

LUTZKER & LUTZKER — LLP —

Lutzker & Lutzker Newsletter May 2023

To our clients, colleagues and friends:

Spring is finally here, and a dizzying pace of developments in IP, privacy law, cybersecurity and especially artificial intelligence continues. One would need to be living under a rock to avoid hearing about Chat GPT on a daily basis. Through this periodic newsletter, we continue to keep you informed of these relevant and exciting developments.

We have taken our own dive into Chat GPT with an [insight addressing basic questions about the technology](#) and, in particular, its potential for various target audiences, including educational institutions. Much more to follow as we all gain a better understanding as to how AI bots will co-exist and interact with human creativity.

Speaking of artificial intelligence, we [updated our insight on Copyright in AI-Generated Art](#) to report on the Copyright Office's cancellation of graphic artist Kristina Kashtanova's registration for her comic book Zarya of the Dawn. With new information as to the images generated by the AI software Midjourney, the Copyright Office reiterated its position that human authorship is a prerequisite to copyright registration in the U.S.

We reported on the [decision of the Eleventh Circuit](#) in November 2022 dismissing a trademark infringement suit by the famous Flora-Bama Lounge against a TV series called MTV Floribama Shore. The case raises the issue of the tension between Lanham Act and First Amendment concerns when a trademark is used in the title of an artistic work. On March 22, 2023 the Supreme Court heard oral arguments in Jack Daniel's v. VIP Products, a case that may provide the Court with an opportunity to balance trademark rights with free speech.

The Americans for Disabilities Act (ADA) requires the design, construction and alteration of places of public accommodation to provide full and equal enjoyment of the goods, services, facilities, privileges and advantages that they offer. The ADA requires accommodations not just in physical locations, but on websites as well. However, there is a lack of clarity as to what is required to be compliant. [Our insight offers some practical guidance as to how to comply.](#)

[We take a look at the immensely popular website TPT](#) (formerly known as Teachers Pay Teachers and recently acquired by IXL Learning), which can add value to the educational community and provide a supplemental income stream for Teacher-Authors. TPT and similar sites raise important copyright issues ranging from ownership of the posted content to enforcement of the rights of the Teacher-Authors against infringers.

We couldn't resist jumping into the conversation about former [President Donald Trump's \\$50 million lawsuit against journalist Bob Woodward](#), his publisher Simon & Schuster, Inc. and its parent company Paramount Global for the public release of interview recordings in an audiobook titled "The Trump Tapes: Bob Woodward's Twenty Interviews with President Donald Trump." The case should be open and shut because works of U.S. Government officials are excluded from copyright protection.

However, the case does raise interesting issues as to the copyright ownership of interviews generally. These issues are important not only for professional journalists but for blog writers and podcasters as well.

[#CultureCan'tWait](#) is an insight about the losses of a community's intangible cultural heritage that accompany the human loss when a natural disaster strikes. Often in areas that are fragile to begin with because of political crises, failure to address these intangible losses is an impediment to the community's recovery. The International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM) has developed a methodology to prepare for and address such issues.

We are excited to report that Law360 has [published an article](#) co-authored by Susan Lutzker and her INBLF colleague Thomas Wallentin, a partner in Kunz Wallentin Rechtsanwälte GmbH, a full-service law firm in Vienna, Austria. The article is entitled "Evaluating the Legal Standing of Natural Elements" and, in honor of World Water Day on March 22, focuses on the rights of bodies of water. Susan and Thomas discovered their shared interest in the issue of legal standing for elements of nature at an INBLF event in Vienna in June 2022.

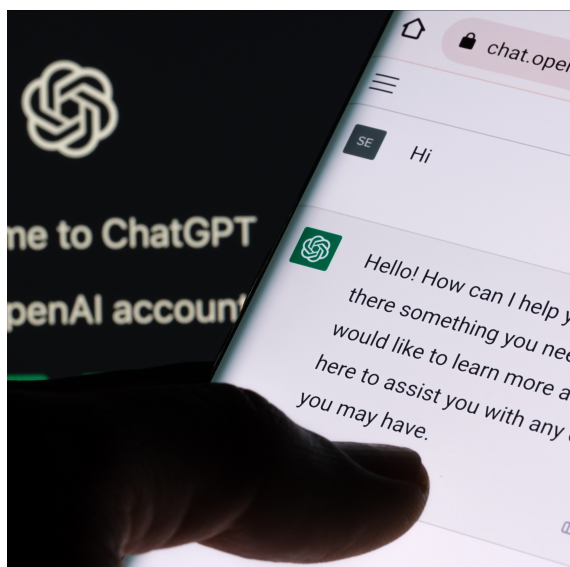
We have also updated our series of insights on the [Internet Archive case](#), explaining the recent victory of the publishers on a theory of fair use.

