



# Technology and IP Forum: Copyright Law Updates & Best Practices

**July 31, 2018**

**Presenters:**

Anna Chauvet, *U.S. Copyright Office*

Regina Thomas, *Oath Inc.*

Brian Westley, *PBS*

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# Agenda

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- **Copyright 101**
- **Public Domain, Fair Use & Rights Clearance**
- **DMCA**
- **First-Sale Doctrine**
- **Standing To Sue**
- **Copyright Office Guidance & Resources**

# Copyright 101

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# Copyright 101

- **Copyright law automatically protects original works upon creation— photos, videos, articles, blogs, etc.**



Copyright Owner has exclusive right to publish, distribute, and related rights.

You need license/permission or an exception (e.g., fair use).

**"I didn't write the book report. I downloaded and printed it directly from the Internet, but I did collate and staple it myself."**

# COPYRIGHT 101

Protected	Not Protected
Literary, musical, & dramatic works	Works consisting entirely of information that is common property or has no author
Pictorial, graphic, & sculptural works	Words and short phrases
Motion pictures & other audiovisual works	Ideas, plans, methods, systems
Sound recordings & architectural works	Blank forms, typeface as type face
	U.S. government works

# COPYRIGHT 101: EXCLUSIVE RIGHTS

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## 17 U.S.C. § 106

- (1) Reproduction
- (2) Distribution
- (3) Creation of Derivative Works
- (4) Public Performance (Certain Works)
- (5) Display (Certain Works)
- (6) Public Performance via Digital Audio Transmission (Sound Recordings)

# Copyright 101: Damages \$\$

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- Actual damages, or “statutory damages” of **\$750 - \$30,000 per infringing work**.
- Up to **\$150,000 per work** for “willful infringement”.

# Copyright 101: Common Misconceptions

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- Just because websites and social media sites/apps are publicly viewable does **not** make them “public domain.”
- Crediting is **not** a substitute for permission.

# Fair Use v. Public Domain

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- **When it's unnecessary to obtain permission:**
  - **Public Domain** – No longer protected by copyright
    - Most works enter public domain due to expired copyright
    - Sometimes authors dedicate work to the public domain
  - **Fair Use** – permits limited copying of a work that is still protected by copyright
    - Usually reserved for comment, criticism, teaching, parody
    - One of the most difficult issues to navigate in copyright law

# Public Domain

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- **When does a copyright expire?**
  - Can be very complicated; depends on when work was created and whether it was published (and, if so, when)
  - Generally, the copyright term for works created by U.S. authors after 1976 is as follows:
    - If individual author: **life of author + 70 years**
    - If joint authors: **life of last author to die + 70 years**
    - If work for hire/anonymous: **95 years after publication**

# Public Domain

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- Authors sometimes decide not to protect their creative works and “dedicate” them to the public domain
- This is **rare** and should not be assumed unless the dedication is expressly authorized

# Public Domain

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- Just because a website *claims* works are in the ‘public domain’ doesn’t necessarily mean they are
  - How reputable is the site?
    - Website owner likely didn’t create the works and may not fully understand complicated copyright terms
  - Public domain works may be incorporated into new works that have copyright-protected elements
    - Photos of public domain paintings and sculptures
    - Artwork accompanying public domain text of a book

# Fair Use

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- In determining whether there's fair use, courts consider the following **four factors**:
  - 1) Purpose and character of the use
  - 2) Nature of the copyrighted work
  - 3) Amount of work used and importance to the whole
  - 4) Effect on potential market for or value of copyrighted work

# Fair Use

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## ■ (1) Purpose and character of use

- Was the use for a noncommercial or nonprofit purpose?
- Did the use “transform” the material taken from the copyrighted work?
  - In other words, did the alleged infringer add value by creating “**new expression, meaning, or message.**” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579

# Fair Use

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- **(2) Nature of the copyrighted work**
  - Is the work primarily factual (weaker protection) or completely creative (stronger protection)?
  - Is the work published or unpublished? (author's right to be the first to publish is regarded as a valuable right)

# Fair Use

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- **(3) Amount of work used and importance to the whole**
  - Is the portion taken the “heart” of the work?
    - An alleged infringer may use very little of the allegedly infringed work from a **quantitative** perspective (for example, a few minutes of an hours-long baseball game) but the **qualitative** taking may nonetheless be significant (the few minutes copied was the only home run of the game)

# Fair Use

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- **(4) Effect on the potential market for or value of the copyrighted work**
  - Look at economic impact
  - If market for the original work is diminished by new use, this factor will weigh heavily in favor of copyright owner
    - Example: Copying even a few questions from a secured exam (SAT, LSAT) often renders the entire exam unusable, destroying its value

# Fair Use

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- **Two most important elements to evaluate:**
  - Whether, and to what extent, the new work is transformative
    - Transformative works “lie at the heart of the fair use doctrine,” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579
  - The market harm of the new work on the original work
    - “[U]ndoubtedly the single most important element of fair use,” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566

# Fair Use 101

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## Some ways to increase likelihood of fair use:

- The law recognizes sometimes a license shouldn't be required.
- Use needs to be "transformative" (e.g., adds something new and different, doesn't supersede/substitute for the use of the original).
- Use a small portion of the whole, and only what you need to make the new point. No set number of seconds is always OK. Don't use the best part of a video.
- No commercial/promotional uses.
- The context of use determines the amount of risk involved.
- You may still need to take down upon complaint.
- You may still need to pay out license fees for use.
- When in doubt, ask permission first - it will likely be less expensive.

