SFIPLA FALL SEMINAR 2017

Commentary on Selected Cases From The Year in Copyright 2017

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SFIPLA FALL SEMINAR 2017
The Year in Copyright 2017

- **Cases**
  - **Updates:**
  - PETA (on behalf of Naruto) v. Slater
  - Star Athletica LLC v . Varsity Brands, Inc.
  - Graham v. Prince
  - **New Cases:**
  - Paramount v. Axanar
  - Schleifer v. Berns
  - Pepe the Frog (Matt Furie v. everyone)
  - Prince's Estate and Copyright Termination
  - Medallion Homes v. Tivoli Homes
  - Disney Enterprises v. VidAngel
- **A New Book**
- **Legislation**
  - Copyright Office DMC Registration expires
  - New leadership and turmoil in the Copyright Office

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The Year in Copyright 2017

- ***PETA (on behalf of Naruto) v. Slater***
- In 2011, photographer David Slater attempted to claim copyright in photos taken by a monkey named Naruto in Indonesia. A dispute arose as to whether an animal has rights to a copyright in an image created by the animal hitting the photo button.
- In December 2014 the Copyright Office published a revised Compendium of U.S. Copyright Office practices, providing that the Office would not register works produced animals or plants.'
- In Sept. 2015, PETA sued on behalf of Naruto to declare him the author and © owner of the selfies.
- In January, Judge William Orrick granted Slater's motion to dismiss the action, punting the issue to Congress or the President.
- Peta appealed the dismissal. And now this:
- Under the agreement, Slater will donate 25% of any future revenue derived from using or selling the monkey selfie to charities that protect the crested macaques' habitat in Indonesia, according to a joint statement published on PETA's website.
- "PETA and David Slater agree that this case raises important, cutting-edge issues about expanding legal rights for nonhuman animals, a goal that they both support, and they will continue their respective work to achieve this goal," the two parties said.

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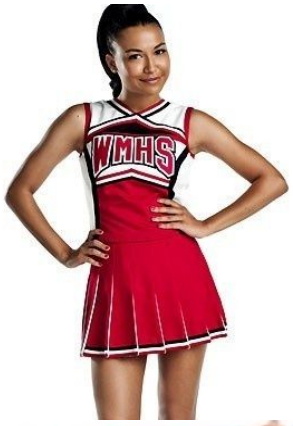
The Year in Copyright 2017



- ***Star Athletica LLC v . Varsity Brands, Inc.***
- Are the stripes, chevrons and other visual elements that appear on a cheerleading uniform protectable under copyright law?
- The 6th Circuit said yes in this August 2015 case. In May, 2016, the SCOTUS granted cert. to decide the issue.
- Applying a separability test analysis the Court holds:

  "[t]he surface decorations on the cheerleading uniforms are separable and therefore eligible for copyright protection. First, the decorations can be identified as features having pictorial, graphic, or sculptural qualities. Second, if those decorations were separated from the uniforms and applied in another medium, they would qualify as two-dimensional works of art under §101. Imaginatively removing the decorations from the uniforms and applying them in another medium also would not replicate the uniform itself. "
- The fashion industry was disappointed by the Court's failure to use this case to provide an independent copyright in fashion design.

SFIPLA FALL SEMINAR 2017
The Year in Copyright 2017

- **Paramount v. Axanar**
- Defendant Axanar Productions had created a 21-minute film, *A Prelude to Axanar*, which told a story about a battle between the forces of the Federation and the Klingon empire – all well-known characters and plot elements of the *Star Trek* television and movie series.

- Paramount and CBS, owners of *Star Trek*, brought suit for copyright infringement in 2015. In 2016, the USDC in Los Angeles ruled on cross-motions for summary judgment, finding that Axanar's fair use defense lacked merit. Left for jury trial was the question of whether the works were subjectively similar.
- The case settled in January 2017, with Axanar agreeing to modify its screenplay to remove most of the key Star Trek elements found in the short film, and agreeing further to comply, in any future *Trek*-related films, to comply with a set of 10 guidelines Paramount and CBS created for allowable fan film standards.
- The guidelines approach is one way pop-culture focused companies have dealt with the tricky problem of regulating fan-created content – companies are reluctant to incur bad optics by suing their fans, but need to draw a line to protect their copyrights.

SFIPLA FALL SEMINAR 2017
The Year in Copyright 2017

- **Schleifer v. Berns**
- In this epic battle between the authors of two Ethiopian cookbooks, Plaintiff Schleifer's counsel could only find four alleged instances of infringement, none of which had merit, and all of which were either *scenes a faire* and/or unprotected scattered words and short phrases.
- The trial court granted dismissal of the complaint in its entirety, and awarded defendant legal fees. In justifying the sanction of about $30,000 in fees, the court found:
- "No reasonable copyright attorney, or even an attorney who had devoted 20 minutes to legal research, would have filed this complaint".
- Ouch.

SFIPLA FALL SEMINAR 2017
The Year in Copyright 2017

- **Pepe the Frog (Matt Furie v. everyone)**
- Matt Furie created a comic character, Pepe the Frog, known primarily for pulling down his pants, and urinating while saying “Feels Good , Man”. Pepe was launched in 2005 and became a popular internet meme.
- Pepe was appropriated by a variety of alt-right groups and was used by President Trump in a tweet of the character with a face like Trump.
- Early in 2017, a comic book for kids was published, using Pepe as the lead character. The content of the book advanced "racist, Islamophobic and hate-filled themes", according to a federal lawsuit filed by Furie. The lawsuit was settled out of court in August 2017, with the terms including the withdrawal of the book from publication and the profits being donated to the non-profit Council on American-Islamic Relations. The book's author, a vice-principal with the Denton Independent School District, was reassigned after the publicity

