

# LUZKER & LUZKER — LLP —

## Lutzker & Lutzker Newsletter December 2021

To our clients, colleagues and friends:

First and foremost, we wish our clients, colleagues, family and friends a good holiday season and a 2022 that we all hope will bring us back to something like normal. Through this periodic newsletter we continue to explore the many new developments in the realm of IP, privacy law, cybersecurity and artificial intelligence.

We [surveyed](#) significant copyright, trademark and privacy cases on the dockets of U.S. federal courts this past fall. There was only one Supreme Court case of note - *Unicolors, Inc. v. H&M Hennes & Mauritz, LP* – [a case we previously reported on](#). The case was argued on November 8, 2021, and the Justices were critical of Unicolors due to the company's inconsistent arguments in its brief and petition for certiorari, so it is unclear whether they will actually rule on the substantive issues in the case. *Unicolors* involves Section 411 of the Copyright Act, which prevents the filing of an infringement action without a valid copyright and was to have resolved a circuit split as to whether knowledge or intent is required to invalidate a copyright registration. In any event, the questions at issue demonstrate the need for precision in filing copyright and trademark applications.

We took a [deeper dive into sovereign immunity](#) – at issue in the *Canada Hockey* case described in our fall survey – to understand the legal analysis that has generally protected states and to analyze the circumstances under which state actors may still be held subject to suit for copyright infringement. Last year we [reported on the Supreme Court's decision in \*Allen et al. v. Cooper, Governor of North Carolina\*](#), in which the Court held that Congress's attempt to abrogate sovereign immunity for copyright suits was unconstitutional.

Although the Fifth Circuit Court of Appeals relied on *Allen* to bar a copyright suit against Texas A&M University, there still may be ways to hold state actors accountable.

We also looked at [Apple's rollout of its iOS 14.5 and iOS 15.2 software](#). These new versions contain substantial privacy features that empower consumers to have better control over who can track their information but impact app developers and any businesses that collect user information in potentially negative ways. In the wake of these changes, such companies should review their website practices and privacy policies to ensure compliance with the new regulations.

We continued our interest in music copyright issues with an [insight about the American Music Fairness Act](#), which would provide streams of revenue to artists whose songs are played on terrestrial radio stations, which are currently exempt from paying royalties. Unlike artists who live-streamed their works on services like Instagram Live, they did not have an opportunity to recoup lost concert revenue during the pandemic.

We have [previously written](#) about the decision of the U.S. Court of Appeals for the Second Circuit in *The Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* to the effect that Warhol's use of photographer Lynn Goldsmith's image was not a transformative fair use. The Court [upheld its decision after rehearing](#) in the wake of the Supreme Court's decision in *Google v. Oracle*. The Warhol Foundation has now asked the Supreme Court to review the case. We will continue to

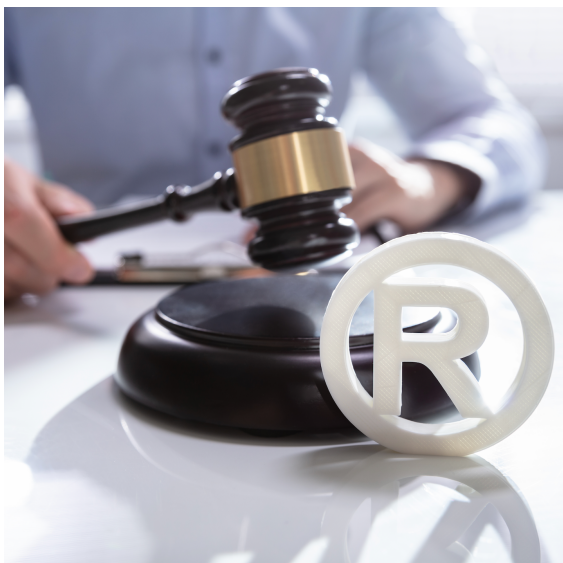
provide updates about this case, which has important implications for the fair use doctrine.

We [have been following](#) the implementation of the Copyright Alternative in Small-Claims Enforcement (CASE) Act, which established the Copyright Claims Board as an alternative and less expensive forum to resolve copyright disputes. The CCB was to begin operations by December 27, 2021, one year after enactment of the CASE Act. However, the Register of Copyrights has elected to extend the date for 180 days, as permitted in the law. The Register has reported that substantial progress has been made towards implementation, but the additional time will, among other things, allow the public to comment on proposed regulations.

Please enjoy the holiday season and continue to stay safe. And, of course, don't hesitate to reach out to us at [info@lutzker.com](mailto:info@lutzker.com) with any questions.

# Insights from the Firm

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## Fall 2021 Survey of Copyright, Trademark and Privacy Cases of Note Across the Federal Courts

*Unicolors Inc. v. H&M Hennes & Mauritz LP*, 2021 U.S. Dist. LEXIS 160223 (Aug. 20, 2021), the only trademark, copyright or privacy case before the Supreme Court this term, was heard on November 8, 2021. Looking forward, there are several cases before the lower courts that are worth noting, including a trademark case before

the Second Circuit, a BIPA case in the Northern District of Illinois and copyright cases in the Northern District of California and the Fifth and Ninth Circuits.

[Read Here >>](#)

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## Are States Totally Immune from Copyright Infringement Suits?

The Supreme Court's 2020 decision in *Allen v. Cooper, Governor of North Carolina* appeared to be the death knell for copyright owners seeking redress in federal court for infringements by state entities. In the wake of *Allen*, Congress asked the Copyright Office to examine the extent of state copyright infringement. The Report comes to some interesting conclusions, which suggest that legislative reform may be in order. Even without legislative reform, copyright holders may have some remedies against infringing state actors.

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## Apple's Rollouts of iOS 14.5 and iOS 15 Impact Marketers, App Developers and Small Businesses

Apple's iOS 14.5 and iOS 15.2 contain substantial privacy features that empower



consumers to have better control over who can track their information. While the benefits to consumers are undeniable, the changes impact app developers and any businesses that collect user information in potentially negative ways. In the wake of these changes, such companies should review their website practices and privacy policies to ensure compliance with the new regulations.

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## American Music Fairness Act: Implications for Musicians and Radio Stations

The American Music Fairness Act, introduced in June 2021, would provide streams of revenue to artists whose songs are played on terrestrial radio stations, which are currently exempt from paying royalties.

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## New From Lutzker & Lutzker LLP: FAQs

Don't forget to check out the new FAQ feature on our website, focusing on [Privacy Law](#), [Technology and the K-12 Classroom](#), [Copyright Law](#), [Trademark Law](#), [NFTs](#) and [Patent FAQs](#).

# Connect with us online



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## LUTZKER & LUTZKER — LLP —

Arnold Lutzker and Susan Lutzker founded Lutzker & Lutzker LLP in 1998 to provide high-quality, cost-effective legal services to businesses, creative professionals and their lawyers in the creation, strategic exploitation and defense of intellectual property assets.

Drawing on their experiences in law, business and the arts, our firm's lawyers have stayed on the leading edge of digital-era issues, including online content, social media, mobile applications, cybersecurity and data privacy requirements. We advise corporate counsel on challenging intellectual property matters and also help more than 300 clients protect and manage their traditional copyright and trademark portfolios.

Questions: please email us at [info@lutzker.com](mailto:info@lutzker.com)



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