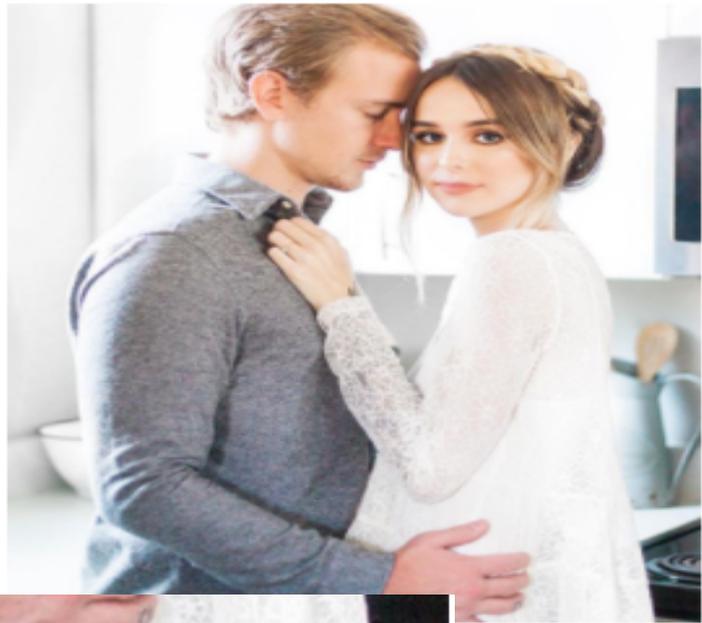
# Likely NOT Transformative

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- Just playing a clip because it is entertaining.
- Straight news reporting of news event recorded in video or photograph.
- Just using a photo of a celebrity in a story about that celebrity.

## Court Rejects Gossip Site's Fair Use Defense—*Barcroft v. Coed Media*

*November 9, 2017 · by Venkat Balasubramani · in Copyright, Licensing/Contracts*



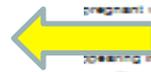
# Disney Star Live-Tweets Her Labor



Acacia Brinley and her boyfriend, Jairus Kersey, are expecting a baby any day now. (Photo: Instagram/Acacia Brinley)

Disney star Acacia Brinley, who is 18 years old and nine months pregnant with her first child, has gone into early labor — and she’s sharing every contraction on social media.

baby any day now. (Photo: Instagram/Acacia Brinley)



pregnant with her first child, has  
speaking in the upcoming film  
g, writing, "Hello love! Just thought  
rol in active labor, but I am in early  
too painful so my midwife has  
ok it up a notch."  
morning. We cannot say for certain  
for all your guys' support and kind



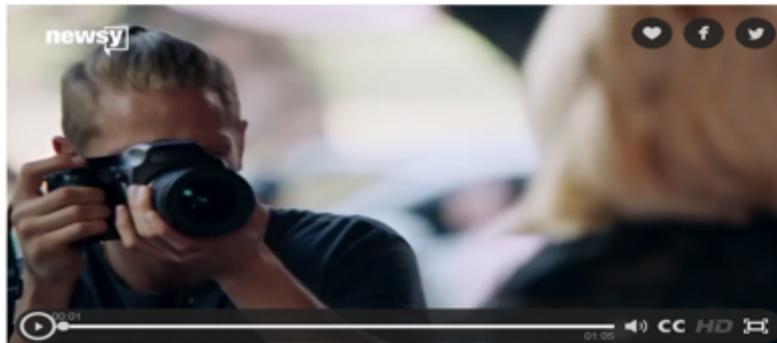
# Transformative: The work doesn't simply illustrate the subject of the story, it IS the subject of the story

ENTERTAINMENT 04/05/2017 01:38 pm ET

## Pepsi Pulls Kendall Jenner Ad Following Intense Backlash

"We are removing the content and halting any further rollout," the company said.

By Maxwell Strachan



Pepsi apologized for its advertisement featuring Kendall Jenner at a political protest and pulled the video from YouTube on Wednesday following intense backlash over the way it portrayed demonstrators and police officers.

"Pepsi was trying to project a global message of unity, peace and understanding. Clearly we missed the mark, and we apologize," the company said in a statement, per Wall Street Journal reporter Jennifer Maloney.

"We did not intend to make light of any serious issue," the statement read. "We are

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If you are 62 or older, you can generate up to \$625,000 from your home while you live there. Your mortgage payments are eliminated and you begin to receive income through the Pre-2009 American Recovery and Reinvestment Act. You'll be shocked to see how much you can make.

TAP YOUR AGE

TAP YOUR AGE: 62-65

TAP YOUR AGE: 71-75

Calculate Your Reverse Mortgage

TRENDING

The work itself has prompted action, public statements by those involved, etc.

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# Transformative: The work doesn't simply illustrate the subject of the story, it IS the subject of the story:

ENTERTAINMENT 06/23/2017 10:08 am ET

## Jennifer Lopez Hits Back At Haters Who Accused Her Of Photoshopping Ab Photo

[Jennifer Lopez](#) clapped back at the haters who accused her of Photoshopping one of her most recent Instagram photos.

On Thursday, the performer shared the photo below:



If you weren't distracted by how amazing J.Lo looks, you may have noticed what appears to be a smudge just under her sweatshirt on the right. Plenty of people in the comments claimed the mark was a result of an unsuccessful attempt at altering the pic, but Lopez wasn't having any of it.

The "Shades of Blue" star replied to the comments and then shared a screenshot of her response in her Instagram story.

**The work itself has prompted action, public statements by those involved, etc.**

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# Fair Use

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- ***Fox News v. TVEyes***, 883 F.3d 169 (2d Cir. 2018)
  - Background: TVEyes records television programs and then compiles the recordings into a text-searchable database. Clients can search for segments that are responsive to their interests. Those segments can be played for up to ten minutes, but clients can play an unlimited number of segments.
  - Fox News filed suit, alleging that TVEyes was making unauthorized redistribution of its audiovisual content. TVEyes asserted that its redistribution of Fox's content was protected by the doctrine of fair use by serving a transformative purpose.

# Fair Use

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- ***Fox News v. TVEyes***, 883 F.3d 169 (2d Cir. 2018)
  - Fair Use Analysis:
    - (1) *Purpose and character*: The court determined that TVEyes’ service was “at least somewhat transformative” because it allows users to “isolate, from an ocean of programming, material that is responsive to their interests and needs” with targeted precision.
      - Similar to “Google Books” case, which held that Google’s creation of a text-searchable database of millions of books was transformative
    - **This factor favored TVEyes only slightly**, however, given the commercial nature of TVEyes’ service and its modest transformative character.

