

Dancing Baby will be neither seen nor heard



The US Supreme Court will not hear the 'Dancing Baby' copyright infringement case, following advice from the acting US solicitor general Jeffrey Wall.

The case between Stephanie Lenz and Universal Music Corp focuses on the 29 second 'Dancing Baby' YouTube video, which featured Lenz's toddler son dancing to Prince's Let's Go Crazy.

Universal sent a Digital Millennium Copyright Act (DMCA) notice to YouTube, claiming Lenz had committed copyright infringement. The

Electronic Frontier Foundation (EFF) took the case on behalf of Lenz and sued Universal, claiming improper use of the DMCA.

Last year, the Supreme Court asked the US to file an amicus brief expressing its views on the case, after multiple interested parties weighed in.

In May, Wall argued: "Even if a question concerning the mental state required for DMCA liability otherwise warranted this court's review, this case would not be an appropriate vehicle in which to consider it."

The Supreme Court, seemingly in agreement, has denied certiorari.

The US Court of Appeals for the Ninth Circuit sided with Lenz in 2015, ruling that the video fell under the fair use exemption of the DMCA, but advocated for Universal's right to send false infringement notices, as long as it subjectively believed the material it targeted was infringing. EFF petitioned the Supreme Court to "ensure that copyright holders who make unreasonable infringement claims can be held accountable if those claims force lawful speech offline".

The logo for eprint, featuring a stylized '@' symbol followed by the word 'print' in a bold, white, sans-serif font. A checkmark is integrated into the end of the 't', and a registered trademark symbol (®) is to the right.

Your IP Firm for the Caribbean & Latin America

MAIN OFFICE

Edificio Alvasa, Barrio Tournón,
frente al Periódico La República
P.O.BOX 713-1000. San José,
Costa Rica
Tel: (506) 2256-4056
Fax: (506) 2256-4043
Email: info@eprint.com

CJEU confirms The Pirate Bay does communicate to the public

The Court of Justice of the EU (CJEU) has confirmed that The Pirate Bay and other file-sharing websites do commit an act of communication to the public under Article 3(1) of the Copyright Directive.

The Pirate Bay, as a peer-to-peer network that indexes infringing content, is engaging in communications to the public under the Copyright Directive because it is aware of that content and doesn't take action to make inaccessible, the CJEU held in the litigation between Dutch anti-piracy group BREIN and two ISPs on 14 June.

In the decision, the CJEU explained: "The view must ... be taken that the operators of the online sharing platform The Pirate Bay, by making that platform available and managing it, provide their users with access to the works concerned. They can therefore be regarded as playing an essential role in making the works in question available."

The Supreme Court of the Netherlands, on referring questions to the CJEU for a preliminary ruling in the litigation, also asked whether website blocks are proportional responses to sites such as The Pirate Bay, which do not host infringing content but provide access to third parties, as well as whether they are effective.

But the CJEU declined to answer this question in light of its ruling that The Pirate Bay and other file-sharing websites do commit an act of communication to the public under Article 3(1) of the Copyright Directive.

In his recommendation to the CJEU earlier this year, advocate general Maciej Szpunar reaffirmed the proportionality and effectiveness of website blocks, which are executed once a court grants an injunction compelling ISPs to do so.

"It is not necessary that intellectual property should be absolutely protected, that is to say, that the proposed measure should result in a complete cessation of copyright infringements," Szpunar explained. "It is sufficient that it should seriously deter internet users from committing such infringements by making infringement difficult."

"Given the role of websites such as The Pirate Bay in the operation of peer-to-peer networks, there seems to me to be no question that blocking access to such a site would make it difficult or impossible for most users to find the works made available on such a network and therefore to download them in breach of copyright."

