Is it time for a strategic GPL litigation plan?

CivicActions

1. **Introduction**
2. Review Cases & Discussion
3. Wrap Up/Report Out

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Goal for Today:

- Not advocating for a specific litigation strategy
- Not trying to craft a strategy
- But asking: should the free software community have a litigation strategy?

Format:

- Review about a dozen cases
- 1 minute by the panel, then ~7 minutes of discussion

Ask yourself:

- Does this case freak me out?
- What about this case surprises me?
- Why haven't we been talking about them?
- Is there strategic litigation we should be doing?

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Jacobsen v. Katzer, 535 F.3d 1373 (Fed. Cir. 2008)

"Copyright holders who engage in open source licensing have the right to control the modification and distribution of copyrighted material. . . . Copyright licenses are designed to support the right to exclude; money damages alone do not support or enforce that right. The choice to exact consideration in the form of compliance with the open source requirements of disclosure and explanation of changes, rather than as a dollar-denominated fee, is entitled to no less legal recognition."

The Point: This case changed the conversation away from questioning if open source licenses were enforceable.

End Discussion 3:45

Philpot - Creative Commons Attribution 2.0 litigation

- About 34 cases filed since January 2018
- Two claims
  - Copyright Infringement (CC-BY)
  - Copyright Management Information
- Based on use of photos contributed to Wikipedia of musicians
- Cases
  - Philpot v. Planck, LLC, Docket No. 1:17-cv-04513 (S.D.N.Y. Jun 15, 2017)
  - Philpot v. Entravision Communications Corporation, Docket No. 4:18-cv-07255 (N.D. Cal. Nov. 20, 2018)
  - Philpot v. Hubbard Radio Phoenix LLC, Docket No. 2:18-cv-03084 (D. Ariz. Oct 01, 2018)
  - Philpot v. New Orleans Tourism Marketing Corporation, Docket No. 2:18-cv-09087 (E.D. La Oct 1, 2018)

The Point: This is a related license that is being being sued on a lot by one actor. Do we care?

End Discussion 3:55

Drauglis v. Kappa Map Grp., LLC, 128 F. Supp. 3d 46, 2015 ILRC 2503 (D.D.C. 2015)

- P licensed Photo under CC BY SA
- Photo was used on the cover of a published atlas
- P alleged the CC BY-SA 2.0 license meant the atlas had to be offered for free
- Court Rules:
    - The atlas was not a derivative work of the photo
    - The cover was not a derivative work of the original photo (not enough alteration of the photo)

The Point: What is the scope of copyleft and derivative work?

End Discussion 4:05

Drauglis v. Kappa Map Grp., LLC, 128 F. Supp. 3d 46, 2015 ILRC 2503 (D.D.C. 2015)

- "[T]he interpretation of a Creative Commons license is an issue of first impression in this Circuit ..."

- "Creative Commons has unique names for each of its six licenses . . . license at issue . . . easily located online by the phrase 'CC BY-SA 2.0.' . . . Therefore, the Court finds that defendant's reference to the name of the License on the back cover of the Atlas was sufficient to satisfy the section 4(a) notice requirement, and defendant is entitled to summary judgment on this issue."

End Discussion 4:05

Blizzard Entm't, Inc. v. Lilith Games (Shanghai) Co., 2017 U.S. Dist. LEXIS 74639 (N.D. Cal. May 16, 2017)

"uCool counters that DotA Allstars is a collective work because Guinsoo and Icefrog—and Meian and Madcow before them—took the most popular DotA heroes and arranged them into a new game. … None of this can be right, and the Copyright Act does not suggest otherwise. … Individual versions of DotA and DotA Allstars, then, are the 'works' at issue here."

But see Oracle Am., Inc. v. Google Inc., 810 F. Supp. 2d 1002, 1007 (N.D. Cal. 2011) (individual files were separate copyrights, even though the copyright registration was for the Java platform as a whole)

The Point: We don't even know what increment of software will be the subject matter of the lawsuit.

End Discussion 4:05

Blizzard Entm't, Inc. v. Lilith Games (Shanghai) Co., 2017 U.S. Dist. LEXIS 74639 (N.D. Cal. May 16, 2017)

Its developmental history was complicated and some of it lost to time, but it included forks of cracked versions, later forks after the original author "open sourced" it, many different contributors, two parallel versions (DoTA and DoTA Allstars), several different lead developers at different points in time, some of the work done while the lead developers were employed by game companies and some not, and the ultimate acquisition of three different lead developers' rights by plaintiffs Blizzard Entertainment and Valve Corp..

