



## Recent Trends in Copyright Litigation

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# Presenters



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# Topic Areas

1. Audiovisual works (e.g., TV shows and movies)
2. Computer software
3. Artificial intelligence

# Audiovisual Works

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# *Woodall v. Disney, 20-cv-03772 (C.D. Cal.)*



# Copyright Infringement

“To establish a successful copyright infringement claim, [a plaintiff] must show (1) he owns the copyright . . . (2) copied protected elements of [the copyrighted work].” *Swirsky v. Carey*, 376 F.3d 841, 844 (9th Cir. 2004).

# How to Prove Copying

“The plaintiff can prove that the defendant copied from the work by proving by a preponderance of the evidence that [1] the defendant had access to the plaintiff’s copyrighted work and that [2] there are substantial similarities between the defendant’s work and original elements of the plaintiff’s work.”

Ninth Circuit Model Jury Instructions § 17.17

# Woodall v. Disney: The Copyrighted Work



Copyright © 2003 Buck Creations Multimedia, Buck Woodall  
All Rights Reserved

**Bucky** is an animated feature created, written and illustrated by Buck Woodall of Kauai, Hawaii.

Bucky will bestow influential and prevailing messages for people through our intention of combining, life in Hawaii today with Hawaiian mythology and folklore...this includes of course, Hawaii's predominant sport: **SURFING!**



# Side-by-Side Comparison



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# Side-by-Side Comparison

1.



*Bucky's volcano goddess, Pele*  
DE20, *Bucky* concept trailer, 1:39



*Moana's goddess Te Fiti, who is also the lava monster, Te Ka, Moana, 1:30:16*

# Side-by-Side Comparison

5.



Bucky as a baby at the beach without parents, DE18-1:269



Moana as a baby at the beach without parents, *Moana*, 4:47

# Side-by-Side Comparison

16  
17  
18  
19  
20  
21  
22  
23

10.



Hanalei Bay, Hanalei River



Motunui, Moana's island

# Other Alleged Similarities

- h. Both *Bucky* and *Moana* involve a journey by the main character which starts with a turtle;
- i. Both *Bucky* and *Moana* incorporate the concept of sea navigation by the stars;
- n. Both *Bucky* and *Moana* involve characters shapeshifting into bugs;



# How Did Disney Get Access to Bucky?

1       **INTERROGATORY NO. 8:** Identify any and all documents  
2       regarding or relating to Bucky that you provided to any Defendant  
      from 2001 to 2016. and. [sic]

3       **RESPONSE TO INTERROGATORY NO. 8:**

4       ... The only Bucky documents that Marchick may have provided to  
5       any Defendant was the Bucky material she provided to the individual  
      at Disney TV Animation referenced in her response to Interrogatory  
      No. 3.<sup>11</sup>

# Summary Judgment

Court denies Disney's MSJ for various reasons, including:

- Fact dispute on “substantial similarity” because of dueling expert reports
- Fact dispute as to whether Disney independently created (rather than copied) *Bucky*

# Jury's Verdict

1	1.	Did Plaintiff prove the creators of <i>Moana</i> had access to Plaintiff's				
2		copyrighted works identified below?				
3						
4	a.	The 2003 Treatment entitled BUCKY, which is Exhibit 11:				
5						
6		<table><tr><td><u>          </u></td><td><u>          </u> ✓</td></tr><tr><td>Yes</td><td>No</td></tr></table>	<u>          </u>	<u>          </u> ✓	Yes	No
<u>          </u>	<u>          </u> ✓					
Yes	No					
7						
8	b.	The 2008 Treatment entitled BUCKY THE SURFER BOY, which is				
9		Exhibit 13, and additional 2008 materials, which are Exhibits 14, 15,				
10		16, and 17:				
11						
12		<table><tr><td><u>          </u></td><td><u>          </u> ✓</td></tr><tr><td>Yes</td><td>No</td></tr></table>	<u>          </u>	<u>          </u> ✓	Yes	No
<u>          </u>	<u>          </u> ✓					
Yes	No					
13						
14	c.	The 2011 Script entitled BUCKY THE SURFER BOY, which is				
15		Exhibit 12:				
16						
17		<table><tr><td><u>          </u></td><td><u>          </u> ✓</td></tr><tr><td>Yes</td><td>No</td></tr></table>	<u>          </u>	<u>          </u> ✓	Yes	No
<u>          </u>	<u>          </u> ✓					
Yes	No					
18						
19						
20	If you answered "No" to all of (a), (b), and (c) above, you do not need to answer					
21	any further questions. Skip to the end and sign and date the Verdict Form.					
22						



