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Introduction

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INTRODUCTION

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The Ninth Circuit is often called the "Hollywood Circuit," and sometimes the "Left Coast Circuit," but the moniker "Digital Circuit" or "Tech Circuit" seems more appropriate, particularly for an introduction to this year's *Ninth Circuit Survey*. The Ninth Circuit spans the West Coast from San Diego, a center of wireless technology; up to Silicon Valley, home to giants like Apple, Google, Facebook, and eBay; over to San Francisco's Market Street, where Uber and Twitter are based; through Portland's Silicon Forest and up to Seattle's tech-rich corridor, mission control for Microsoft, Amazon, and many others. Inland, our circuit covers Idaho, where Micron had its roots, and Arizona and Nevada, headquarters for multiple data centers and other digital companies.

As home to many of the world's innovative technology companies, our circuit sees some of the most significant cases on the digital frontier, hearing nearly forty percent of the nation's copyright and trademark cases[1] and scores of other technology cases involving trade secrets, antitrust, unfair competition, software, databases, privacy, and related issues. This year was no exception. One of the cases featured in this survey, *Garcia v. Google*,[2] is part of our long tradition of grappling with the rapidly evolving world of technology that challenges the boundaries of existing law.

Just months after its creation in 1891, the nascent court heard its first technology case—a patent challenge involving gas engines.[3] Many more

* United States Circuit Judge, United States Court of Appeals for the Ninth Circuit. The views expressed in this introduction are my own and do not necessarily reflect the views of my colleagues or of the United States Court of Appeals for the Ninth Circuit. My thanks to my law clerk, Julia Lisztwan (Yale 2011) for her research assistance.

[1] This figure excludes the Federal Circuit, whose statistics are reported separately. United States Courts, *Table B-7—U.S. Courts of Appeals Federal Judicial Caseload Statistics (March 31, 2014)*, http://www.uscourts.gov/statistics/table/b-7/federal-judicial-caseload-statistics/2014/03/31 (last visited Nov. 5. 2015).

[2] 786 F.3d 733 (9th Cir. 2015) (en banc).

[3] *Regan Vapor-Engine Co. v. Pac. Gas-Engine Co.*, 49 F. 68 (9th Cir. 1892). *See* OFFICE OF THE CIRCUIT EXECUTIVE, A HISTORY & GUIDE TO THE UNITED STATES COURTS FOR THE NINTH CIRCUIT, 8-12 (1992), for a brief history of the creation of the Ninth Circuit.

would follow before the Federal Circuit assumed exclusive jurisdiction over patent appeals in 1982.[4]

Another landmark came in 1927, when the Ninth Circuit drew national attention with its decision in *Olmstead v. United States*.[5] *Olmstead* raised a critical question: what are the limits on electronic surveillance with the advent of the telephone? The government, suspecting that Roy Olmstead was smuggling alcohol in violation of Prohibition, decided to wiretap his office phones without a warrant. The court concluded that the Fourth Amendment did not protect the phone conversations: "It is not disputed that evidence obtained by the vision of one who sees through windows or open doors of a dwelling house is admissible. Nor has it been held that evidence obtained by listening at doors or windows is inadmissible. Evidence thus obtained is not believed to be distinguishable from evidence obtained by listening in on telephone wires."[6] The Supreme Court affirmed, notably writing that the Fourth Amendment protects only "the person, the house, his papers, or his effects."[7] But it was Justice Brandeis's dissent that would win the day forty years later. He reasoned that the Founders:

> conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[8]

Thus began the privacy debate, stemming from a Ninth Circuit appeal.

Justice Brandeis was vindicated in 1967 in *Katz v. United States*, another case originating in the Ninth Circuit.[9] The Supreme Court did an about face and held that "once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[10]

Although the technology in *Olmstead* may be pedestrian by today's standards, it was a precursor to the current debate over the intersection of the Fourth Amendment and government surveillance. In cases ranging

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[4] Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended at 28 U.S.C. § 1295).

[5] 19 F.2d 842 (9th Cir. 1927), *aff'd*, 277 U.S. 438 (1928).

[6] *Id.* at 847.

[7] *Olmstead v. United States*, 277 U.S. 438, 464 (1928).

[8] *Id.* at 478.

[9] 389 U.S. 347 (1967).

