Copyright Litigation: A Year in Review

2017 BYU COPYRIGHT SYMPOSIUM

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1 Copyrightability

STAR ATHLETICA, LLC V. VARSITY BRANDS, INC. (U.S.)

The design of a "**useful article**" is copyrightable "only if, and to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be **identified separately from**, and are **capable of existing independently of**, the utilitarian aspects of the article."
(17 U.S.C. § 101)

STAR ATHLETICA, LLC V. VARSITY BRANDS, INC. (U.S.)

Design 299A
Registration No. VA 1-319-228

Design 074
Registration No. VA 1-411-535

"A feature incorporated into the design of a useful article is eligible for copyright protection only if the feature:
(1) can be perceived as a two- or three-dimensional work of art separate from the useful article; and
(2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated."

NARUTO V. SLATER (N.D. CAL.)

"No indication" that the Copyright Act extends to animals

PETA appealed to Ninth Circuit; settled

Photographer said he could not afford the trip to the appeal; "I'm even thinking about doing dog walking"

The Office will not register works produced by nature, animals, or plants. Likewise, the Office cannot register a work purportedly created by divine or supernatural beings, although the Office may register a work where the application or the deposit copy(ies) state that the work was inspired by a divine spirit.

Examples:

- A photograph taken by a monkey.
- A mural painted by an elephant.
- A claim based on the appearance of actual animal skin.
- A claim based on driftwood that has been shaped and smoothed by the ocean.
- A claim based on cut marks, defects, and other qualities found in natural stone.
- An application for a song naming the Holy Spirit as the author of the work.

'Monkey Selfie' Lawsuit Ends With Settlement Between PETA, Photographer

September 12, 2017 · 1:46 PM ET

JASON SLOTKIN

Naruto, a macaque, took this self-portrait in 2011 with a camera owned by photographer David Slater. The photo has b
the subject of a years-long copyright battle.

David Slater via Wikimedia Commons

Back in 2011, Naruto was just an anonymous macaque in the jungles of Indonesia. On

KASEBERG V. CONACO (S.D. CAL.)

"Tom Brady said he wants to give his MVP truck to the man who won the game for the Patriots. So enjoy that truck, Pete Carroll"

v.

"Tom Brady said he wants to give the truck that he was given as Super Bowl MVP … to the guy who won the Super Bowl for the Patriots. Which is very nice. I think that's nice. I do. Yes. So Brady's giving his truck to Seahawks coach Pete Carroll," O'Brien said during his show."

United States Copyright Office

July 17, 2017

Jayson M. Lorenzo, Esq.
2794 Gateway Road, Suite 116
Carlsbad, CA 92009

Re: **Second Request for Reconsideration for Refusal to Register A LITTLE BIT BAD, Blog Content, Brady Joke February 3, 2015; Correspondence ID: 1-25KMZ9Z; SR #: 1-2752094070**

Dear Mr. Lorenzo:

The Review Board of the United States Copyright Office ("Board") has considered Robert Alexander Kaseberg's second request for reconsideration of the Registration Program's refusal to register a text claim in the work titled "A LITTLE BIT BAD, Blog Content, Brady Joke February 3, 2015" ("Work"). The Work consists of the following two-sentence textual work, containing twenty seven words, posted on Mr. Kaseberg's blog on February 3, 2015:

> Tom Brady said he wants to give his MVP truck to the man who won the game for the Patriots. So enjoy that truck, Pete Carroll."

After reviewing the application, deposit copy, and relevant correspondence in the second request for reconsideration, the Board finds that the Work does not contain sufficient authorship to support a claim in text, and thus may be registered.

Hollywood Reporter

MOVIES TV BUSINESS STYLE POLITICS TECH CULTURE AWARDS VIDEO SITES

Entertainment Banking
City National is the bank built on client referrals.
CITY NATIONAL BANK
AN RBC COMPANY

SEPTEMBER 18, 2017

Conan O'Brien to Probe Whether Copyright Office Was Duped by Tom Brady Joke

Busan City Is Almost 68 & Is Unrecognizable Today

FLO & EDDIE LAWSUITS (C.D. CAL.) (FLA.) (2D CIR.)

Does common law recognize an exclusive right of public performance for pre-72 sound recordings?

Florida

No

"Florida law has never previously recognized an exclusive right of public performance for sound recordings"
(Oct. 26, 2017)

New York

No

"[T]he consequences of [recognizing the right] could be extensive and far-reaching . . . [is] unprecedented, would upset settled expectations, and would have significant economic consequences."
(Dec. 20, 2016)

California

Yes . . . so far

District court – California statute protects sound recordings fixed before February 15, 1972 against unauthorized public performance (Sept. 22, 2014)
Question certified to California Supreme Court
(Mar. 15, 2017)

2 Fair Use

GRAHAM v. PRINCE (S.D.N.Y 2017)

"[A]n **essentially unaltered reproduction** … and both works are two-dimensional artworks made available in virtually identical sizes."