SFIPLA FALL SEMINAR 2017
The Year in Copyright 2017

- **Prince's Estate and Copyright Termination**
- Prince died intestate April 21, 2016. Many of his early works were subject to copyright termination rights beginning in 2013. Rather than terminate those rights, he used his entitlement to termination to modify his agreements with Warner Bros., which allowed him to reclaim ownership of his back catalogue. This kind of renegotiation is consistent with the intent of the copyright termination statutes – to give artists more leverage in the later, presumably more successful periods of their careers, to get a second bite at the apple re: the exploitation of their work.
- Other holders of rights to Prince's work (like Hallmark, which licensed some songs for use in greeting cards) did not engage in renegotiation with Prince before his death. This creates a problem, because under Section 2043 those rights can only now be terminated by Prince's widow, children or grandchildren. Prince was unmarried at the time of his death, and left no issue.
- So that leaves only the Administrator of his estate with the right to file a termination claim. An interim Administrator was appointed for a six month period, soon to expire. Then we are likely to see a pitched battle over who will become permanent Administrator. Should the law allow a broader group of heirs to file claims?

SFIPLA FALL SEMINAR 2017
The Year in Copyright 2017

- **Medallion Homes v. Tivoli Homes**
- Two Florida home building companies got into a copyright infringement battle over whether Tivoli's designs were based on infringement of the copyright-protected plans of Medallion's homes.
- Despite evidence of direct copying of the design plans, the 11th Circuit found "there is no infringement unless the defendant succeeded to a meaningful degree". This is a novel argument, not found generally in copyright law.
- The case was decided in the district court on a summary judgement motion. Critics of the case argue that at the very least, the 11th Circuit should have reversed that decision and remanded to allow a jury to consider the infringement evidence.

SFIPLA FALL SEMINAR 2017
The Year in Copyright 2017

- **Disney Enterprises v. VidAngel**
- VidAngel Inc. operates an unlicensed video-on-demand service for movies and television shows that filters out "objectionable content" as chosen by customers from a list of possible edits provided by VidAngel.
- Major film studios, including Disney, Lucasfilm, Twentieth-Century Fox and Warner Bros. sued, alleging copyright infringement and sought injunctive relief.
- The district court granted the relief and VidAngel filed an interlocutory appeal to the 9th Circuit. The panel affirmed the injunction grant, holding that VidAngel's use was both commercial and non-transformative, nor was it personal "space-shifting". The Court also affirmed the determination that VidAngel violated DMCA Sec. 1201 by circumventing copy protection software embedded in the films and television programs they modified.
- So perhaps transformativeness is not an absolute?

SFIPLA FALL SEMINAR 2017
The Year in Copyright 2017

- **A New Book** – ABA Publishing has agreed to publish my next book, which focuses on fan-created content – fan art, fiction and film. It will offer creators of this content a guide to legal issues they will encounter in creating and distributing this material.
- The book will be co-written with Bay Area literary rights attorney Francine Ward.
- Fan created content is the subject of thousands of websites and includes street art, cosplay, and a wide array of art, fiction and film displayed both online at at pop culture conventions (ie: comic-cons and related events.
- Look for the book next fall!

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The Year in Copyright 2017

- **Legislative Branch**
- Copyright Office DMC Registration expires
  - Last December the Copyright Office rolled out its new online filing system for designating an agent to receive notices of copyright infringement. Website operators and other online service providers who have previously registered a designated agent with the Copyright Office must refile using the new online system **before January 1, 2018**, to remain eligible for the Digital Millennium Copyright Act's (DMCA's) safe harbor, which can protect eligible website operators and other service providers from monetary liability for copyright infringement committed by their users.
- New Leadership and turmoil at the Copyright Office
  - Last October, Register of Copyrights Maria Pallante was demoted and later resigned, amidst conflict over whether the Office should remain under the authority of the Library of Congress, or should become part of the Patent and Trademark Office.

SFIPLA FALL SEMINAR 2017
The Year in Copyright 2017

- **Copyright Office Turmoil**
  - Carla Hayden, Librarian of Congress, ousted Pallante and appointed Karyn Claggett as interim director. The appointment was controversial, as Pallante was seen as a pro-copyright supporter of the entertainment industry, and Claggett was viewed as a supporter of the views of Google and other tech companies seeking to limit the scope of copyright.
  - In April 2017, Congress passed the he Register of Copyrights Selection and Accountability Act, (H.R. 1695) which divests the Librarian of Congress from the authority to appoint the Register of Copyright, and places that authority in the hands of the President, with the confirmation of the Senate. The bill is now in the Senate, with bi-partisan support from Senators Grassley, Hatch, Feinstein and Leahy supporting it. No word yet on whether this legislative effort will also address the issue of under whose authority the Copyright Office should operate. Stay tuned!

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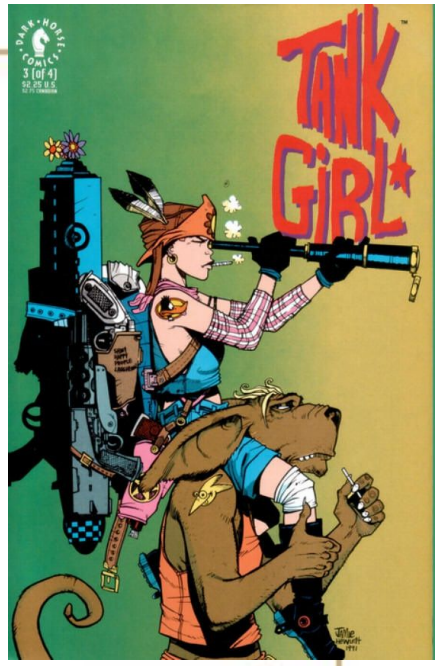
The Year in Copyright 2017



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