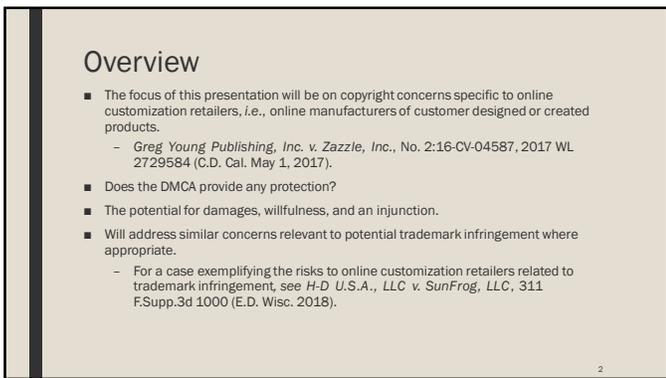
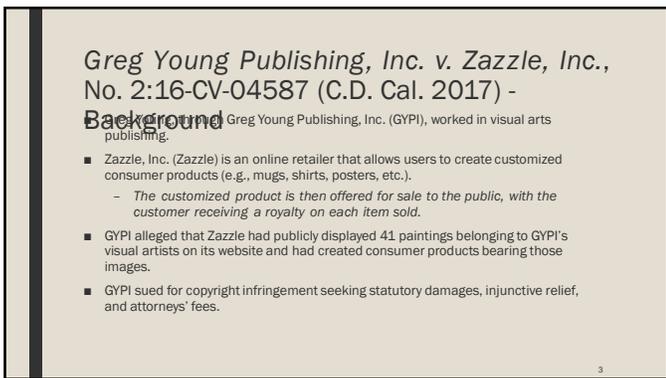


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GYPI's Motion for Partial Summary Judgement

- The crux of GYPI's Motion for Partial Summary Judgement was on the Safe Harbor provision of the Digital Millennium Copyright Act (DMCA), Section 512(c), which provides:
 - A **service provider** shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the **service provider**, if the **service provider**-
 - (A)
 - Does not have **actual knowledge** that the material or an activity using the material on the system or network is infringing;
 - In the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
 - Upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to the material;
 - (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has **the right and ability to control such activity**; and
 - (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

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GYPI's Motion for Partial Summary Judgement

- Three aspects of the Safe Harbor provision were at issue:
 - Was Zazzle a "service provider" able to rely on the Safe Harbor provision?
 - Yes.
 - "Service Provider" means "a provider of online services or network access, or the operator[s] of facilities therefor."
 - Court noted that the definition is so broad that "it is difficult to imagine any online service that the definition would not encompass."
 - No.
 - GYPI argued that it had informed Zazzle that its photos were being uploaded and given Zazzle a catalogue of its images as a reference to check for future infringements.
 - Court noted "[e]ven if that is true, it does not render Zazzle ineligible for the protection of § 512(c)'s safe harbor. GYPI offers no evidence that Zazzle had 'specific knowledge of particular infringing activity' and nonetheless failed to take corrective action[.]"
 - Did Zazzle have "actual knowledge" of the infringement, which would preclude Zazzle from relying on the Safe Harbor provision?
 - Yes.

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GYPI's Motion for Partial Summary Judgement – Zazzle's Financial Benefit and Ability to Control

- Zazzle did not dispute it received a financial benefit directly attributable to the infringing activity when it sold physical products bearing GYPI's images. Question turned to control:
 - Zazzle argued "it lacked the ability to control the sale of infringing products because, in practice, 'the production process was effectively automatic ... after a product was ordered and approved by Zazzle's [content management team].'"
 - Court disagreed, "It doesn't matter if Zazzle lacked the ability to control its production process after [content management team] approved the product; presumably [content management team] had the authority to reject products that were infringing. More to the point, even if the entire process was automatic, that would suggest at most that Zazzle had chosen not to exercise its right and ability to reject infringing products, not that it lacked the right or ability to do so."

