

LUZKER & LUZKER — LLP —

Lutzker & Lutzker Newsletter September 2022

To our clients, colleagues and friends:

As fall begins - too soon for some of us - we continue to see a dizzying array of interesting developments in the realms of IP, privacy law, cybersecurity and artificial intelligence. Through this periodic newsletter, we endeavor to keep you informed of the most relevant and exciting ones.

First, [an update](#) to a topic we have reported on previously. The use of copyrighted music in political campaigns has been a longstanding and contentious debate. [We have previously discussed](#) the use of copyrighted music at live events and the role of performance rights organizations (PROs), but a case pending in the Southern District of New York, *Grant et al v. Trump et al*, may shed further light on the use of copyrighted music in political advertisements. In Eddy Grant's lawsuit against former President Trump for the use of his song "Electric Avenue" in an ad, the judge has allowed Trump's former deputy chief of staff to be subpoenaed, moving the case further along.

[We have reported on the Italian conceptual artist Maurizio Cattelan](#), who has found himself defending copyright claims on both sides of the Atlantic. A French court has ruled in his favor in a suit by a fabricator claiming sole authorship of sculptures he executed for Cattelan, raising interesting issues of acknowledgment and ownership when the concept of an artistic work is divorced from its execution. However, Cattelan has not fared as well in a Florida case in which the court declined to dismiss a claim that Cattelan's famous banana-duct-taped-to-the-wall sculpture infringed an earlier banana-and-orange sculpture by Joe Morford.

Also in the realm of the arts, we have [an insight on artist resale rights](#). Canada is considering legislation to provide a 5% royalty to artists upon resale of their works. Such legislation would bring Canada in line with nearly 100 other countries that have a similar "droit de suite" for artists and potentially improve economic conditions for indigenous artists. U.S. copyright law does not include such a right and attempts to legislate one have not been successful to date. The issue of artist royalties is also timely because artists are building resale rights into the "smart contracts" associated with their NFTs. Opponents claim that the rights favor artists who don't need the extra revenue, drive down sale prices and create administrative nightmares.

We have posted the second and third in our series of insights addressing important issues for photographers and those who want to use online images. [The second insight](#) discusses best practices photographers should employ to better protect their works against possible infringement, including registration with the U.S. Copyright Office and embedding metadata into photographs. If infringement does occur, there are routes beyond federal court that photographers should be aware of, such as issuing a DMCA takedown notice or beginning proceedings with the newly formed Copyright Claims Board.

The [third insight in the series](#) addresses the special scenarios of photographs taken on behalf of or for a government agency, photos of individuals that may raise a right of privacy or right of publicity issue and photos of celebrities. Exceptions to traditional copyright law, the involvement of various state laws and ongoing case law mean that these areas in particular are important to be aware of in the photography space.

In firm news, [Jeannette Carmadella was quoted](#) in an excellent article, "'Bridgerton' Musical, Church's 'Hamilton': IP Fair Use Explained" by Kelcee Griffis, reporter for *Bloomberg Law*. Jeannette explained why the two productions – an unauthorized musical production inspired by the Netflix TV series "Bridgerton" and a Texas church's performance of the Broadway show "Hamilton" - both go beyond the limits of what is permissible under the fair use doctrine. In discussing what constitutes a "transformative" use for the purposes of the fair use defense, the article references the [Andy Warhol Foundation case pending before the U.S. Supreme Court](#), a case which Lutzker & Lutzker is following closely.

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.

Enjoy the summer!

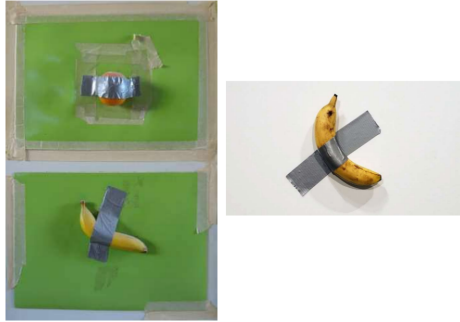
Insights from the Firm

Copyright Challenges on Both Sides of the Atlantic for Conceptual Artist Maurizio Catalan

By [Susan Lutzker](#)

Unrelated copyright lawsuits against Italian conceptual artist Maurizio Cattelan on both sides of the Atlantic raise interesting issues. A French court has ruled in Cattelan's favor in a suit by a fabricator claiming sole authorship of sculptures

Comedian was a financial success too, as Cattelan sold three copies of the work, as well as two proofs, for over \$390,000. (Id. at 4.) Morford now alleges that Cattelan plagiarized and copied Banana & Orange. The two works are provided below, with Morford's Banana & Orange on the left and Cattelan's Comedian on the right:



Thankfully for the Court, the question of whether a banana taped to a wall can be art is more a metaphysical question than a legal one. But the legal question before the Court may be just as difficult—did Morford sufficiently allege that Cattelan's banana infringes his banana?

*From the Florida Court decision

He executed for Cattelan. However, a Florida court declined to dismiss a claim that Cattelan's famous banana-duct-taped-the-wall sculpture infringed an earlier banana-and-orange sculpture by Joe Morford.

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Resale Rights for Artists: New Developments

By [Susan Lutzker](#)

Canada is considering legislation to provide a 5% royalty to artists upon resale of their works. Such legislation would bring Canada in line with nearly 100 other countries that have a similar "droit de suite" for artists and potentially improve economic conditions for indigenous artists. The issue of artist royalties is also timely because artists are building resale rights into the "smart contracts" that create their NFTs. Opponents claim that the rights favor artists who don't need the extra revenue, drive down sale prices and create administrative nightmares.

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Copyrighted



Copyright and Photography: A Practical Primer

By [Carolyn Wimby Martin](#) & [Charlotte Cuccia](#)

There are certain best practices photographers should employ to better protect their works against possible infringement, including registration with the U.S. Copyright Office and embedding metadata into photographs. If infringement does occur, there are routes beyond federal court that photographers should be aware of, such as issuing a DMCA takedown notice or beginning proceedings with the newly formed Copyright Claims Board.

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Copyright and Photography: Exceptions and Special Cases

By [Carolyn Wimby Martin](#) & [Charlotte Cuccia](#)

Some scenarios, such as photographs taken on behalf of or for a government agency, photos of individuals that may raise a right of privacy or right of publicity issue, or photos of celebrities, should receive special time and attention. Exceptions to traditional copyright law, the involvement of various state laws and ongoing case law mean that these areas in particular are important to be aware of in the photography space.

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News from the Firm

See [Jeannette Carmadella's](#) explanation of fair use featured in *Bloomberg Law* in the cases of "Bridgerton the Musical" and a church's performance of "Hamilton."

[Read Here >>](#)



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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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



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