
Copyright Flash Report: Attorneys' Fees and Pre-1972 Safe Harbor

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Objective Reasonableness Must Receive “Substantial Weight” in Copyright Attorney-Fee Shifting Decisions: *Kirtsaeng v. John Wiley & Sons, Inc.*, No. 15-375 (U.S. June 16, 2016)

Kagan, J. In a unanimous decision, the Supreme Court clarified the Copyright Act's fee-shifting provision of 17 U.S.C. § 505, holding that district courts must give “substantial weight to the objective (un)reasonableness of a losing party's litigating position,” while “taking into account all other relevant factors,” without raising a presumption against granting fees where the losing party's position was reasonable. In so holding, the Court rejected the approach proposed by petitioner Kirtsaeng, under which courts would grant “special consideration to whether a lawsuit resolved an important and close legal issue and thus ‘meaningfully clarifie[d]’ copyright law,” finding such an approach to be unworkable. The Court vacated the Second Circuit's decision and remanded the case to the district court for further consideration in light of the refined approach.

DMCA Safe Harbor Applies to Pre-1972 Sound Recordings: *Capitol Records, LLC v. Vimeo, LLC*, Nos. 14-1048/1049/1067/1068 (2d Cir. June 16, 2016)

Leval, J. In a suit alleging copyright infringement of plaintiffs' pre-1972 sound recordings by videos posted by third parties to defendant Vimeo's website, the Second Circuit affirmed in part and vacated in part the district court's summary judgment rulings on various issues. The Second Circuit held that the Digital Millennium Copyright Act's safe harbor provision of 17 U.S.C. § 512(c) shields Internet service providers from liability under state copyright law with respect to sound recordings fixed before February 15, 1972. Regarding the “red flag knowledge” exception to the safe harbor, Section 512(c)(1)(A)(ii), the court held that under the standard of *Viacom International, Inc. v. YouTube, Inc.* (2d Cir. 2012), a showing that “some employee of Vimeo had some contact with a user-posted video that played all . . . of a recognizable song” could not establish “red flag knowledge” by Vimeo sufficient to forfeit the safe harbor. Finally, the Second Circuit ruled that evidence cited by plaintiffs of “sporadic instances” of Vimeo employees' encouraging infringement could not support plaintiffs' theory that Vimeo had engaged in a pattern of “generalized

encouragement of infringement” and thereby forfeited the safe harbor with respect to specific videos under the doctrine of willful blindness.

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