Prince reproduced entire photo "in a size that enables the original to **retain its full aesthetic appeal**."

REINER V. NISHIMORI (M.D. TENN.)

Non-profit, educational use

No market harm was established as Reiner did not prove "that widespread use of photographs …would **adversely affect any potential market** for his work."

As to DMCA § 1202, Nishimori did not know or have reasonable grounds to know that removing Reiner's information would "**induce, enable, facilitate, or conceal an infringement of the federal copyright laws**"

PARAMOUNT V. AXANAR (C.D. CAL.)

"[G]oing where no man has gone before in producing Star Trek fan films, Defendants sought to make 'a professional production' 'with a fully professional crew, many of whom have worked on Star Trek itself'

Did "not have 'a further purpose or different character, altering the [Star Trek works] with new expression, meaning, or message'"

Source: Amended Complaint, *Paramount v. Axanar* (C.D. Cal. Case No: Case No. 2:15-cv-09938-RGK-E)

DR. SEUSS ENTERPRISES V. COMICMIX (S.D. CAL.)

District judge stated "**[t]his case presents an important question regarding the emerging 'mash-up' culture where artists combine two independent works in a new and unique way**."

"Applying the fair use factors in the manner Plaintiff outlines would **almost always preclude a finding of fair use** under these circumstances. However, if fair use was not viable in a case such as this**, an entire body of highly creative work would be effectively foreclosed**."

HOSSEINZADEH V. KLEIN (S.D.N.Y.)

Court found that the defendant's video was "**quintessential criticism** and **comment**"

Source: Ethan Klein

PENGUIN RANDOM HOUSE V. COLTING (S.D.N.Y.)

Defendants did not "**meaningfully recast the work.**"

Plaintiffs' works "**are precisely the sorts of creative works that receive special solicitude in a fair use analysis.**"

"Fair use, however, is not a jacket to be worn over an otherwise infringing outfit. One cannot add a bit of commentary to convert an unauthorized derivative work into a protectable publication"

BARRÉ V. CARTER (E.D. LOU.)

Beyoncé's use was:

- **Not transformative**
- **Commercial**
- **Qualitatively significant**
- Plaintiffs also asserted there was a vibrant **sampling licensing market** on YouTube

The court could not find that the Defendants' use was fair as a matter of law

Court found use of a 35 second sample was fair use

"This is precisely the type of use that **'adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning or message'"**

PETESKI PRODUCTIONS V. ROTHMAN (E.D. TEX.)

Bad faith behavior of defendant *plus* use was *solely* for the benefit of Rothman, not commentary, criticism, or public benefit

Work is "strictly confidential, unpublished" and "possesses a mixed nature of fact and creativity"

