

# LUZKER & LUZKER — LLP —

## Lutzker & Lutzker Newsletter December 2022

To our clients, colleagues and friends:

As 2022 draws to a close, we are reminded what an active year it has been for IP, privacy law, cybersecurity and artificial intelligence. Through this periodic newsletter, we continue to keep you informed of the most relevant and exciting developments.

First, some updates to topics we have reported on previously:

- Until now London's Victoria & Albert Museum has been a notable holdout amidst the large-scale removal of the Sackler family name from museums in response to the family's ownership of Purdue Pharma, the maker of OxyContin, and the company's role in fueling the U.S. opioid epidemic. The V&A has now followed other major museums on both sides of the Atlantic and [removed the Sackler name](#) from its entrance courtyard.
- President Biden has issued an Executive Order designed to pave the way for implementation of a [new safe harbor mechanism for GDPR-compliant data transfer to the U.S.](#) The Executive Order limits and defines the situations in which personal data can be collected and establishes a new court within the Department of Justice to hear challenges. Specific guidance is forthcoming that will allow us to advise clients as to how to modify their privacy policies.
- As we await the Supreme Court's decision in the [important fair use case involving the Andy Warhol Foundation](#), we looked at the issue of how that decision may affect the broader art world. A question that was touched upon in the briefs of the parties and amici and in the argument involves the impact of a decision against the Warhol Foundation on the activities of museums.

In anticipation of the October holiday traditionally called Columbus Day, we posted an [insight on the increasing observance of the day as Indigenous Peoples' Day](#) in recognition of the history of wrongs inflicted on our native population by European explorers. The renaming of the day coincides with an increasing recognition of the damage caused by the derogatory use of Native American names and attempts to rectify that damage.

Also in the realm of the arts, we looked at the unsettled copyright status of [art generated by artificial intelligence](#). The Copyright Office has consistently taken the position that human authorship is a prerequisite to copyright registration in the U.S. A recent registration by the Copyright Office suggests that if a human is named as an author, works with AI-generated elements may be registered. Social media sites, buffeted with calls by artists to remove AI-generated content that they believe is unfairly jeopardizing their own sales, have been inconsistent in their responses to the problem.

As the holiday season approaches, we explored the [privacy issues involved in direct-to-consumer DNA testing kits](#), a popular gift item. As we explain, the direct-to-consumer genealogy industry is

largely self-regulated and, as such, the privacy practices employed by these companies are often inadequate to protect personal information.

Finally, we have published an [insight on “Russian Doll” copyright infringement](#), which occurs when a copyrighted work “nestles” inside another copyrighted work, in the same way that Russian dolls nestle inside one another. Photographers should be wary about copyrighted works which may inadvertently appear within their photographs, such as sculptures or murals. Conversely, if an artist’s work appears in another copyrighted work without permission or a license, that artist may have recourse even for an unintentional infringement.

In firm news, in November Arnie and Susan Lutzker hosted about 60 members and guests of [INBLF](#) firms in Seaside, Florida, the first post-pandemic all-network gathering of the International Network of Boutique and Independent Law Firms. The 2022 Reunion/Retreat was attended by representatives of member firms from Australia, India, Dubai, Bolivia, the UK, the Netherlands, the Czech Republic and Canada. [Jeannette Carmadella](#), [Ben Sternberg](#) and [Carolyn Martin](#), in addition to Susan and Arnie, attended from Lutzker & Lutzker. Other U.S. members came from San Francisco, New York, Miami, Atlanta, Chicago, St. Louis, DC, Delaware, Pennsylvania, San Diego and San Jose. Business sessions focused on public benefit corporations and post-Covid issues for the courtroom and the office. Jeannette participated in a panel on retaining and attracting junior lawyers to boutique law firms. INBLF’s [Task Force on Cybersecurity, Ransomware and Privacy](#) discussed ways in which the network can help both member firms and clients protect their data against attack.

Also in November, Carolyn Martin gave a presentation on “Protecting Designs in the Virtual World” at the 2022 Design Rights Boot Camp, a virtual, five-day program hosted by the [American Intellectual Property Law Association \(AIPLA\)](#). Carolyn’s presentation focused on what brand owners should consider before entering the metaverse, licensing opportunities in the metaverse, the registration of virtual goods and the current body of case law. In addition, Carolyn was quoted in [Bloomberg Law](#) in the aftermath of BNSF Railway Co.’s loss in the first jury verdict in a biometric privacy class action.