# Fair Use

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- ***Fox News v. TVEyes***, 883 F.3d 169 (2d Cir. 2018)
  - Fair Use Analysis:
    - (2) *Nature of the copyrighted work*: The court paid little attention to this factor, determining that it was **neutral**, but rejected TVEyes’ argument that since facts are not copyrightable, the factual nature of Fox’s content should militate a finding of fair use.
      - “Those who report the news undoubtedly create factual works. It cannot seriously be argued that, for that reason, others may freely copy and re-disseminate news reports.”

# Fair Use

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- ***Fox News v. TVEyes***, 883 F.3d 169 (2d Cir. 2018)
  - Fair Use Analysis:
    - (3) *Amount of work used and importance to the whole*: The court determined that **this factor clearly favored Fox** because “TVEyes makes available virtually the entirety of the Fox programming that TVEyes users want to see and hear.”
      - Distinguished the “Google Books” case, in which Google allowed users to see only “a very small piece” of a book (three lines of text, or about one-eighth of a page). Users also were prevented from performing repeated searches to compile multiple snippets. Users were also prevented from searching dictionaries and cookbooks, in which limited text might convey all the information the user was likely to need.

# Fair Use

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- ***Fox News v. TVEyes***, 883 F.3d 169 (2d Cir. 2018)
  - Fair Use Analysis:
    - (4) *Effect on the potential market for or value of the copyrighted work*: The court determined that **this factor also favored Fox** because TVEyes was undercutting Fox’s ability to profit from licensing revenues or its own ability to offer searchable access to its copyrighted content.
  - Holding: “At bottom, TVEyes is unlawfully profiting off the work of others by commercially re-distributing all of that work that a viewer wishes to use, without payment or license.”

# Fair Use

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- ***Disney Enterprises v. VidAngel***, 869 F.3d 848 (9th Cir. 2017)
  - VidAngel operated an online streaming service that removed “objectionable content” from movies and television shows
  - VidAngel purchased DVDs or Blu-ray Discs, decrypted the discs, “ripped” digital copies, and created “intermediate” files, converting them to HTTP Live Streaming format and breaking them into segments that could be tagged for 80+ categories of inappropriate content (once tagged, the segments were encrypted and stored in cloud servers)
  - Customers “purchased” a physical disc for \$20 and selected at least one type of objectionable content to be filtered out; VidAngel “removed” the physical disc from its inventory and “ownership” transferred to customer; VidAngel then streamed the filtered work to customer from cloud server
  - After viewing the work, the customer could sell the disc back to VidAngel for partial credit

# Fair Use

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- ***Disney Enterprises v. VidAngel***, 869 F.3d 848 (9th Cir. 2017)
  - District court's findings
    - Plaintiffs had demonstrated likelihood of success on the merits of their **copyright infringement** claims (rights of reproduction and public display) and section **1201(a)(1)** claim (unlawful circumvention of technological measures protecting copyrighted works)
    - VidAngel was unlikely to succeed on its defense under the Family Movie Act
    - VidAngel was unlikely to succeed on its fair use defense
    - Granted preliminary injunction

# Fair Use

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- ***Disney Enterprises v. VidAngel***, 869 F.3d 848 (9th Cir. 2017)
  - Ninth Circuit's findings
    - District court did not abuse its discretion in finding:
      - VidAngel's copying infringed plaintiffs' exclusive reproduction right
      - Plaintiffs likely to prevail on section 1201 claim
      - VidAngel unlikely to succeed on its defense under the Family Movie Act
      - VidAngel's service would likely not be considered a fair use (not transformative, commercial, broad space-shifting is not fair use)

# Copyright on social media platforms

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## ***Agence France Presse v. Morel*, 769 F. Supp. 2d 295 (S.D.N.Y. 2011)**

- AFP sued photographer seeking DJ of no copyright infringement after it lifted photos from Twitter and distributed/ licensed them elsewhere
- Photographer counterclaimed for infringement
- AFP/Getty argued that Twitter TOS granted them implied license to use the photos
  
- Held: Willful infringement; \$1.2 million damages

# Copyright on social media platforms

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“You retain your rights to any Content you submit, post or display on or through the Services. What’s yours is yours — you own your Content (and your incorporated audio, photos and videos are considered part of the Content).

By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed). **This license authorizes us to make your Content available to the rest of the world and to let others do the same.** You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submitted to or through the Services available to **other companies, organizations or individuals** for the syndication, broadcast, distribution, promotion or publication of such Content **on other media and services**, subject to our terms and conditions for such Content use. Such additional uses by Twitter, or other companies, organizations or individuals, may be made **with no compensation paid to you** with respect to the Content that you submit, post, transmit or otherwise make available through the Services.”

Q: “If a photo/video is all over YouTube/Twitter/Instagram /Facebook, and can be embedded on a website article page, what’s the difference if we use it in a video without permission?”

A: Big difference – legally and practically



yet again,” Hilton captioned a photo of him holding the newborn, alongside his mother Teresita Lavandeira.

Hilton, who is father to Mario Armando, 4, and Mia Alma, 2, continued: “Last week my son and daughter welcomed a sister into the world! #MayteAmor was born on Wednesday, October 4th at 3:26 PM — weighing 7 lbs 4 oz, measuring 20 inches long, and she’s perfect!”

theperezhilton  
Los Angeles, California Follow



68.8k likes 6,561 comments

Dear friends, A lot has changed over the past decade plus and I am so thankful, humbled, and truly indebted that you have accepted me through the fat and the fug and the then and the now. We've grown up together and evolved and I continue to do so - in the best way possible! I am beaming with joy and pride as I share with you that my family has grown yet again. Last week my son and daughter welcomed a sister into the world! #MayteAmor was born on Wednesday, October 4th at 3:26 PM - weighing 7 lbs 4 oz, measuring 20 inches long, and she's perfect! Named after her grandparents - Mario & Teresita - their love will forever flow through her and protect her and all of my kids. Grandma is over the moon



# Embedding Vs. Hosting?

- YouTube, Facebook, Twitter, Instagram provide publicly available embed codes for embedding posts on websites.
- Embedded content remains hosted and controlled on the source site.
- Site users agree to allow this when they upload.