# Some Unaddressed Copyright Defenses

- Lack of substantial similarity
- 17 U.S.C. § 102(b)
- *Scènes à faire*

# Copyrightability - 17 U.S.C. § 102(b)

- “In no case does copyright protection for an original work of authorship extend to **any idea . . . concept, principle** . . . regardless of the form in which it is described, explained, illustrated or embodied in such work.”
- Decided by the Court, not the jury

## Scènes à faire

- “Familiar stock scenes and themes that are staples of literature are not protected.”
- “Scenes-a-faire, or situations and incidents that flow necessarily or naturally from a basic plot premise, cannot sustain a finding of infringement.”

*Cavalier v. Random House, Inc.*, 297 F.3d 815, 823 (9th Cir. 2002).

# Key Takeaways

1. Difficult to win on substantial-similarity at summary judgment.

*See Gregorini v. Apple Inc.*, 2022 WL 522307, at \*1 (9th Cir. 2022) (“While dismissal at the pleading stage is by no means unprecedented, even summary judgment is not highly favored on questions of substantial similarity in copyright cases...”)

2. When there’s no evidence of direct copying, access matters.

# Computer Software

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## 17 U.S.C. § 102(b)

“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, **method of operation** . . . regardless of the form in which it is described, explained, illustrated or embodied in such work.”

# Computer Software

“Applying copyright law to computer programs is like assembling a jigsaw puzzle whose pieces do not quite fit.”

*Lotus Development Corp. v. Borland Int’l, Inc.*, 49 F.3d 807, 820 (1st Cir. 1995) (Boudin, J., concurring)

# Lotus Development Corp. v. Borland

A:A1: 'EMP

Worksheet Range Copy Move File Print Graph Data System Quit

Global Insert Delete Column Erase Titles Window Status Page Hide

A	A	B	C	D	E	F	G
1	EMP	EMP NAME	DEPTNO	JOB	YEARS	SALARY	BONUS
2	1777	Azibad	4000	Sales	2	40000	10000
3	81964	Brown	6000	Sales	3	45000	10000
4	40370	Burns	6000	Mgr	4	75000	25000
5	50706	Caeser	7000	Mgr	3	65000	25000
6	49692	Curly	3000	Mgr	5	65000	20000
7	34791	Dabarrett	7000	Sales	2	45000	10000
8	84984	Daniels	1000	President	8	150000	100000
9	59937	Dempsey	3000	Sales	3	40000	10000
10	51515	Donovan	3000	Sales	2	30000	5000
11	48338	Fields	4000	Mgr	5	70000	25000
12	91574	Fiklore	1000	Admin	8	35000	---
13	64596	Fine	5000	Mgr	3	75000	25000
14	13729	Green	1000	Mgr	5	90000	25000
15	55957	Hermann	4000	Sales	4	50000	10000
16	31619	Hodgedon	5000	Sales	2	40000	10000
17	1773	Howard	2000	Mgr	3	80000	25000
18	2165	Hugh	1000	Admin	5	30000	---
19	23907	Johnson	1000	VP	1	100000	50000
20	7166	Laflare	2000	Sales	2	35000	5000

DATA.WK3

MENU



# Lotus Holdings

- “We think that ‘method of operation,’ as that term is used in § 102(b), refers to the means by which a person operates something, whether it be a car, a food processor, or a computer.”
- “The fact that Lotus developers could have designed the Lotus menu command hierarchy differently is immaterial to the question of whether it is a ‘method of operation.’”

# Lotus on “Method of Operation”

“In many ways, the Lotus menu command hierarchy is like the buttons used to control, say, a video cassette recorder (‘VCR’).”



# Computer Software

“Copyright protection for a computer program extends to all of the copyrightable expression embodied in the program. The copyright law ***does not protect*** the functional aspects of a computer program, such as the program’s algorithms, formatting, functions, logic, or system design.”