Please don’t hesitate to reach out to us at [info@lutzker.com](mailto:info@lutzker.com) for more information on these developments or advice on your IP questions. And please have a safe, healthy and enjoyable holiday season!

# Insights from the Firm

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## Museums and Questions of Donor Morality: The Sackler Case: Addendum

By [Susan Lutzker](#)

Until now London's Victoria & Albert Museum has been a notable holdout amidst the large-scale removal of the Sackler family name from museums on both sides of the Atlantic due to the family's ownership of Purdue Pharma, the maker of OxyContin, blamed for fueling the U.S. opioid epidemic. The V&A has now followed other major museums and removed the Sackler name from its entrance courtyard.

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## EU Court Decision Invalidating Privacy Shield Results in Massive Confusion for U.S. Businesses: Second Addendum

By [Susan Lutzker](#)

The March 2022 announcement of a U.S.-EU agreement in principle on a Privacy Shield 2.0 has raised hopes that a new safe harbor mechanism for GDPR-compliant data transfer to the U.S. will eliminate the chaos that has existed since the prior Privacy Shield was invalidated by the Court of Justice of the European Union in 2020. But few details are available, and some are skeptical that Privacy Shield 2.0 will stand up to scrutiny and additional court challenges.

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## Andy Warhol and Photographers Take Their Case to the Supreme Court: Third Addendum

By [Susan Lutzker](#)

On October 12, 2022 the Supreme Court heard oral arguments in the Andy Warhol Foundation case. The decision as to whether Andy Warhol's prints "transformed" an image by photographer Lynn Goldsmith has implications for the broader art world. A question that was touched upon in the briefs of the parties and amici and in the argument involves the impact of a decision against the Warhol Foundation on the activities of museums.

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## Columbus Day or Indigenous Peoples' Day?

By [Susan Lutzker](#)

Since 1937 Columbus Day has been a federal holiday. But increasingly the day is being observed as Indigenous Peoples' Day, in recognition of the history of wrongs inflicted on our native population by European explorers. The renaming of the day coincides with an increasing recognition of the damage caused by the derogatory use of Native American names and attempts to rectify that damage.



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## Copyright in AI-Generated Artwork

By [Susan Lutzker](#)

The copyright status of art generated by artificial intelligence is in turmoil. The Copyright Office has consistently taken the position that human authorship is a prerequisite to copyright registration in the U.S. A recent registration by the Copyright Office suggests that if a human is named as an author, works with AI-generated elements may be registered. Social media sites, buffeted with calls by artists to remove AI-generated content that they believe is unfairly jeopardizing their own sales, are taking inconsistent approaches to the problem.

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## Check Your List Twice Before Gifting a DNA Testing Kit This Holiday Season

By [Carolyn Wimbley Martin](#) and Punita Patel

Health and genetic information collected by health care professionals is protected from sale and release to third parties by both federal and state statutes. Many consumers utilize direct-to-consumer DNA testing kits with the same confidence that their genetic information and personally identifying information is protected from misuse by federal data privacy statutes, but this is a misconception. The direct-to-consumer genealogy industry is largely self-regulated and, as such, the privacy practices employed by these companies are often inadequate to protect personal information. Not only is consumer information regularly shared with third parties, but also the method used to “de-identify” your data before sharing it with third parties is not sufficient to keep you from being re-identified.

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## Copyright and Photography: Russian Doll Copyright Infringement

By [Carolyn Wimbley Martin](#) and Charlotte Cuccia

Russian doll copyright infringement occurs when a copyrighted work “nestles” inside another copyrighted work, in the same way that Russian dolls nestle inside one another. Photographers should be wary about copyrighted works which may inadvertently appear within their photographs, such as sculptures or murals. Conversely, if an artist’s work appears in another

copyrighted work without permission or a license, that artist may have recourse even for an unintentional infringement.

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## 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](#), [Patent FAQs](#), and the [TEACH Act](#).

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# Connect with us online





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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