the monetary harm to a business through misappropriation of one or more trade secrets is fraught with difficulty. How much does each specific trade secret contribute to the trade secret owner's profit on each product? How important was each trade secret to the defendant's accused product? What was the development timeline and did the trade secret provide an "early mover" development

head-start. What are the relevant market shares? Are there commercial substitutes? Do consumers have a preference? Is that preference a basis of demand for the product? Did the defendant sell at a higher margin than the trade secret owner and make more profit per sale than the owner of the trade secret makes? A relatively rare remedy that addresses some of these concerns is known as "disgorgement" where a judge (not a jury) may award the trade secret owner up to the total profit earned on sales of a product that incorporates the accused trade secret.

Disgorgement was recently analyzed in detail by the United States Court of Appeals for the Federal Circuit in *Texas Advanced Optoelectronic Solutions, Inc. v. Renesas Electronics America, Inc.*, no. 2016-2121, 2208 and 2235 (Fed. Cir. May 1, 2018). The plaintiff, Texas Advanced Optoelectronic Solutions, Inc., ("TAOS") and the defendant ("Renesas" f/k/a as its predecessor Intersil Corp. with respect to the conduct at issue) both manufactured ambient light sensors for electronic devices such as mobile phone screens. The sensors detect ambient light and adjust the power to the screen based on the amount of ambient light detected one problem with using a silicon-based photo diode as the sensor is that such a sensor detects both visible and infrared light (such as from an incandescent light bulb). If the infrared light causes a signal that overestimates the amount of ambient visible light, then an improper screen lighting setting will be generated.

In the early 2000s, TAOS developed and patented a solution based on having two sets of photodiode sensors. One set was shielded from infrared light. The second set was not shielded. The patent disclosed an embodiment....

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Firm Updates

AWARDS

> We are honored to announce David Carstens and Vince Allen have received the prestigious award "Best Lawyers in Dallas 2018" by D Magazine.

> Partners, David Carstens and Vincent Allen, were elected to membership in the Fellows of Texas Bar Foundation! Each year only one-third of one percent of State Bar members are invited to become Fellows.

PRESENTATIONS, & Other News

> Partner, Colin Cahoon, has made multiple guest appearances on the Mark Davis Show to discuss various hot IP topics.

> Partners, Vincent Allen and James Ortega, sponsored and participated in Dallas Bar Association's Pro Bono Golf Tournament in April 2018.



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For more information, please contact the editor, Vincent Allen at (972) 367-2001 or email him at allen@cclaw.com.



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Professional Profile



Samie Leigh

Associate

Ms. Leigh received her law degree from The University of Houston Law Center in December 2016, where she served as the submissions editor of the Houston Business & Tax Law Journal. Her paper “Safe Harboring the Cloud on an Evolving Digital Platform” was selected for publication in the spring 2017 edition of the Journal. She was also a recipient of the Houston Intellectual

Property Law Association scholarship awarded in fall 2016, as well as a scholarship with the Institute for Intellectual Property & Information Law at the University of Houston Law Center.

While attending the law school part-time program, Ms. Leigh worked full-time as an engineer at ExxonMobil Chemical Company in the Polyolefin Technology group, particularly in the development of improved Polyethylene

and Polypropylene resins.

Prior to law school, she graduated from Rutgers University with a Bachelor of Science degree in Chemical Engineering and Mathematics where she was a member of Omega Chi Epsilon Honors Society. During her time at Rutgers University, Ms. Leigh was an enlisted veteran in the New Jersey Air National Guard where she deployed once in support of Operation Enduring Freedom and once in support of Operation Iraqi Freedom.

Ms. Leigh serves on the charity selection committee of Attorneys Serving the Community which is a women’s volunteer organization that benefits local non-profits each year. Her interests include long distance running, Baptiste Yoga, and scuba diving. Below is Ms. Leigh hiking the mountains of Lucerne, Switzerland.