Copyright Office Circular 61

# Google v. Oracle

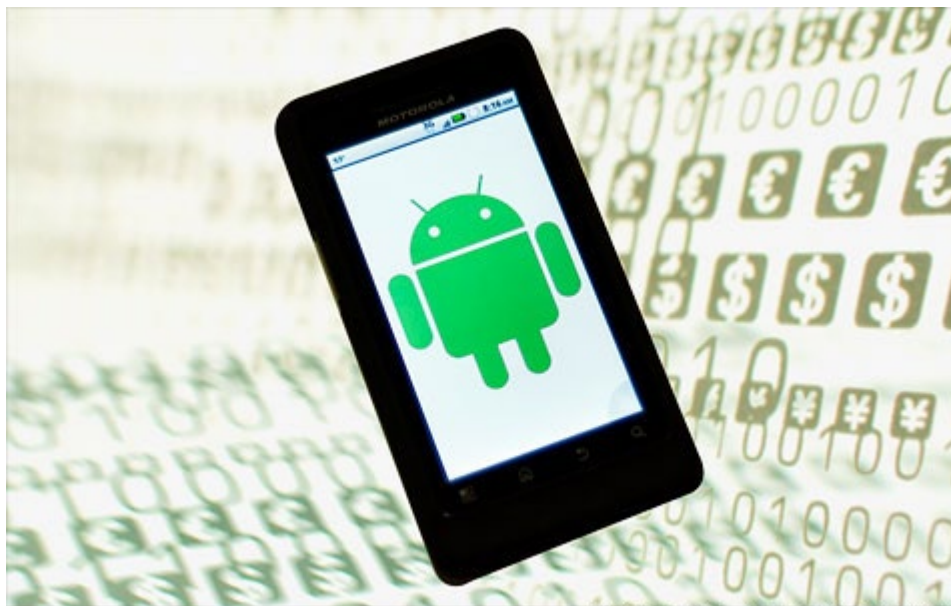
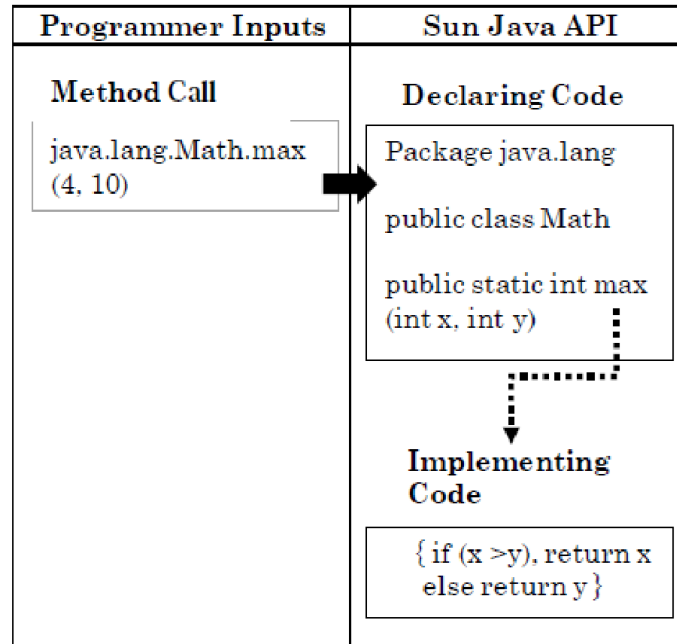


PHOTO: JOHN R. COUGHLIN/THINKSTOCK

# Google v. Oracle

Sun Java API Diagram



# *Google v. Oracle*



# Google v. Oracle (Round 1)



- After a jury trial, trial court holds that APIs are not protectable because they are, among other things, a method of operation
- Jury hangs on Google's fair use defense
- Federal Circuit reverses copyrightability ruling, and remands for a jury trial on fair use

# *Oracle v. Google*, 750 F.3d 1339 (Fed. Cir. 2014)

1. **Copyrightability**: “[A] set of commands to instruct a computer to carry out desired operations may contain expression that is eligible for copyright protection.”
2. **Fair Use**: “On balance, we find that due respect for the limit of our appellate function requires that we remand the fair use question for a new trial.”



