Litigation

Copyright Law – Professor Grimmelmann
Class 13 – October 16, 2008

a hypo

- Laura Jones records *Noon Heartache*, an album of jazz songs
- Skeletor plays four of the songs live (with hard-rock arrangements)
- Tom Tapedeck sells unauthorized *Noon Heartache* CDs at Skeletor concerts
- Jones sues
- Skeletor claims transformative fair use
- Tapedeck admits infringement and promises to stop
- What remedies can Jones get against each?

damages

- plaintiff may recover:
  - statutory damages OR
  - actual damages
    - plaintiff's losses PLUS
    - defendant's "additional" profits

damages: plaintiff's losses

- Jones sells CDs for $15 each
  - duplication costs $5 each
  - sales last 4 months: 100, 90, 105, 105
  - sales this month: 80
- Jones earns ~$500/concert at jazz clubs
- what are her losses?

damages: Skeletor's profits

- Skeletor plays 20 concerts/mo.
  - average attendance: 10,000 @ $100
  - 16-song setlist; 4 Jones songs
- what are Skeletor's revenues?
- what fraction are due to the infringement?

damages: Skeletor's costs

- Skeletor's revenues: $20m
  - amount due to infringement: $2m
  - roadies, venue, amps, &c. $15 million/mo.
  - manager's salary: $50,000/mo.
- what amount is Jones entitled to?

damages: Tapedeck's profits

- recall: Jones sells ~100 CDs/mo @ $15 (but only 80 this month), with duplication cost: $5/CD
- Tapedeck sold 1000 CDs at the concerts at $20 each, with duplication cost $8/CD
- what are Tapedeck's profits attributable to the infringement, and how much can Jones recover from him?

statutory damages

- how many distinct "works" has Skeletor infringed?
- is Skeletor an innocent infringer, a willful infringer, or neither? Tapedeck?
- what statutory damages may Jones recover?

damages wrap-up

- what if the songs were unregistered?
- can she get punitive damages?
- is Skeletor liable for Tapedeck's damages?
  - (does this affect statutory damages?)
- should Jones take actuals or statutories?
- don't forget about interest!

injunctions

- the four-factor test:
  - irreparable injury
  - no adequate remedy at law
  - balance of hardships
  - public interest
- should the court enjoin Skeletor? Tapedeck?

preliminary injunctions

- what's different in the test for a preliminary injunction, as opposed to a permanent one?
- if the tour is ongoing, should the court preliminarily enjoin Skeletor? Tapedeck?
  - if so, what should the injunction say?
- don't forget about TROs

issues in injunctions

- do the defendants have speech interests?
- are there important derivative works?
- what about Tapedeck's promise to stop?
- what kind of injury *isn't* irreparable?
- are there presumptions in IP cases?

seizure and impoundment

- what can be seized during litigation?
  - what showing does Jones need to make?
  - what happens if Jones wins? if she loses?
- what would it take for her to get an *ex parte* seizure order?

fees and costs

- fees and costs: what's the difference?
  - how big are they in a typical case?
- under what circumstances should Jones be awarded attorney's fees?
- under what circumstances should the defendants be awarded them?

remedial checklist

- injunctions
  - preliminary
  - permanent
- seizure
  - impoundment
  - destruction
- damages & profits
  - plaintiff's losses
  - defendant's gains
  - statutory damages
- attorney's fees
  - court costs

remedy bottom line

- as a plaintiff, what remedies matter most?
  - as a defendant, which ones do you fear?
- what do these answers tell you about litigation strategy?
- what do these answers tell you about pre-litigation planning?

next time

scavenger hunt!