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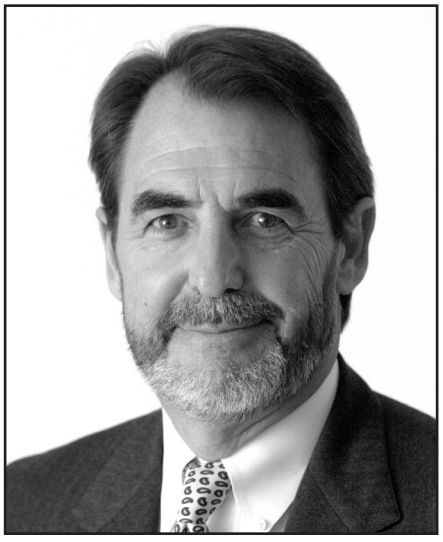
Licensing Forum



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2014 TRENDS: RASTAS, DIGITAL T-SHIRTS & MORE

It's that time of year again—to put on thinking caps about trends in 2014 that will affect licensing lawyers. This year, we have selected five such trends—wearable displays, head-mounted displays, 3-D printing, Big Data and Rastafarians. (OK, that last one is a bit misleading: It is about the transformative use of photographs of Rastafarians.)

If there is one theme they all share it is that recent legal opinions and recent technology further weaken means of controlling the use of your clients' intellectual property. This is especially true of copyright, where recent court opinions have added more substance to the court-created Fair Use principle of "transformative use." With that in mind, you will see the phrase "cold comfort" more than once in this column.

Wearable Display: Copyright Infringement on Foot?

Digital displays on your backpack, your jacket, your belt. You name it. New flexible devices enable images to be displayed on just about any surface you wear.

So you want to project the Andy Warhol silkscreen of Marilyn Monroe? Or Mickey Mouse. Or the latest running shoe from Nike. Or just your own website. From a technical (as opposed to legal) point of view (pun intended), you will soon be able to do it.

At the moment, the displays are pretty rudimentary—for example, a backpack that cyclists wear that display safety signs such as STOP. Last year, Samsung announced its new products with more robust display capabilities. In October, the Korean digital powerhouse LG announced flexible OLED panels that can be applied to pretty much anything. 2014 promises the launch of clothing lines with more comprehensive display capabilities.

The Legal Risks. Tort liability first comes to mind. Clever plaintiffs (well, their clever lawyers) will claim that the person wearing the display knowingly, and recklessly, distracted the plaintiff, leading to injury.

From an IP point of view, imagine the conniption fit when Disney's lawyers see some starlet traipsing down Melrose Avenue wearing a prominent display of Mickey engaged in some salacious activity. Or, imagine that it is an animated cartoon (think *Bambi Meets Godzilla*). Or that Mulan is advertising a new weapon system. True, Mickey has been doing all sorts of things on t-shirts since t-shirts ceased to be merely underwear. But it is one thing if it is a silkscreen, another if it is a digital—and quite prominent—display.

This could be a matter of enforcement: What can Disney do, have the lawyers walk around with C&D letters that they hand out on the street? Or is it something that can be drafted into license agreements for copyrighted content? Still, there are enough images floating around on the web that people can pick and choose what they wish to display, circumventing license terms.

So What?

First, licensing attorneys could make sure that the license grant limits the display devices (or media) on which the license images could be displayed. Second, the licensee can assume liability—both direct and indirect—for copyright infringement *and* tort. Most license agreements already provide for some such shift of liability but does it have to be specific, now, to the media? Third, and cold comfort though it may be, licensors should reach out to the display, clothing and accessory manufacturers and work out some sort of warning to end users—indeed, perhaps even some form of TOU. Imagine that: When you don that chic jacket next year, you will have to click on "I accept."

Wearable Display #2: Burying Your Head in the Digital Sand

Head-mounted displays will find their way onto Main Street next year, whether they are Google Glass or some variant.

So What?

Tort liability will be the big issues. Shortly after this consumer-market introduction, users will find ways to cause accidents on Main Street. The issue is not so much product liability as it is a "reck-

less endangerment" claim for clients providing content that is implicated in the injury. However, these issues do not differ too much from existing risks with smartphones or tablets being used while driving.

There are not necessarily any IP issues. After all, it is just another type of display. However, that raises the issue of suitability of the content for such display—*i.e.,* the risk that the content might not properly display, damaging the brand. Lawyers might want to restrict the type of display media on which the brand could be displayed. It is a limited solution, however, if the brand is already displayed on a website and that site is accessible by such display devices.

3-D Printing: Now More than Just Plastic Trinkets

If the phrase "3-D printer" conjures up images of cute little toys popping out of a black box, think again. These printers can knock out—and knock *off*—exact replicas of sophisticated products. Reports have it that one guy printed a motorcycle. Homeland Security has issued alerts regarding the use of 3-D printers to manufacture weapons. Pharmaceutical companies beware: Researchers have created new chemical compounds. Shades of Mary Shelley: Using living tissue rather than plastic, they have generated ears, livers and kidneys.

With prices now plummeting on 3-D printers it is projected that they will sell like hotcakes in 2014, moving from research labs and factories to service bureaus, hobbyists and inventors and then into the mainstream. It does not take much thought to imagine counterfeit Gucci bags popping up in even more places than now, but what about sinister chemical compounds? Printer users can download patent applications that can be fed into the printers. As it is, manufacturing diagrams of many products are already available online. From there, it is just a matter of feeding the instructions into the printer.

The Legal Risks: The legal impacts span all forms of IP. Whether a client holds a patent or right, a trademark or a copyright, it may be difficult to prevent the production, distribution and sale of counterfeited goods from quasi-legal factories with dozens of such printers or from an over-eager geek with too much time on his hands who wants to make some extra cash from sales in the local street market.