We have reported on the "[Russian doll](#)" case of *Vila v. Deadly Doll* where the U.S. District Court for the Central District of California granted a double victory to photographer Carlos Vila, holding that his photograph was not a derivative work although it featured a model wearing pants that include copyrightable artwork.

In firm news, on February 9 Carolyn had the honor of attending [Norwich University's 2023 Harold "Doc" Martin Scholarship Benefit Dinner](#) at the National Press Club in Washington, DC, along with three generations of her husband's family. The event was held to raise funds for deserving citizen-soldier-scholars to follow in the footsteps of Doc Martin, exemplifying the motto of the first private military college in the United States - "I Will Try". The endowed scholarship is named after Major Martin, who entered Norwich in 1916 as the first African American cadet to attend the University.

Please don't hesitate to reach out to us at info@lutzker.com for more information on these developments or advice on your IP questions. And happy spring!

Insights from the Firm



ChatGPT: Where Are We Now and the Opportunities and Challenges Ahead

By [Carolyn Wimbley Martin](#)

Since its launch in November 2022 it has been virtually impossible to avoid the discussions around ChatGPT. According to multiple sources, including Subreddit Stats, ChatGPT reached one million users in five days, and 100 million users faster than either Instagram or Spotify reached one million users. On March 14, 2023 ChatGPT Version 4 launched, with significantly enhanced capabilities over the earlier version. Although there is a plethora of commentary in academic and technology publications, mass media and in the political sphere suggesting the threats and opportunities, the commentators are unanimous that such Artificial Intelligence (AI) applications are here to stay. The flaws will become fewer while the strengths are growing exponentially. Thus the challenge is how, not if, humans will have to adapt to this new and powerful tool.

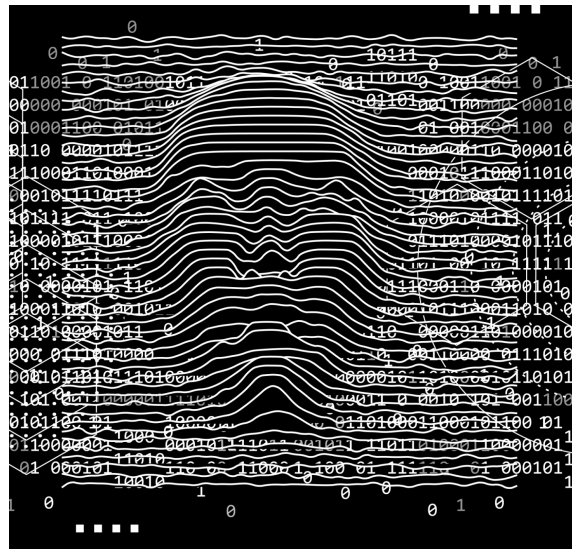
[Read Here >>](#)

Copyright in AI-Generated Artwork: Addendum

By [Susan Lutzker](#)

The Copyright Office has cleared up the confusion surrounding its registration of a graphic novel with AI-generated artwork. The previously-issued registration to graphic artist Kristina Kashtanova for her comic book *Zarya of the Dawn* was issued on the basis of inaccurate and incomplete information and has been canceled as to the AI-generated elements.