THE BLOG

## The Most Beautiful Éclairs On The Internet

05/25/2016 02:46 pm ET | Updated May 31, 2016

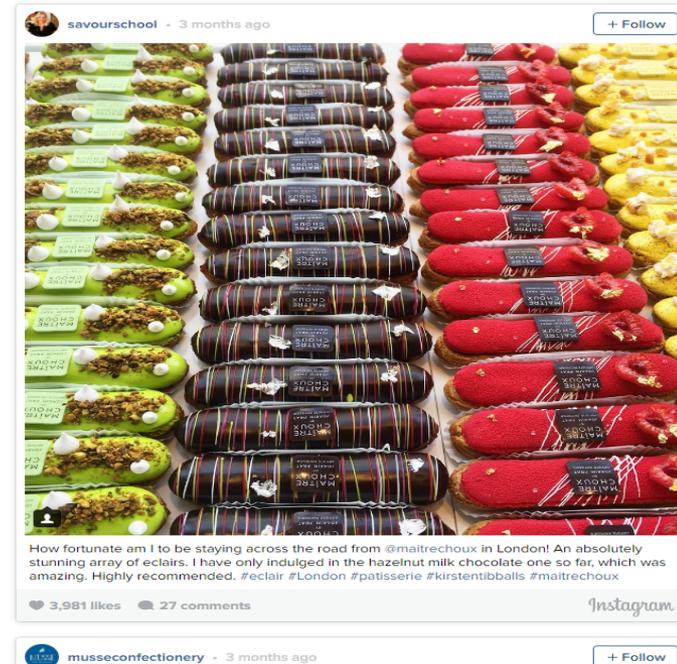


Like 103

Tasting Table

A website and newsletter for culinary enthusiasts

So take a moment to enjoy some of the most gorgeous éclairs on Instagram. We apologize for making you hungry (and for forcing you to meditate on your total lack of artistic prowess).



# Embedding Vs. Hosting?

- For videos, when you use a publicly available embed code, any play of a video is a video view for the source site, and their ads run with it.
- All of this embedding is done with permission of the source site and the user.

**NONE OF THESE THINGS ARE TRUE WHEN YOU GRAB YOUR OWN COPY AND HOST IT OR PUT IT IN YOUR OWN VIDEO.**

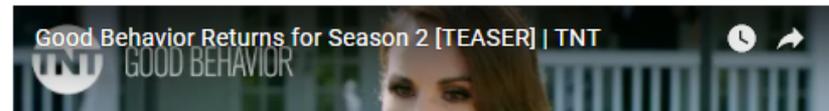
YAHOO!  
ENTERTAINMENT

...from Season 2 of the cult medical comedy to just going to be one long revenge plot pitting Rebecca Bunch against Josh Chan? You'll be excited to hear that the premiere is a lot more nuanced than that.



**Good Behavior:** Sunday, Oct. 15, at 10 p.m. on TNT

Last year's best-kept TV secret returns for a sophomore season. But let's not keep it confidential this time around — Michelle Dockery's Letty Raines is one of the most fascinating characters to watch right now.



# Embedding Vs. Hosting?

- In the recent **Goldman v Breitbart** case in SDNY, the court in parting with the 9<sup>th</sup> Circuit's server test, held that you can still be liable for an infringing embed. As such, only embed from the source site and where it appears the poster had rights.

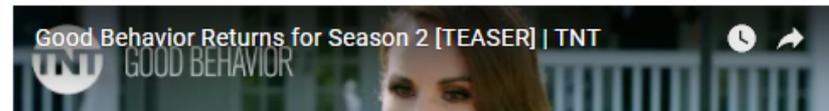
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# Copyright on social media platforms

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## ***Goldman v. Breitbart News*, 2018 WL 911340 (S.D.N.Y. Feb. 15, 2018)**

- Breitbart et al. embedded a Tweet including a photo of Tom Brady, which had been lifted from Snapchat by a third party without permission
- Parties asked the court to rule whether embedding a Tweet (in-line linking) could be copyright infringement
- Held: Yes, it's prima facie copyright infringement (public display)
  - 9<sup>th</sup> Circuit's "server test" rejected
    - July 17<sup>th</sup> – Second Circuit rejected interlocutory appeal

# TEXT/STOCK Photo COMBOS

## Hula, The STD App, Managed To Offend All Of Hawaii



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**MORE:** Stds, Hawaiians, Native Hawaiians, Hook Up Culture, Hook Up Apps, Sex, Hula, Hawaii, Hula App, Hula Std App Hawaii, Technology News

It's a good time to be an awkward spring breaker. After all, there's an app that helps

# “Stock” or “FILE” Images

## Heated sex scandal surrounds Philadelphia fire department: ‘It’s bad stuff’

Rumors emerged that Philadelphia firefighters had been having sexual encounters with a female paramedic at fire stations as a fellow paramedic filed an EEOC complaint, the Philadelphia Daily News reports.

BY NICOLE HENSLEY [Follow](#) / NEW YORK DAILY NEWS / Thursday, January 29, 2015, 11:31 AM

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A sex scandal has set Philadelphia Fire Department ablaze with firefighters accused of having sex with a paramedic on- and off-duty.

The investigation implicates dozens of city employees including paramedics, firefighters and the department’s supervisors, who could face charges related to unbecoming conduct, sources told the Philadelphia Daily News.

“It’s bad stuff,” former Philly fire Commissioner Lloyd Ayers told the paper. “That was the word we had.”