And what about the user? Some user sees manufacturing schematics online for a product he or she has always wanted. How will that user know where the infringement boundaries are located?

So What?

As with wearable displays, enforcement will be a nightmare. Perhaps there is a technical solution that would enable a patent holder to track copies of schematics—*e.g.,* a steganographic watermark. Earlier versions of watermarks have never been very good for preventing illegitimate distribution, but perhaps they can work as tracking devices. As for license agreements, one approach is, once again, to limit the license grant to specific—possibly very specific?—uses while also enumerating prohibited uses. Lawyers can reach out to the different players in this space to require certain limits on the capabilities and use of 3-D printers. The printer manufacturers and distributors, for example, can restrict the use of the printers where there is some question as to the rights in the schematics that become the basis for printer instructions. Manufacturing companies and service bureaus can also negotiate restrictions on printer use. They are noble endeavors, and should be undertaken, but their efficacy is in doubt.

Data, Data Everywhere & About Everything. Including about Data.

This is a classic story about rights, in this case, rights in data *about* data, what we call in this column "Metadata." Think of Metadata as the data created by manipulating and mining massive datasets: dataset addresses and descriptions, reports arising from mining big data, or the graphs and charts and other forms of data visualization and other data about the data.

Data come in streams. Datastreams are generated all the time by the use of many digital products and services or by "the Internet of Things" monitoring (think RFID chip output). Taken together these datastreams are Big Data. To quote Wikipedia "big data" is:

> "[…] a collection of [datasets] so large and complex that it becomes difficult to process using on-hand database management tools or traditional data processing applications."

And the first questions are: Who holds the rights in the Metadata and what can that holder do with the Metadata?

If we assert the basic principle of IP law that the person who creates the IP owns it, then it would follow that the company that generates the Metadata would own it, and can use it however it wishes.

That might be leaving money on the table, so to speak (or at least data). It might give competitors an edge if they obtain those Metadata (*e.g.,* a report based on manipulating the Big Data that includes your data). Besides, your client probably spent a lot of money generating the data and creating the pipes for their distribution.

The Legal Risks: Obviously, the first issue in data rights arises from liability for misuse of your data, but in this case, an injury a third party sustains because either your client's data were erroneous or the Metadata based on them were erroneous.

The second issue is the main point: Ownership and use rights. Unless your client's agreement with the Big Data company changes the basis of IP law (which it should), then the Big Data company owns those Metadata and does whatever it wants with them, like, oh, license them to your competitor.

So What?

As for liability, is it clear that your data do not include more than x% of "botclicks" or other fraudulent sources of your data? What about malfunctioning RFID chips? Data corruption because you lost a storage array? Look first to your representations and warranties—*and* disclaimers thereof—as to the accuracy of your data. Include a

comprehensive definition of data , too.

As for ownership and use rights, be clear as to use and manipulation. We counsel our clients to do one or both of the following: First, make it clear that the client (the data generator) owns not only the data but all data derived from data in question. Second, the client should require a license back for all Metadata generated, along with restrictions on use of the Metadata (at least to the extent that they include or are derived from client data).

How to Steal Code: Transform the "Aesthetic"

"Transformative use" now threatens most copyrights. 2013 saw what may end up being one of the most important IP cases in a long time: *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

To summarize: The Second Circuit decided that most of the works of an "appropriation" artist did not infringe the copyrights of another artist by changing the photos of the first artist. Prince, the "appropriation artist," escaped the heavy penalties on appeal because, in the view of the Court, he transformed the works into a "new aesthetic," which was enough for two of the three judges.

This is not the first opinion to inflate the exception of transformative use to swallow the entire rule of copyright, but it is high profile (see also, *Authors Guild, Inc. v. HathiTrust*, 11 C.V. 6351 (2012), on appeal.)

Cariou is about art, so many tech attorneys seem to dismiss it. Unless you have art-related clients, why should you, a licensing attorney, care about a case on photographs of Rastafarians? Ignore it at your peril. To paraphrase an old quip: Saying that *Cariou* is only about art is like saying that *Moby Dick* is just a book about whales. Whether you agree or disagree with the legal reasoning, *Cariou* adds a potent argument against infringement claims, applicable to anything that can be copyrighted.

Software is but one example, especially given that Open Source software is now the driving force in that area. In essence, Open Source is already a type of illicit appropriation via certain permitted forms of transformation. However, at least in principle, the Open Source world requires a license for such transformation. The *Cariou* reasoning could sidestep that requirement.

So What?

Lawyers have limited tools to counter the growing principle of transformative use, in general, and the *Cariou* reasoning, in particular. Undoubtedly, license agreements should continue to require reps and warranties as to adherence to applicable licenses (the usual approach for software licenses and M&A deals). In addition, the agreement can require a "best efforts" covenant not to permit transformative uses. This could be cold comfort, in light of *Cariou*; It's not like the plaintiff could really use any efforts—best or otherwise—to protect his copyright. After all, "appropriation art" is, arguably, theft or conversion by any other name because there is no attempt at permission.

That may leave indemnification provisions. A licensee must indemnify the licensor for damages arising from any uses that give rise to a transformative use where it can be traced to licensee's use of the copyrighted material, *e.g.*, software. Of course, there's always the alternative of writing an *amicus* brief in HathiTrust or otherwise joining that fight.

In conclusion, these few "stories" do not exhaust all of the trends that will shape our practices in 2014 but they should keep us busy.

The views expressed in this article are personal to the author and do not necessarily reflect the views of the author's firm, the State Bar of California, or any colleagues, organization, or client.

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