[Read Here >>](#)



Flora-Bama and Floribama: First Amendment Often Outweighs Trademark Concerns in Titles of Artistic Works

By [Susan Lutzker](#)

When a trademark is used in the title of an artistic work, the Lanham Act is construed narrowly, and actions that might otherwise be considered infringing are frequently outweighed by First Amendment concerns. Following the test enunciated in 1989 by the Second Circuit in *Rogers v. Grimaldi*, the Eleventh Circuit in November 2022 dismissed a trademark infringement suit by the famous Flora-Bama Lounge against a TV series called MTV Floribama Shore. In March 2023 the Supreme Court heard oral argument in the case of *Jack Daniel's v. VIP Products*, a case that may provide the Court with an opportunity to balance

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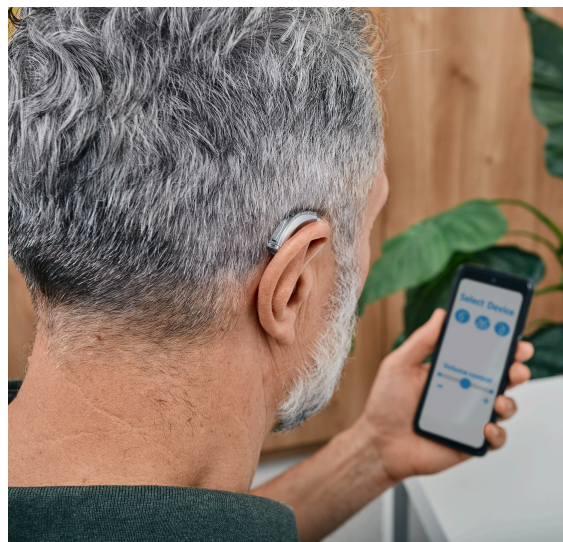
[Read Here >>](#)

Website Compliance and the Americans with Disabilities Act

By [Carolyn Wimbly Martin](#) and Sara Etemad-Moghadam

Despite the flood of lawsuits alleging website violations of Title III of the Americans with Disabilities Act (42 U.S.C. § 12182(a), the “ADA”), the federal government has not yet promulgated accessibility regulations for websites. Although the Department of Justice published guidance on website accessibility in March 2022, it is still unclear what companies need to do to comply with the ADA.

[Read Here >>](#)



Copyright and the Sale of Teaching Materials Online

By [Carolyn Wimbly Martin](#)

Online service providers like TPT (formerly known as Teachers Pay Teachers and now acquired by IXL Learning) can add value to the educational community and provide a supplemental income stream for Teacher-Authors. Before embarking on using this and similar platforms, there are copyright issues to consider.

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Interviews and Copyright

By [Arnold P. Lutzker](#) and Sara Etemad-Moghadam

Former President Trump's lawsuit against Bob Woodward over the public release of interview recordings in an audiobook raises multiple issues, including whether interviews are protected under copyright law, who the author and owner of the interview is and the applicability of the federal government exemption under copyright law.

[Read Here >>](#)



#CultureCannotWait: The Work of ICCROM in Turkey and Syria

By [Susan Lutzker](#)

The International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM) has created a methodology for first aid for intangible cultural heritage that emphasizes both preparedness for crises and integration with humanitarian efforts in the wake of crises. The recent earthquake in Turkey and Syria shines a light on this important work.

[Read Here >>](#)

Internet Archive's Open Library and Copyright Law: Third Addendum

By [Carolyn Wimbly Martin](#) and Dana Sussman

On June 1, 2020, various publishers filed suit against Internet Archive in response to Internet Archive's National Emergency Library and "Open Library." At issue in the suit were 127 works under the publishers' copyrights. On March 24, 2023, the U.S. District Court for the Southern District of New York granted summary judgment in favor of the publishers. The Court analyzed the issue using the four fair use factors codified in 17 U.S.C. §107 and found that all four factors weighed in favor of the publishers.

[Read Here >>](#)



Copyright and Photography: Vila v Deadly Doll Holds that Photo of a Useful Article of Clothing with Copyrighted Artwork is Not a Derivative Work

By [Carolyn Wimbly Martin](#) and Dana Sussman

In *Vila v. Deadly Doll, Inc.*, the United States District Court for the Central District of California granted a double victory to photographer Carlos Vila on his claims for direct copyright infringement and on Deadly Doll's counterclaim that the photograph was a derivative work infringing its copyright in the artwork on the pants. The Court held that Vila's photograph is not a derivative work because it features a model wearing pants that include copyrightable artwork, but the artwork itself is not the focus of the photograph.

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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](#).

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



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