IPPro The Internet issue 120

Anti-Piracy Coalition

A 30-strong group of content creators and entertainment companies have launched the Alliance for Creativity and Entertainment

P4



PIPCU Update

The City of London Police's Operation Creative has led to an 87 percent drop in adverts for licensed gambling operators being displayed on illegal sites

P6



Online Infringement

More than 90 percent of brand owners who responded to a Hogan Lovells survey have experienced intellectual property infringement online

P8



INTA Committee

The International Trademark Association's brands and innovation committee fills an interesting niche. Barney Dixon speaks to its chair, Curtis Krechevsky

P9



MEP's 'Alternative compromises' for DSM reforms blocked

A Belgian member of European Parliament who sought to introduce "alternative compromises" to EU copyright reforms, including increased censorship and content filters, has been defeated.

Pascal Arimont attempted to pass amendments to legislation that is part of the EU's Digital Single Market reforms and was under the consideration of the internal market and consumer protection committee.

German member of European Parliament Julia Reda said that Arimont's amendments read like the "wish list of the content industry, with utter disregard for the Charter of Fundamental Rights and long established principles of EU law".

Arimont wanted to increase regulation among content platforms, and double down on their obligations to filter content. The original proposal suggests that content providers hosting "large amounts" of copyright content should be required to install content filtering systems.

Under Arimont's amendments, any service facilitating the availability of such content, even if it is not actually hosting it, but merely linking to other websites.

Reda said that the only exception to this would be for micro-businesses no older than five years. "If you've been self-employed for more than five years, rules the European Commission wrote with the likes of YouTube and Facebook in mind would suddenly also apply to your website."

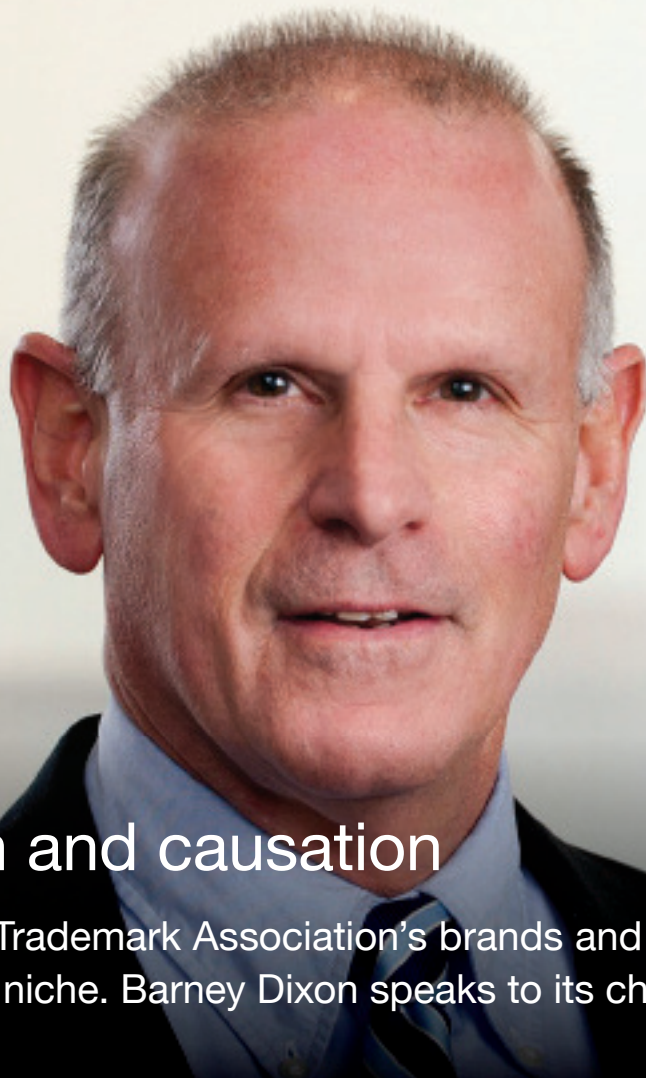
Another facet of the EU Digital Single Market reforms is the controversial 20-year link right for publishers. Reda, who has advocated against the right, said that, "tragically, the committee tasked to defend consumer rights could not agree to come out against the planned extra copyright for news sites that independent experts unanimously slammed and called 'an interference with freedom of speech'".

The right would allow 20 years of protection for the use of news snippets in digital form, and require permission from the original publisher.