[10] *Id.* at 353.

from data collection by the National Security Agency under the Terrorist Surveillance Program,[11] to tracking peer-to-peer (P2P) file-sharing,[12] the court has grappled with the constitutionality of warrantless surveillance involving technology unimaginable in 1927.

The pace of innovation since *Olmstead* has been geometric, with the court contemplating a slew of new inventions, including home video recorders,[13] computers,[14] video games,[15] and cell phones.[16] The dawn of the Internet, however, was the real game changer. While its roots extend back to the 1960s, general commercial use of the Internet was not prevalent until the mid-1990s.[17] Soon after, with Internet start ups suddenly surfacing everywhere in the Ninth Circuit, the court quickly faced the challenge of revisiting traditional principles of copyright, trademark, territorial jurisdiction, privacy laws, and other long-established areas of jurisprudence in the face of a changing technology landscape.

The 2001 landmark decision in *A&M Records, Inc. v. Napster, Inc.* was the court's first decision on the new frontier of the Internet world.[18] Addressing music sharing over the Internet, the court held that a P2P file-sharing service could be held liable for contributory and vicarious copyright infringement. This case was just the first of many to consider P2P file-sharing.[19]

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[11] *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902 (9th Cir. 2011) (holding that plaintiffs had standing to proceed with their claims against the NSA for warrantless surveillance).

[12] *United States v. Borowy*, 595 F.3d 1045 (9th Cir. 2010) (holding that defendant lacked a reasonable expectation of privacy for certain files containing child pornography).

[13] *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963 (9th Cir. 1981) (holding, in a case involving Betamax, that making individual copies for purposes of time shifting does not constitute copyright infringement), *rev'd*, 464 U.S. 417 (1984).

[14] *Bridge Corp. of Am. v. Am. Contract Bridge League, Inc.*, 428 F.2d 1365 (9th Cir. 1970) (antitrust case involving "specialized portable digital computer system for scoring duplicate bridge tournaments"); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994) (addressing copyright and "look and feel" arguments related to graphical interface).

[15] *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992) (establishing the rights of video game users to modify copyrighted works for their own use).

[16] *United States v. Duran*, 189 F.3d 1071 (9th Cir. 1999) (upholding the district court's decision not to suppress evidence from wiretap of cellular phone). In earlier years, a "mobile phone" meant a phone with an extra-long extension cord. *See Shafer v. Mountain States Tel. & Tel. Co.*, 335 F.2d 932, 936 n.2 (9th Cir. 1964).

[17] New Media Inst., *History of the Internet*, *http://www.newmedia.org/history-of-the-internet.html?page=4* (last visited Nov.4, 2015). *See also Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 850 (1997) (providing a brief history of the Internet).

[18] 239 F.3d 1004 (9th Cir. 2001). The Ninth Circuit's earliest reference to the Internet was four years earlier in *United States v. Fanning*, No. 96-35610, 1997 WL 162110, at *1 (9th Cir. Apr. 7, 1997) (challenging a condition of supervised release restricting access to a modem and the Internet).

[19] *See, e.g.*, *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013) (holding a music BitTorrent indexer liable for contributory copyright infringement by providing the platform and encouraging users to infringe protected works).

Music sharing was not the only new frontier in the new Internet age: computing, the web and the cloud have presented significant jurisdictional, cultural, and international law wrinkles. These challenges were put in sharp relief by *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*.[20] While Yahoo! defended the sale of Nazi memorabilia on its auction site, La Ligue countered that such sales violated French law, which prohibited the sale of items that incite racism, such as Nazi artifacts. In litigation spanning from Paris to San Jose, both U.S. and French courts wrestled with issues relating to jurisdiction and free speech.[21]

As computers became ubiquitous in everyday life, technology and privacy once again came head to head. In 2013, in *United States v. Cotterman*,[22] the court confronted whether border officers were justified in seizing and conducting a forensic examination of the laptops and other devices of a U.S. citizen who was flagged for a prior sex crime conviction. The court observed that "'[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.'"[23] In reality, "[l]aptop computers, iPads and the like are simultaneously offices and personal diaries. They contain the most intimate details of our lives: financial records, confidential business documents, medical records and private emails. This type of material implicates the Fourth Amendment's specific guarantee of the people's right to be secure in their 'papers.'"[24] Accordingly, the court concluded that forensic examinations of laptops require reasonable suspicion, and that "[a] person's digital life ought not be hijacked simply by crossing a border."[25]

Which brings us to 2015. Taking a snapshot of the last year, the court continues to confront difficult questions at the intersection of law and technology. We addressed the inherent tension between copyright law and the First Amendment in *Garcia v. Google*.[26] Facing death threats stemming from the online distribution of an anti-Islamic movie trailer in which she played a five-second cameo role, Ms. Garcia sought to use copyright law to force Google to take down the trailer. Although she was unsuccessful because her claim did not fit within the rubric of

[20] 433 F.3d 1199 (9th Cir. 2006) (en banc).