The scandal came to light last year when a fellow paramedic filed a Equal Employment Opportunity complaint alleging misconduct by a female paramedic.

As the investigation was handed to the department’s Special Investigations Office, rumors surfaced that the female



MATT ROUVEAR

Philadelphia firefighter Francis Cheney holds a flag at a 9/11 ceremony in 2006.

DAILY NEWS

Francis X. Cheney v. Daily News LLP (3<sup>rd</sup> Circuit, July 19, 2016)

SECTIONS

The Legal Intelligencer

Third Circuit Reignites Fireman's Defamation Case Over Photo

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# Adding Photos to Text

“Rob Kardashian claims Blac Chyna attempted to choke him with iPhone cable. ... The allegation comes by way of a lawsuit filed by Kardashian and sister Kylie Jenner.”



# Fair Use

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## ARE THESE FAIR USE?:

- **Using short “clips” of movies or music** in company social media posts

# Fair Use

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## ARE THESE FAIR USE?:

- **Using short “clips” of movies or music** in company social media posts
  - Probably NOT fair use – there is an exception for “*de minimis*” use, but it is a strict test (*not as simple as “10 seconds or less is fair use,” etc.*)
  - The amount of the work you are using is only one of the four fair use factors
  - May depend on how “central” that scene or sample is to the movie or song
  - Need synchronization license to synch music to video

# Fair Use

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## IS THIS FAIR USE?:

- Copyrighted artistic work shown in the background of a company video

# Fair Use

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## IS THIS FAIR USE?:

- **Copyrighted work shown in the background of a company video**
  - MAYBE fair use
    - Short, *out-of-focus* glimpses of copyrighted photographs as set decoration in the background of a movie was held to be *de minimis* and non-infringing
    - Short but *clearly visible and recognizable* glimpses of a photograph of a quilt as set decoration in a TV show was held to be infringement
    - Inclusion of a building with artistic towers in a movie was permitted because the towers were part of, and *not conceptually separate* from, the building
      - Pictorial representations of architectural works visible from a public place permitted by federal law, including all features of those works, unless such features are conceptually separate

# FAIR USE CASE QUIZ

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## Case 1:

Online show commenting on user videos shows clip of first person in Perth buying an iPhone dropping the phone. Host comments that lesson is: “Don’t be first” and “Apple’s packaging is absurd.”

# FAIR USE CASE QUIZ

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A1:



• *Equals Three v. Jukin Media (C.D. Cal. 2015)*

<http://www.tubefilter.com/2016/03/04/ray-william-johnson-jukin-media-fair-use/> (1:42)

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# FAIR USE CASE QUIZ

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A1: Not

Fair

Use



- *Equals Three v. Jukin Media (C.D. Cal. 2015)*

# FAIR USE CASE QUIZ

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## Case 2:



Hosted Good Morning America segment reporting and commenting on first man to use Facebook Live to stream wife's birth. Use series of clips of several seconds each, total of 22 seconds (some without audio) of 45 minute video.

# FAIR USE CASE QUIZ

THE DAILY ONLINE EXAMINER

## ABC, Yahoo Battle Father Who Streamed Son's Birth On Facebook

by Wendy Davis@wendyndavis, November 23, 2016, 2:18 PM

★ Recommend (4)



ABC and Yahoo are asking a federal judge to reject a copyright infringement claim brought by a man who used Facebook Live to stream his wife giving birth.

The broadcaster and Web publisher argue that they had

a fair use right to incorporate a portion of the stream into an item about the growth of streaming video.

23  
SHARES



## Man Uses Facebook to Live Stream Wife Giving Birth

by ABC News Videos 0:40 mins

Canadian Father's Mike Filiz documented his wife giving birth to a baby boy via

- <https://gma.yahoo.com/video/man-uses-facebook-live-stream-200930741.html>

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# FAIR USE CASE QUIZ

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A2:

Fair  
Use



• *Kanongataa v. ABC and Yahoo (S.D.N.Y. 2017)*

“ABC reported and commented on a socially significant and newsworthy event: the phenomenon of a couple using the Facebook Live program to publicly broadcast their son’s birth on the Internet.”

# FAIR USE CASE QUIZ

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## Case 3:



In an A&E TV Biography about actor Peter Graves, use of clip excerpts totaling 20 seconds of an old movie Graves appeared in, as part of description and commentary about his early acting work.

# FAIR USE CASE QUIZ

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A3:

Fair  
Use



- *Hofheinz v. A&E Television Networks* (S.D.N.Y. 2001)

# FAIR USE CASE QUIZ

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## Case 4:

Los Angeles TV station uses 30 seconds (out of 4 minutes) of L.A. News Service helicopter footage of truck driver beaten during a riot, in its own report on the riot.

# FAIR USE CASE QUIZ

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A4:

Not  
Fair  
Use



- *Los Angeles News Service v. KCAL* (9<sup>th</sup> Cir. 1997)

# Fair Use

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**What should be considered when your company (or one of its customers) wants to use third-party material protected by copyright?**

- Is the material in the public domain?
- Is there a written agreement granting permission/license?
  - Is the use within the scope of that permission/license?
  - This includes “creative commons” and other licenses commonly mistaken as “public domain”
- Is the use a protected “fair use,” permitted under the First Amendment, or otherwise lawful without permission?

# Best Practice: Permission from Rights Owner

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- Best practice: ask permission first
- You may get it, and it will likely be less expensive in the long run.

# Licensed Content

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- **Tell your clients what resources they have access to for licensed content. E.G., maybe you have these licenses:**
- Licensed Image Databases – E.G., Getty, Reuters, etc.
- Music – Licensed music libraries such as Jingle Punks.
- Third Party Content/Twitter/Social Media – Need either permission from poster, or fair use basis.