The Point: In a case about gaming software with many different contributors, the court held that there were only three copyright owners.

End Discussion 4:15

Artifex Software, Inc. v. Hancom, Inc., No. 16-cv-06982-JSC, 2017 BL 136537 (N.D. Cal. Apr. 25, 2017)

Defendant contends that Plaintiff's reliance on the unsigned GNU GPL fails to plausibly demonstrate mutual assent, that is, the existence of a contract. Not so. . . . These allegations sufficiently plead the existence of a contract. . . . Accordingly, Defendant's motion to dismiss Plaintiff's breach of contract claim is denied. Plaintiff has adequately pled the claim and Defendant has not proved at this stage that the claim is preempted by the Copyright Act.

The Point: Commercial actors have determined the GPL is a license AND a contract.

End Discussion 4:25

P.S.: Why doesn't Artifex get crap for suing so often on Ghostscript?

- *Artifex Software, Inc. v. Palm, Inc.*, No. 5:09-cv-05679 (N.D. Cal.) (Dec 2, 2009)
  - Use of MuPDF on Palm devices
- *Artifex Software, Inc. v. Conduit Ltd.*, No. 3:18-cv-00971 (N.D. Cal.) (Feb 14, 2018)
  - MuPDF GPL/AGPL Contract and Copyright Claim MUPDF being incorporated into Mobile Apps
- *Artifex Software, Inc. v. First Nat. Title Ins. Co.*, No. 4:18-cv-00503 (N.D. Cal.) (Jan 23, 2018)
  - MuPDF GPL/AGPL Contract and Copyright Claim MUPDF being incorporated into Mobile Apps

The Point: Why is no one talking about or upset about this litigation?

End Discussion 4:25

XimpleWare, Inc. v. Versata Software, Inc., Docket No. 5:13-cv-05161 (N.D. Cal. Nov 5, 2013), Document 85

- Patent infringement case
- "Because an express license is a defense to patent infringement, XimpleWare's direct infringement claims against Versata's customers turn on whether the customers' distribution is licensed under the GPL. . . . the only real issue to resolve is whether XimpleWare has sufficiently alleged that its software was 'distributed' . . . . The act of running the Program is not restricted, . . ."
- "Sharing the software with independent contractors working with the customers alone does not constitute distribution. Put another way, this is effectively internal distribution, and internal distribution is not enough to breach the GPL."

The Point: A court found a express patent license in GPLv2.

End Discussion 4:35

Oracle Am., Inc. v. Google LLC, 886 F.3d 1179, 1203–04 (Fed. Cir. 2018)

> "Google responds that the jury heard sufficient evidence of Google's good faith based on industry custom and was entitled to credit that evidence. But, while bad faith may weigh against fair use, a copyist's good faith cannot weigh in favor of fair use. ... If it were clear, accordingly, that the jury found fair use solely or even largely because it approved of Google's motives even if they were in bad faith, we would find such a conclusion improper."

The Point: We think industry custom will be highly influential in open source software cases. It won't be.

End Discussion 4:45

Motion to File Amicus Curiae Brief, *Great Minds v. FedEx Office & Print Services, Inc.*, Case No. 17-808 (2d Cir. July 5, 2017) , Doc. 40

"In the proposed brief, Creative Commons seeks to aid the Court's consideration of this appeal in two ways: first, by walking through the mechanics of how this widely-used license works; and second, by discussing relevant public policy concerns . . that can only be fairly and fully addressed by CC. With respect to the first issue, Creative Commons' experience and intimate familiarity with the license it drafted in consultation with legal experts and creators around the world **affords a unique, if not definitive, perspective** on the operation of the license and its terms. . . . Creative Commons seeks to share its own perspective on the public policy issues at stake, given CC's unequaled experience with the license, its purpose, and the diverse licensors and licensees who use it."

End Discussion 4:55

Motion to File Amicus Curiae Brief, *Great Minds v. FedEx Office & Print Services, Inc.*, Case No. 17-808 (2d Cir. July 5, 2017) , Document 40

"IT IS HEREBY ORDERED that Creative Commons Corporation's motion for leave to file an amicus curiae brief is DENIED"

The Point: The License steward was specifically denied the opportunity to inform the court about the meaning of a license.

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