FAIR USE INDEX

197 cases summarized in a **filterable index**

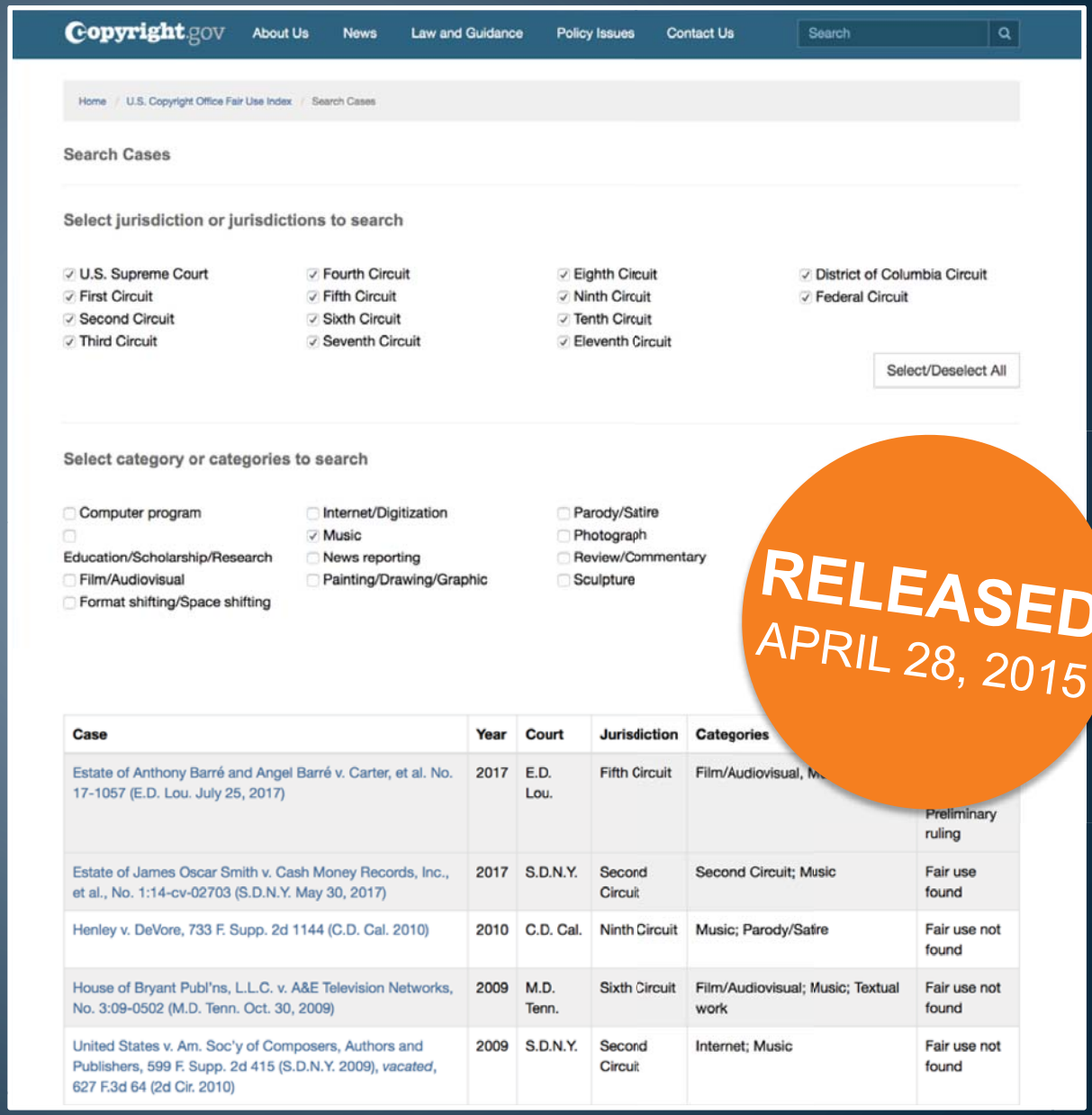
Continuous updating

A "**valuable resource for artists and academics hoping to get a better grasp of how the fair use doctrine has been applied**"

GRAPHIC ARTISTS GUILD

A "**fascinating new tool**"

DUKE UNIVERSITY LIBRARIES



3 Potpourri

DISNEY ENTERPRISES V. VIDANGEL (9TH CIR.)

VidAngel's Defenses

- **Family Movie Act (FMA) provides exemption**
- **Fair use**
- **No violation of DMCA for circumventing the access controls on the physical discs**

Court's Response

- **FMA only protects edits made to authorized copies**
- **Not fair use**
  - **Commercial, not transformative**
  - **Clear market harm**
- **Circumvention must be authorized**

FOX V. AEREOKILLER (9TH CIR.)

Ninth Circuit holds that a service that "**captures copyrighted works broadcast over the air, and then retransmits them . . . over the internet without the consent of copyright holders**" is not a cable system eligible for a compulsory license.

Court deferred to USCO's interpretation. Since 1992, the Office has taken the position that to qualify as a "cable system," a retransmission service must use a **localized retransmission medium**.

SPANSKI ENTERPRISES, INC. V. TELEWIZJA POLSKA S.A., (D.C. CIR.)

Appeal from D.D.C. bench trial finding that TVP had willfully infringed SEI's public performance right by streaming 51 episodes from servers located in Poland to recipients in the United States.

In an amicus filing, the United States urged the Court to hold that "**a copyright owner's exclusive right to control the public performance of [a] work in the United States is infringed…when the transmission comprising the unauthorized performance originates overseas…**"

GREAT MINDS V. FEDEX (E.D.N.Y.)

Great Minds argued that FedEx had **exceeded the scope of the CC license** by copying for a commercial benefit

The district court disagreed and found that FedEx was **merely assisting** the school district in **exercising their rights under the CC license**

Source: FedEx

BMG V. COX (E.D. VA.)

BMG alleged that Cox failed to properly enforce repeat infringer policy

Court found Cox liable for contributory infringement

- **Not eligible for safe harbors**
- **First instance of transitory, rather than hosting, ISP liability**

MAVRIX PHOTOGRAPHS, LLC V. LIVEJOURNAL, INC. (9TH CIR.)

Team of 15 moderators, led by one full-time LiveJournal employee, reviewed material before it was posted for substance, including copyright infringement

The court disagreed with the district court and concluded that the **common law of agency does apply to this analysis** and that there were genuine factual disputes regarding whether the moderators were LiveJournal's agents

4 On the Horizon

Perfect 10 v. Giganews
(up for Cert from 9th Cir.)

Fourth Estate Public Benefit v. Wall-street.com
(up for Cert from 11th Cir.)

Antonick v. Electronic Arts
(up for Cert from 9th Cir.)

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