# Training

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**In-house copyright attorneys should train their editorial client teams on proper use of photos and videos. Why?**

- **Ensure they are aware of photo/video licenses.**
- **Ensure they understand fair use or come ask you.**
- **Avoid legal risk (complaints, lawsuits) and PR drama.**
- **Avoid payouts, often many times more than up front license fees cost.**
- **Current trend: payouts are higher, some trolls sue without first sending a cease and desist letter.**

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# THE DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA)

# THE DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA): GENERAL OVERVIEW

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- DMCA was enacted in 1998 as a response to the rapid growth of the internet, which made it easier to illegally download and share copyrighted works.
- Among other things, DMCA concerns:
  - A system for copyright owners and online entities to address online infringement, including limitations on liability for compliant service providers to help foster the growth of internet-based services (section 512)
  - Circumvention of access controls (section 1201)

# DMCA: GENERAL OVERVIEW

**THEN: 1998**

**2017**

**56K Modem**

**Download Speeds**

**Broadband**

**30-second  
movie clip:**

**30 minutes**

**1-minute  
song clip:**

**20 minutes**

**216-page  
novel:**

**9 minutes**



**2-hour  
movie**

**8 minutes**

**4-minute  
song**

**1 second**

**Novel**

**Instantaneous**

**Katten**

KattenMuchinRosenman LLP

**ACC** Association of  
Corporate Counsel  
NATIONAL CAPITAL REGION

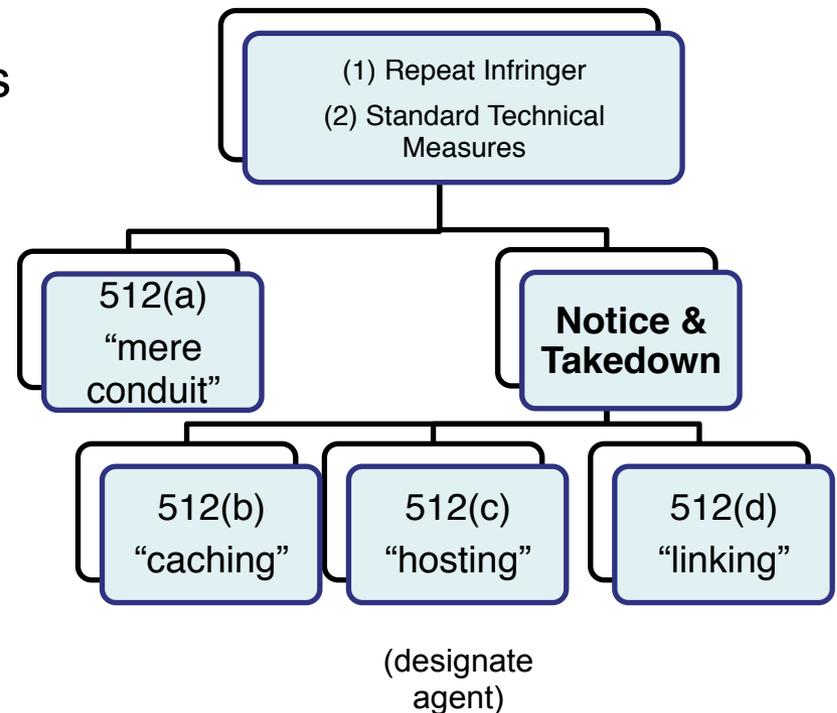
# DMCA: SECTION 512

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- Safe Harbors Under Section 512 For Service Providers
  - Serving as a conduit for the automatic online transmission of material as directed by third parties (section 512(a));
  - Caching (*i.e.*, temporarily storing) material that is being transmitted automatically over the internet from one third party to another (section 512(b));
  - Storing (*i.e.*, hosting) material at the direction of a user on a service provider's system or network (section 512(c)); or
  - Referring or linking users to online sites using information location tools (*e.g.*, a search engine) (section 512(d)).
- Not automatic—a service provider must fulfill certain requirements

# DMCA: SECTION 512

- **Threshold Requirements:**
  - (1) Repeat Infringer
  - (2) Standard Technical Measures
    - No duty to monitor
      - 512(a): “mere conduit”
- **Notice & Takedown**
  - 512(b): “caching”
  - 512(c): “hosting”
  - 512(d): “linking”



# ISSUES IN THE DIGITAL ERA: LIABILITY UNDER THE DMCA

## Requesting Removal

*Copyright owner can ask ISP to remove infringing content, requires:*

- Designation of an agent
- Notification and counter-notification

## Limitations on DMCA

*Four separate limitations depending on ISP conduct:*

- Transitory communications
- System caching
- User's information residing on systems
- Information location tools

## ISP Conduct

*ISPs Cannot:*

- Have actual knowledge of infringement
- Be aware of facts or circumstances from which infringing activity is apparent
- Receive a direct financial benefit from the infringing material if it has the right and ability to control the material

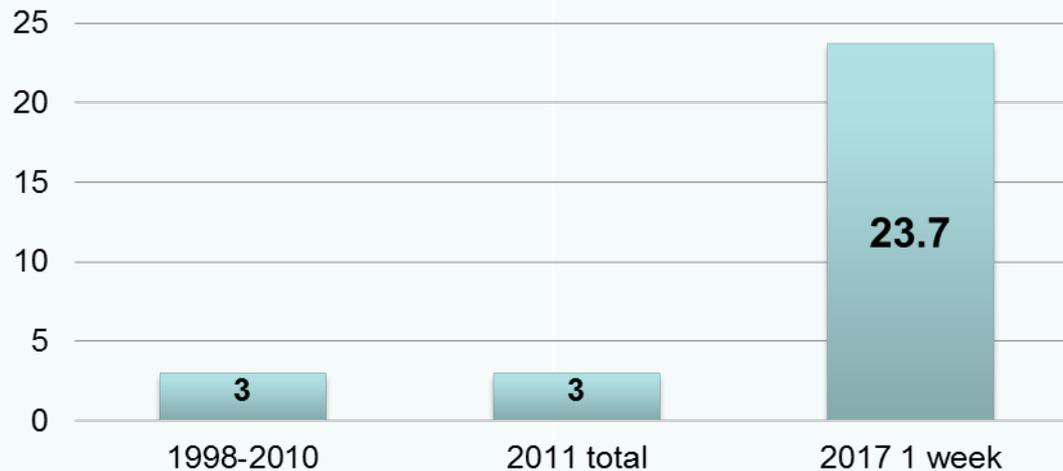
If there is knowledge of infringing activity, the ISPs must expeditiously remove the infringing material.