[21] *Id.*; *La Ligue Contre Le Racisme et L'Antisemitisme v. Yahoo! Inc.*, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, May 22, 2000, No. 00/05308 (Fr.).

[22] 709 F.3d 952, 964 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 899 (2014) (quoting *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001)).

[23] *Id*. at 965.

[24] *Id.* (quoting U.S. Const. amend. IV).

[25] *Id.* at 965, 970.

[26] 786 F.3d 733 (9th Cir. 2015) (en banc).

copyright, her approach was by no means unique. There is a broader trend of copyright becoming a go-to tool to remedy privacy and other harms, now heightened in an age of social media, viral videos, and online bullying.[27]

Other cases in 2015 address similarly interesting issues of the digital age. For example, the circuit reviewed the antitrust consequences of parceling out new top-level domain names;[28] the antitrust implications of a foreign-based price-fixing conspiracy for LCD panels;[29] trademark infringement in the context of online shopping;[30] application of the hearsay rule to Google maps imagery;[31] copyright and trademark claims involving video games;[32] application of the Video Privacy Protection Act to online streaming;[33] and obstruction of justice stemming from the deletion of an email.[34]

These cases highlight a consistent theme: as *Cotterman* put it, "[t]he point is technology matters."[35] Whether our approach is incremental or bold, with each new development, our inquiry looks first to the existing law and the principles that motivate it, and we then ask whether it applies to the new technology. Inevitably we adapt jurisprudence and metaphors that no longer make sense.[36] Today's reality makes it difficult to accept whole hog what an inventor told a trial court back in 1934: "[t]here is nothing new under the sun; every invention consists of old parts and new combinations."[37] The truth is that some things *are* new, which keeps things interesting.

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[27] *See, e.g.*, *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325 (M.D. Fla. 2012).

[28] *Name.Space, Inc. v. ICANN*, 795 F.3d 1124 (9th Cir. 2015).

[29] *United States v. Hui Hsiung*, 778 F.3d 738 (9th Cir.), *cert. denied*, 135 S. Ct. 2837 (2015) (affirming a criminal conviction for conspiracy to fix the price of LCD panels).

[30] *Multi Time Mach., Inc. v. Amazon.com, Inc.*, No. 13-55575, 2015 WL 6161600 (9th Cir. Oct. 21, 2015).

[31] *United States v. Lizarraga-Tirado*, 789 F.3d 1107 (9th Cir. 2015).

[32] *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172 (9th Cir. 2015); *Bizar v. Dee*, No. 12-17826, 2015 WL 4480702 (9th Cir. July 23, 2015).

[33] Video Privacy Protection Act, 18 U.S.C. § 2710 (2014); *Mollett v. Netflix, Inc.*, 795 F.3d 1062 (9th Cir. 2015).

[34] *United States v. Katakis*, 800 F.3d 1017 (9th Cir. 2015).

[35] 709 F.3d at 965.

[36] The court takes seriously its commitment to technology, even in its own operations. Except for a brief hiatus, media have been permitted to bring cameras into Ninth Circuit courtrooms since 1991. In an effort to heighten transparency and public access to proceedings, in 2007 the court pioneered posting audio recordings of oral arguments on its website. Starting in 2012, the court started live-streaming of audio and gradually expanded coverage until access was available in all courtrooms by 2014. The court was the first federal court of appeals to provide live video streaming of oral arguments and both en banc and three-judge panel arguments are now available through this medium. United States Courts for the Ninth Circuit, Internet Viewing of En Banc Proceedings, http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000712 (last visited Nov. 3, 2015).

[37] *Magnavox Co. v. Hart & Reno*, 73 F.2d 433, 440 (9th Cir. 1934).