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GYPI's Motion for Partial Summary Judgement – Zazzle's Financial Benefit and Ability to Control

- However, the Court's decision related only to those images that were actually printed onto physical products:
 - "This ruling does not preclude Zazzle from invoking § 512(c) with respect to images that were displayed on its website but never printed onto physical products. It is not clear that Zazzle received a financial benefit from merely displaying images on its website, or that Zazzle had the right or ability to control the types of images its users uploaded."
 - GYPI dropped its copyright infringement claims as to the images never manufactured before trial, so this issue was never resolved.

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So what happened next?

- The case proceeded to trial.
- Jury held that Zazzle had infringed 35* works and awarded GYPI \$460,000 in statutory damages.
 - The statutory awards varied greatly from work to work, with the jury's award ranging from \$200 to \$66,800 per work.
 - Five of the damages award exceeded \$30,000, which is only allowable in cases of willful infringement.
 - On October 27, 2017, after post-trial motions, the district court reversed those awards, agreeing with Zazzle that GYPI had failed to prove willfulness, and reduced each of five damages awards that exceeded \$30,000 to that cap (more on this later).
- On October 27, 2017 Court then issued a permanent injunction against Zazzle, but ultimately reconsidered and vacated that injunction (more on this later as well).

*GYPI was found to lack standing with respect to 6 of the alleged works originally brought.

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What Happened with the Permanent Injunction?

- The Court initially granted the permanent injunction on October 27, 2017, enjoining Zazzle "from infringing any of the exclusive rights in 17 U.S.C. § 106 with respect to Plaintiff's copyright works identified on the joint trial exhibit list ([Exhibit A](#) hereto)."
- The stated grounds for entry of the injunction was "[t]he court has considered Plaintiff's motion for equitable relief and Defendant's opposition thereto. For good cause appearing, it is therefore ORDERED, ADJUDGED, and DECREED that: ..."
- Following a motion for reconsideration, the Court Vacated the injunction. Finding specifically that:
 - The stated grounds (above) were insufficient;
 - No evidence of irreparable harm existed;
 - No Lack of an Adequate Remedy at Law (e.g., damages);
 - Overbroad Scope (extended to hosting, but not manufacturing, the copyrighted works).

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Why no willfulness?

- In reversing the jury's finding, the district court said no willfulness:
 - The Court identified the following factors in concluding that no reasonable jury could have found that Zazzle willfully infringed:
 - (1) Zazzle adopted a policy against copyright infringement,
 - (2) Zazzle required its users to contractually warrant that each design's use was authorized,
 - (3) Zazzle employed a large team to help enforce its policy,
 - (4) Zazzle responded to every one of Plaintiff's takedown requests, and
 - (5) Zazzle made an effort to try to locate and remove additional infringements from Plaintiff's catalogue.

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9th Circuit Reverses the district court's Willfulness Determination

- But on November 20, 2019, the 9th Circuit reversed that finding:
 - "Recklessness can constitute willful infringement, and can be established by an infringer's knowing reliance on obviously insufficient oversight mechanisms."
 - "Zazzle never deviated from, or improved, its oversight system throughout the two-year period at issue, despite repeated notice of that policy's ineffectiveness."
 - "Zazzle 'knew it needed to take special care with respect to [Young's] images' . . . But never gave its content-management team a catalogue of those images provided by Young."
 - "Even after Young provided the catalogue, Zazzle continued to sell products bearing each of the works for which the jury found willful infringement."
 - "Zazzle also relied on a user-certification process it knew produced false certifications and took no action to remove a user who had marketed more than 2,000 infringing products."

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The Saga Continues - GYPI Recently Moved Again for a Permanent Injunction

- In its decision, the 9th Circuit authorized Plaintiff to "seek (1) to reinstate the permanent injunction, (2) make a renewed motion for attorneys fees."
- On January 10, 2020, Plaintiff did just that, arguing:
 - After the Court vacated its permanent injunction, relevant intervening events occurred during the appeal. Zazzle was caught infringing four of plaintiff's works, and the Ninth Circuit ruled the jury's willfulness findings were supported by substantial evidence."
- For its part, Zazzle reiterated many of the arguments that successfully led the court to vacate the first permanent injunction—still no irreparable harm, still no evidence if inadequate remedies at law, and still overbroad.
- Briefing on Plaintiff's motion concluded on February 10, 2020 and on February 24, 2020 the Court issued an order noting:
 - Hearing held. The motion is submitted. Order to issue.

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