**Process bars monetary relief and provides only limited injunctive relief**

**THEN: 1998**

**2017**

**Removal Requests (millions)  
sent to Google**



**Notice and Takedown Statistics: March 2016**

**78** million URLs Requested to be Removed from Google Search in February 2016

**2.9** of the 78 million URLs were for a single site – 4shared.com

**Top 5** websites each received **over a million** URL removal requests

**> 1000** copyright owners submitted URL removal requests for Uploaded.net and Rapidgator.net

# DMCA: SECTION 512 POLICY STUDY

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- In late 2015, the Copyright Office initiated a study to evaluate the impact and effectiveness of section 512
  - Received 92,000+ written submissions in response to NOI
  - Office held public roundtables in New York and San Francisco to seek further input on the study
- Among other things in the study, the Office will:
  - Consider the costs and burdens of the notice-and-takedown process
  - Review how successfully section 512 addresses online infringement and protects against improper takedown notices

# DMCA: SECTION 512 STUDY COMMENTS

## *A2IM et al.*

“The DMCA was supposed to provide balance between service providers and content owners, but instead it provides harmful “safe havens” under which many platforms either pay nothing or pay less than market value for music.... DMCA reform is essential to bring about balance. A vibrant and healthy future for the music ecosystem depends on it.”

## *Amazon.com, Inc.*

“By establishing a system of shared responsibility for preventing or addressing infringing activity, the DMCA strikes the right balance for rightsholders and service providers alike.”

# DMCA: SECTION 1201

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- Section 1201 provides protection against circumvention of technological measures used by copyright owners to protect their works.
- Section 1201 prohibits two types of activities:
  - **“Circumventing a technological measure”** (or “TPM”), that is, to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a TPM, without the authority of the copyright owner
  - **“Trafficking”** in certain circumvention technologies, including manufacturing, importing, offering to the public, providing, or otherwise trafficking in certain circumvention technologies, products, services, devices, or components

# DMCA: SECTION 1201

- Section 1201 concerns two types of TPMs:
  - **“Access Controls”** – Technological measures that prevent unauthorized access to copyrighted works
  - **“Copy Controls”** – Technological measures that protect the exclusive rights granted to copyright owners under title 17, such as measures preventing unauthorized reproduction



# DMCA: SECTION 1201

- Section 1201(a)(1)(A) **prohibits** circumvention of an **access control**, for example, decrypting a Blu-Ray Disc to access it on an unauthorized device
  - This prohibition is subject to certain permanent, statutory exemptions and temporary exemptions (via a rulemaking)
  - The law **does not prohibit** circumvention of a **copy control**, but acts taken after circumvention may constitute copyright infringement



# SECTION 1201: TECHNOLOGICAL PREVENTION MEASURES

## TMPs

Control who may see, hear, or use a copyrighted work

## Access Controls

Prevent users from accessing a work without permission (*i.e.*, passwords, encryption)

- Circumvention Conduct – 1201(a)(1)(A)
- Trafficking in device – 1201(a)(2)

## Copy Controls

Prevent users from making an infringing use after access. Under U.S. law:

- No prohibition on circumvention conduct
- Trafficking in devices prohibited

## Trafficking: Prohibited Devices

- Primarily designed or produced for circumventing
- Knowingly marketed or promoted for circumventing
- Limited commercially significant purpose or use other than circumventing

## Statutory Exceptions

- Library browsing
- Law enforcement
- Reverse engineering
- Encryption research
- Protection of minors
- Cell phone unlocking
- Security testing
- Privacy

## Regulatory Rulemaking

Additional exemptions created through triennial rulemaking process overseen by the Copyright Office

# DMCA: SECTION 1201

<b><i>TPM MATRIX</i></b>	<b><i>Copy Controls</i></b>	<b><i>Access Controls</i></b>
<b><i>Act of Circumvention</i></b>	<b>Allowed</b>	<b>Not allowed</b>
<b><i>Trafficking in Devices</i></b>	<b>Not allowed</b>	<b>Not allowed</b>



Trafficking term is just shorthand. The language actually is very broad and covers “manufacture, import, offer to the public, provide, or otherwise traffic in any technology or product, service or device, component or part thereof . . .”

# DMCA: SECTION 1201

Section 1201 also includes a procedure to request **temporary exemptions** to the prohibition against circumvention. These exemptions are created through a rulemaking that takes place **every three years**, and take a little over a year to complete

**Copyright Office:** Conducts public rulemaking and drafts recommendation to Librarian of Congress after consulting with NTIA

**NTIA:** Consults with Copyright Office during the rulemaking

**Librarian of Congress:** May grant exemptions from the prohibition against circumventing access controls

*Information on current temporary exemptions can be found at 37 C.F.R. § 201.40 and on the Copyright Office's website at [www.copyright.gov/1201](http://www.copyright.gov/1201)*

# DMCA: SECTION 1201 TRIENNIAL RULEMAKING

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- New rulemaking launched June 2017
- In fall 2017, NOI with renewals and exemption categories (39 renewal petitions and 23 petitions for new exemptions)
- Hearings in DC and LA in April – live streamed
- Recommendation and Library’s Final Rule both to be published in October

# 1201 RULEMAKING: PREVIOUSLY GRANTED TEMPORARY EXEMPTIONS

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- **E-books** for use with **assistive technologies** for blind or visually impaired
- **Unlocking** (Cellphones, tablets, hotspots, wearable devices)
- **Jailbreaking** (Smartphones, tablets, and other all-purpose mobile computing devices, Smart TVs)
- **Motion picture excerpts**
  - **Educational uses** (universities, K-12, MOOC's, digital and literacy programs offered by libraries and other nonprofits)
  - **Multimedia e-books** offering film analysis
  - Use in **documentary films**
  - Use in **noncommercial videos**