Arimont proposed this right be extended to 50 years, which Reda said would result in allowing publishers to request remuneration for linking to a headline from the Cold War era.

This amendment was also blocked as part of Arimont's "alternative compromises".

The legal affairs committee still needs to scrutinise the legislation, which is expected to be completed by September.



Correlation and causation

The International Trademark Association's brands and innovation committee fills an interesting niche. Barney Dixon speaks to its chair, Curtis Krechevsky

Why was the brands and innovation committee formed?

The brands and innovation committee launched in January 2016. It was established by the International Trademark Association (INTA) board of directors in March 2015 following a final report to the board from a taskforce on brands and innovation that gave a number of recommendations, including that INTA should establish the permanent committee. The committee was formed to investigate the effect and impact of brands on innovation as well as the impact of innovation in various industries on brands.

What links are there between brands and innovation?

This actually asks two very different questions. First, do brands have a positive, negative or neutral effect on innovation? From INTA's perspective, it would be great to show that brands can act as a stimulus or catalyst for innovation. The taskforce, which I co-chaired with former INTA president Heather Steinmeyer, looked at the existing research and concluded it was fairly sparse. The existing research did not really demonstrate a causal connection. It was only able to show correlation. In countries such as the UK, Germany and the US, where innovative technologies come to market more frequently, you also find more activity in branding, specifically in the number of trademark applications filed in the trademark offices of those countries. But that correlation wasn't sufficient, at least in our view, to show causation. One of the objectives for the committee is to commission a study that

will be more rigorous and will withstand true peer review, achieved through generally accepted research methods, to test whether there is a positive causation effect from brands on innovation.

As to the second question, the other side of the relationship as it were, the taskforce's report listed about two dozen examples within the last 20 years or so, where innovations or 'disruptive' technologies have made entire product lines, or even entire industries, obsolete. How often have you used a fax machine in the last few years?

We're hoping the committee can provide resources and tools for INTA members, to anticipate and respond to these kinds of developments and disruption to their industries and their companies' business models.

How do you define 'brand' and 'innovation'?

You'd be surprised as we were that going to a dictionary does not yield an easy answer. Early on, the taskforce recognised that we were being asked to think about brands and innovation and what the relationship was, but there are many different types of innovation. One of the first things I created was a summary of various definitions of 'innovation', listing some of the perspectives that one could take into account in developing a definition that worked more broadly. For example, there's a substantial difference between what innovation means to the electronics industry and what it means in the political sector.

INTA Committee

What we did was come up with a working definition. We needed something we could build on when moving forward with the committee. I'm not sure whether it's possible to come up with an umbrella definition for 'innovation' that would work for everyone, but we also haven't given up on that as an objective.

We also realised, again to our surprise, that INTA had never attempted to define the term 'brand'. Yet there is a difference, I think, in most people's minds, even if they aren't able to articulate why, between a 'trademark' and a 'brand'. A trademark is, in some sense, an 'anchor' for the brand, but a brand is a larger bundle of attributes that go along with the trademark.

These are everything from reputation to goodwill. There is also a psychological component. A very well-known and strong brand can move beyond the products and services it identifies and become something more, such as a lifestyle or even a political or philosophical statement for its owner and consumers.

You see this in the more recent movement among some companies to become more socially responsible. In the US, for example, there is the Whole Foods brand, where social responsibility is part of the entire company's mission statement.

Some of the companies that are on the cutting edge of technologies in their field, whether it's Apple, Google or Facebook, want to be sure they are acting within what they consider to be socially responsible parameters. All of this gets wrapped up into what we call a brand.

We had a sub-committee devoted to defining these terms. We asked them to come up with a definition that we could publish to the rest of INTA and see if it worked for the association more generally, and without thinking that our working definitions would be acceptable even within all the contexts of INTA, and being mindful that we didn't have a mandate to define these terms for all time and all purposes.

The sub-committee developed what we termed 'final working definitions' of both terms that we believe are worth further consideration within and outside of INTA:

- Innovation means a change that makes a difference in any particular societal context and that alters the manner in which markets or society interact or operate.
- Brand means the total identity of a product, service, organisation, individual, or any item, which people relate to and connect with intellectually, psychologically, and emotionally. A brand is a complex, multi-layered promise by the owner of a consistent level of quality, and of what will be delivered and experienced.

