

LUTZKER & LUTZKER — LLP —

Lutzker & Lutzker Newsletter

October 2021

To our clients, colleagues and friends:

Somehow summer gave way to fall and the usual burst of activity that this new season ushers in. Through this periodic newsletter we continue to explore the many new developments in the realm of IP, privacy law, cybersecurity and artificial intelligence.

In an ironic turn of events, [the United States Patent and Trademark Office has applied to register its own name and design](#). As a reason, the USPTO cites the rapid increase in sophisticated trademark scams by third parties seeking to pass themselves off as the USPTO. The official word is that the application will need to go through the USPTO's regular review process. More on trademark scams to follow on our website.

We have [taken a close look](#) at the procedures being developed for the new small claims court within the Copyright Office established pursuant to the Copyright Alternative in Small-Claims Enforcement Act of 2020 (the CASE Act). Although we can see both legal and practical problems, we hope this will be a feasible way for copyright owners to pursue infringers and a practical way to resolve certain fair use disputes.

We have [updated our earlier article](#) on the important decision of the U.S. Court of Appeals in *The Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* to report on the Court's amended opinion upon rehearing. The amended decision came to the same conclusion – that Warhol's use of photographer Lynn Goldsmith's image was not a transformative fair use. Stay tuned for additional analysis on the state of the transformative use defense as other decisions emerge from the courts.

[Our insight](#) into the ability of employers to track their employees in the workplace analyzes the legal and ethical aspects of the sophisticated surveillance that artificial intelligence and rapid advances in technology have made possible. Surprisingly, U.S. privacy laws have little to say about this.

We regularly report on the devastating cultural losses occurring around the world. So we [took a moment to examine](#) some bright spots in the form of grass roots efforts aimed at arming communities with tools to protect their property.

DMCA takedown notices are a valuable tool for rightsholders to protect their copyrighted works. However, when someone files a takedown notice frivolously or fraudulently, it can have serious detrimental effects. [Our insight](#) analyzes the use and abuse of DMCA takedown notices.

We are excited to report that [Law360 has published an article](#) by Carolyn Martin and Ethan Barr analyzing the copyright termination right. The article and an [earlier insight on our website](#) were prompted by the recent flurry of litigation by the comic book publisher Marvel against former writers. The Marvel litigation has shone a spotlight on the need to reexamine the work for hire exception to the termination right in our new "gig" economy, which is largely governed by independent contractor agreements. This contentious issue underscores the need for current creators, as well as those approaching the termination window, to protect their termination rights in advance.

Finally, [we have discussed *Unicolors, Inc. v. H&M Hennes & Mauritz, LP*](#), which is on the Supreme

Court's docket for November. The case involves Section 411 of the Copyright Act, which prevents the filing of an infringement action without a valid copyright. Although copyright applications appear on their face to be straightforward, the questions at issue demonstrate the need for precision in filing the application.

Please continue to stay safe. Of course, don't hesitate to reach out to us at info@lutzker.com with any questions.

Insights from the Firm



USPTO Files for Trademark Protection of Its Own Name

In an ironic turn of events, the United States Patent and Trademark Office has applied to register the USPTO trademark and logo design, citing the rapid increase in sophisticated trademark scams by third parties seeking to pass themselves off as the USPTO. According to an official statement, the application will need to go through the USPTO's regular review process.

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New Proposed Rule for CASE Act

The new CASE Act offers the opportunity for copyright owners to enforce their interests before a small-claims tribunal, rather than in expensive federal court litigation. As the specifics of implementing the law take shape, many questions surround its legality and the likely effectiveness.

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Andy Warhol Decision Spells Stronger Rights for Photographers Fighting Infringers: Addendum

Less than two weeks after the United States Court of Appeals for the Second Circuit issued its decision in *The Andy Warhol Foundation v. Goldsmith*, narrowing the range of works which can be considered 'transformative' under a fair use analysis, the Supreme Court issued its opinion in *Google v. Oracle*. Claiming that the Supreme Court's decision in Google required a different result in its case, The Andy Warhol Foundation requested a rehearing. Upon rehearing, the Second Circuit Court of Appeals addressed the Google case in an amended opinion but stood by its original holding.

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Big Business is Watching: Employee Tracking in the Workplace

Rapid advances in technology have enabled employers to track employees with greater granularity and detail than ever before. Large companies like Amazon use algorithms and wearable technology to determine an employee's location at any given moment. Surprisingly, U.S. privacy laws have little to say about tracking employees in the workplace, but invasive surveillance still comes at a cost.

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Preserving Cultural Heritage: Some Bright Spots Amidst the Losses

The unauthorized commercial exploitation of cultural property, such as the traditional designs of indigenous communities, is making headlines but not necessarily headway toward their protection. The lack of adequate IP laws, together with an inability to access the legal remedies that do exist, cries out for help. Fortunately, some grass roots efforts are starting to arm the communities with tools to protect their property.

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DMCA Takedown Notices: A Valuable Tool for Copyright Holders, Yet Subject to Abuse

YouTube's copyright takedown policy is an essential tool for rightsholders to protect their copyrighted works, allowing them to file a takedown notice with the click of a button to trigger YouTube's automatic removal. However, when someone files a takedown notice frivolously or fraudulently, it can have detrimental effects on users who rely upon YouTube to promote their products, convert viewers into customers, attract advertising revenue and engage their audience. Here we discuss how YouTube's notice and takedown process benefit rightsholders, and what solutions YouTube users have to ensure their videos are not unfairly targeted with takedown requests.

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Marvel Lawsuits: Is it Time For a Review of Copyright Termination Rights and the Work for Hire Test?

A recent flurry of litigation by Marvel against former writers warrants a review of the copyright termination right and work for hire doctrine, particularly in a creative arts industry governed



largely by independent contractor agreements.

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Supreme Court to Clarify Copyright Act Knowledge and Publication Standards: *Unicolors, Inc. v. H&M Hennes & Mauritz, LP*

On November 8, 2021, the Supreme Court will hear *Unicolors, Inc. v. H&M Hennes & Mauritz, LP*, a decision that will determine whether knowledge or intent is required to invalidate a copyright registration under 17 U.S.C. §411(b)(2), and whether the Copyright Act's publication standard requires items filed under the same copyright application to be sold as part of a "bundled collection." The decision will impact the ability of copyright holders to file single copyright applications for multiple designs and resolve a circuit split on the knowledge standard enumerated under what is commonly referred to as the "PRO IP Act."

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Our Features in Law360

You can find [our more technical analysis of the copyright termination right and work for hire doctrine](#), as well as our review of the [Epic v. Apple antitrust case](#) on Law360.

New From Lutzker & Lutzker LLP: FAQs

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

New FAQs on Copyright and Patent coming soon!

Connect with us online



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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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