Baffled by Technology: Have Courts Lost Sight of Copyright's Balancing Principles?

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Are we living in an age in which the dollar is the ultimate judge when it comes to copyright? A number of recent cases in the United States would seem to indicate the Courts' slow slide towards tipping the balance between reward and incentive to favor ever bigger and longer rewards. Of course, it is somewhat ingenuous not to recognize that virtually every plaintiff who registers a costly claim is doing so to recoup a perceived financial loss. However, this makes it even more vital for courts to maintain a balanced view of how the monetary reward will affect the dissemination of knowledge, free speech, and innovation. Recent cases such as *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 176 (2d Cir. 2018), *Capitol Records v ReDigi* 934 F. Supp. 2d 640, *Goldman v Breitbart* 2018 WL 911340 (S.D.N.Y. Feb. 15, 2018), and *Oracle v Google* 750 F.3d 1381 , see the courts continuing to grapple with applying copyright in the digital environment. *BMG v Cox* Nos. 16-1972, 17-135 (4th Cir. Feb. 1, 2018) examines ISP liability and the decision makes for an interesting comparison to the recent Canadian case *Rogers Communications Inc. v. Voltage Pictures, LLC* [2018] 2 SCR 643. The Rogers decision focuses on the Notice and Notice provision, but is instructive for the Court's pushing back with a monetary award that favors the ISP. The decision is reminiscent of the Ninth Circuit's statement in *Lenz v Universal Music Corp.* 801 F.3d 1126 (2015) that "Copyright holders cannot shirk their duty to consider — in good faith and prior to sending a takedown notification — whether allegedly infringing material constitutes fair use" (1138). While technology continues to create uncertainty in court decisions, recent cases such as *Fox News v TVEyes* and *Cambridge University Press v Albert* would also appear to destabilize the reliance on the court's interpretation of the four factor test. In *Fox News v TVEyes*, the Second Circuit decision included a lengthy concurring opinion by designated Judge Kaplan states that "attempts by alleged infringers to characterize their uses of copyrighted works as "transformative" have become a key battleground in copyright litigation, particularly as technological advances provide ever-new contexts" (I.1) as a justification for reducing the weight given to the first factor of the test. The weight being given to this decision is already being felt as the case is cited in the *Capital Records v ReDigi* case and outside the Second Circuit in another Fourth Circuit case *Russell Brammer v Violent Hues Productions* LLC No. 1:2017cv01009 - Document 69 (E.D. Va. 2018). It's instructive to note who is winning these cases and what it means for innovation, free speech, and cultural preservation.