# Google v. Oracle (Round 2)



- Both sides agree to have the jury resolve fair use
- Jury finds fair use; Oracle moves for JMOL under Rule 50
- Federal Circuit reverses again

# *Oracle v. Google*, 886 F.3d 1179 (Fed. Cir. 2018)

1. Holds that fair use is a mixed question of law and fact, but the ultimate question is legal and gets de novo review.
2. Finds no fair use as a matter of law

# Google v. Oracle (Final Round)



- Supreme Court grants cert on copyrightability and fair use
- But the Court's opinion only addresses fair use

# Fair Use Statutory Factors (17 U.S.C. § 107)

1. Purpose and character of use;
2. Nature of the work;
3. Amount or substantiality of the portion used; and
4. Effect of the use on the potential market for or value of the work

# What Did the Supreme Court Hold?

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1. Google's use was transformative.
2. Declaring code was further than most computer programs (such as implementing code) from the core of copyright.
3. Only 0.4% of Sun Java API computer code was used.
4. Android did not harm actual or potential markets for Java SE. Google's use advanced the goals of copyright.



# Software Copyright Litigation Post-Google

- Fair use can be resolved at summary judgment.

*Teradyne, Inc. v. Astronics Test Systems, Inc.*, 2025 WL 341828 (9th Cir. 2025)

*Synopsys v. Real Intent*, 2024 WL 5364480 (N.D. Cal. Aug. 26, 2024)

- Copyrightability of certain aspects of computer programs are on shaky ground.

# *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith*



# *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith*

Sole question is the first fair use factor (the purpose and character of the use).

The Supreme Court holds that:

1. “[T]he purpose of [Warhol’s] image is substantially the same as that of Goldsmith’s photograph” because “[b]oth are portraits of Prince used in magazines to illustrate stories about Prince.”
2. The use “is of a commercial nature” because Warhol’s image was licensed for money.

# Artificial Intelligence

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# Generative AI

What's a good restaurant in San Francisco that you recommend?

San Francisco has a ton of great dining options! Here are a few highly recommended spots:

1. **Zuni Café** – A classic in the city, Zuni Café is famous for its roast chicken and wood-fired dishes. It's a cozy spot with Mediterranean-inspired cuisine.
2. **State Bird Provisions** – Known for its innovative dim sum-style service, this restaurant serves up seasonal, inventive American food with influences from around the world. It's a fun experience with exceptional food.
3. **Tacko** – If you're in the mood for casual but high-quality Mexican, this is the place. Their tacos are fantastic, and the atmosphere is great for a laid-back meal.
4. **Gary Danko** – If you're looking for a fine dining experience, Gary Danko is one of the city's top Michelin-starred restaurants. It's perfect for special occasions, offering an unforgettable tasting menu.
5. **Boudin Bakery Café** – For a true San Francisco experience, Boudin's sourdough bread is legendary, and their clam chowder served in a sourdough bowl is a must-try.

Do any of these sound good, or would you like more specific recommendations based on what type of food you're in the mood for?

# Generative AI

Can you write a haiku about lawyers?

Of course! Here's a haiku about lawyers:

Words sharp as a blade,  
In the search for truth they stand,  
Justice in their hands.

# *Thomson Reuters v. Ross Intelligence*

## **Question**

Does originality for copyright purposes mean that the work was independently created and has some minimal degree of creativity?

## **West Headnote**

Originality, for copyright purposes, means that the work was independently created and has some minimal degree of creativity.

## **Case Opinion**

Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.

# Lawsuits against Generative AI Companies

Fair use will be a key defense. Questions will focus on:

- The transformative nature of generative AI tools.
- The market effects (if any) of these AI companies' use of the asserted works.



# *Thomson Reuters v. Ross Intelligence*

Two key questions:

1. Are headnotes copyrightable?
2. Was Ross Intelligence's use of headnotes a fair use?

# *Thomson Reuters v. Ross Intelligence*

Two key questions:

1. Are headnotes copyrightable? **Yes.**

2. Was Ross Intelligence's use of headnotes a fair use? **No.**

# Fair Use Holding

1. Ross' use was commercial and not transformative. Both Ross and Thomson Reuters use headnotes to create a legal research tool.
2. Nature of the copyrighted work was not *that* creative.
3. Ross' output contained "little sense of the original." The output does **not** contain the headnotes.
4. Ross' AI tool is a market substitute for Westlaw. The Court also rules that Ross has not adduced enough facts to show that potential market for AI training data does not exist.

# Thank you!

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