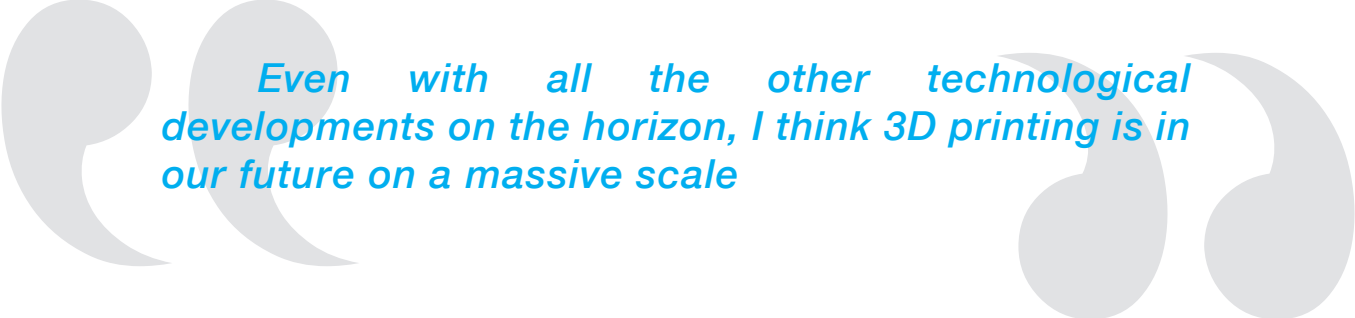
What about innovations as a threat to brands, like 3D printing?

Even when the taskforce was first established in 2014, it was asked to look at evolving and cutting edge technologies, such as the internet of things, wearable technology and 3D printing. Technologies such as these will likely create opportunities, but in some cases will also present threats for brands. 3D printing is maybe the current poster child for that duality. Even with all the other technological developments on the horizon, I think 3D printing is in our future on a massive scale.

So as a committee, we are definitely looking at 3D printing, the internet of things and even artificial intelligence, because each one of these can have an impact on brands. We don't have a specific sub-committee dedicated to looking at each technology separately, but Marc Trachtenberg, who chairs our programming and communications sub-committee, happens to be one the best known experts on 3D printing, so we have asked him and his sub-committee to take a closer look at the effect 3D printing is going to have on brands, and what kind of resources and tools we can come up with for brand owners to both adopt that technology and use it as a resource to change their business model for the better, but also to be prepared for the threats posed by the technology, particularly in the trademark infringement and counterfeiting area.

There are a number of people actively thinking and writing about this. Just to explain one obvious way in which 3D printing can be a threat: imagine that 3D printing becomes available on a mass scale at a relatively low cost, not necessarily that everybody has a 3D printer in their own home, but the technology is available locally at an office supply store or a printing centre. Maybe someone comes up with a blueprint in digital form for manufacturing the same, or virtually the same, product as a branded item. But the printed item will have no branding, unless you code it into the digital blueprint. Other forms of intellectual property may be more helpful in this scenario, such as if you have a design registration or patent on the item that's being printed without authorisation, rather than trying to show that the ornamental appearance of the product has trademark significance or that its replication constitutes a form of unfair competition recognised in the jurisdiction where it occurs.

Among the models of legitimate 3D printing that I've been talking about, a brand owner could make available to consumers an entire packet of software for 3D printing that would include the brand appearing in whatever the finished product looks like. The software could include various security tools so it would not be easy to replicate without authorisation. In addition, brand owners may try to ensure that, as is now the case with software updates for your computer, the 3D printing software packet can only be obtained through authorised channels so consumers can be confident they are purchasing defective or virus-infected software. [IPPro](#)



Even with all the other technological developments on the horizon, I think 3D printing is in our future on a massive scale

Curtis Krechevsky

Chair of INTA brands and innovation committee
Partner and chair of trademark and copyright department at Cantor Colburn