# 1201 RULEMAKING: PREVIOUSLY GRANTED TEMPORARY EXEMPTIONS

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- **Software:**

- **Motor vehicles** (including agricultural equipment) for diagnosis, repair, and modification
- **Video games** with discontinued support to allow continued play and preservation
- **Data compilations** generated by implanted medical devices and personal monitoring systems
- **3D printers** to allow alternative feedstock
- **Good faith security research**, except immediately for voting machines:
  - Devices designed for **individual consumers**, including voting machines
  - **Motorized land vehicles**
  - Implanted **medical devices** and **monitoring systems**

# CURRENTLY PROPOSED TEMPORARY EXEMPTIONS

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- **Audiovisual Works:**
  - **Criticism and Comment**
    - Expansion of existing exemptions relating to motion pictures for purposes of criticism and comment by various users (educators/students, multimedia e-book authors, filmmakers)
  - **Accessibility**
    - Circumventing motion pictures to add captions and/or audio description to create accessible versions for students with disabilities
  - **Space-Shifting**
  - **HDCP/HDMI**

# CURRENTLY PROPOSED TEMPORARY EXEMPTIONS

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- **Unlocking**
- **Jailbreaking**
- **Repair**
- **Video Game Preservation**
- **Software Preservation**
- **Security Research**
- **Avionics**
- **3D Printing**

# DMCA ‘Safe Harbor’

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- ***BMG v. Cox***, 881 F.3d 293 (4th Cir. 2018)
  - Background: Subscribers to Cox, an Internet service provider, shared and received copyrighted music files using a technology known as BitTorrent. As part of its agreement with subscribers, Cox:
    - reserved the right to suspend or terminate subscribers who used its service to infringe copyrights.
    - took increasingly stringent actions up until the 13<sup>th</sup> infringement notice, when it considered terminating the subscriber. (But, in practice, subscribers terminated for infringement were always reactivated.)
    - only counted one infringement notice per subscriber per day; 13-strike policy was reset after six months.

# DMCA ‘Safe Harbor’

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- ***BMG v. Cox***, 881 F.3d 293 (4th Cir. 2018)
  - BMG filed suit against Cox, asserting that Cox was contributorily liable for its subscribers’ infringement of BMG’s copyrights. Cox asserted that it was entitled to the safe harbor defense under the DMCA.
  - The court noted that to fall within the DMCA safe harbor, Cox must show that it has “adopted and **reasonably implemented** ... a policy that provides for the termination in appropriate circumstances of subscribers who are **repeat infringers**.” (quoting 17 U.S.C. § 512(i)(1)(A))

# DMCA ‘Safe Harbor’

---

- ***BMG v. Cox***, 881 F.3d 293 (4th Cir. 2018)
  - Holding: The court determined that Cox failed to qualify for the DMCA safe harbor because “it failed to implement its [repeat infringer] policy in any consistent or meaningful way – leaving it essentially with no policy.”
    - The court first rejected Cox’s argument that “repeat infringers” means *adjudicated* repeat infringers, citing to the legislative history of the repeat infringer provision and the statute itself.
    - The court then explained that although Cox had a repeat infringer policy, it made every effort to avoid reasonably implementing it. An ISP can’t merely terminate customers as a “symbolic gesture before indiscriminately reactivating them...”

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# THE FIRST SALE DOCTRINE

# First Sale Doctrine

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- Overview
  - Allows “the owner of a particular copy or phonorecord lawfully made under [the Copyright Act] . . . to sell or otherwise dispose of the possession of that copy or phonorecord” without the permission of the copyright owner. 17 U.S.C. § 109(a)
  - In other words, the copyright owner’s exclusive right to **distribute** a *particular copy* of a work is “exhausted” once the owner transfers title to that copy
  - Does *not* allow for the reproduction of that copy

# First Sale Doctrine

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- ***Disney v. Redbox***, 2018 U.S. Dist. LEXIS 69103 (C.D. Cal. Feb. 20, 2018)
  - Background: Redbox, which rents and sells movies to consumers through kiosks, acquires Disney films by purchasing “Combo Packs” at retail outlets. The packaging contains a digital download code for online streaming. Redbox removes the code and then sells it to consumers.
  - Disney filed suit, alleging that Redbox was making unauthorized reproductions of its movies. As a defense, Redbox asserted the first sale doctrine. Disney, however, argued that the doctrine did not apply because the codes are not “copies” of the movies.

# First Sale Doctrine

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- ***Disney v. Redbox***, 2018 U.S. Dist. LEXIS 69103 (C.D. Cal. Feb. 20, 2018)
  - Holding (First-Sale Doctrine): The court sided with Disney on the first-sale issue, determining that the first sale defense was inapplicable because “**no particular, fixed copy of a copyrighted work yet existed** at the time Redbox purchased, or sold, a digital download code.” *Id.* at \*26.
  - The court cited to *Capitol Records LLC v. ReDigi Inc.*, where the court held that the first sale defense was inapplicable when the defendant attempted to create a marketplace for digital music downloads by migrating the file from one computer to another without the data ever existing in two places at the same time. 934 F. Supp. 2d 640, 645 (S.D.N.Y. 2013)

# First Sale Doctrine

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- ***Disney v. Redbox***, 2018 U.S. Dist. LEXIS 69103 (C.D. Cal. Feb. 20, 2018)
  - In *Capitol Records*, the court determined that the new music file was not the same “particular copy,” but rather an unauthorized reproduction. “Put another way, the first sale defense is limited to material items, like records, that the copyright owner put into the stream of commerce.”
  - *Disney* also cited to a U.S. Copyright Office report that recommended against explicitly expanding the first sale doctrine to include digital transmissions. The need to transport physical copies of works, which degrade with time and use, “acts as a natural break on the effect of resales on the copyright owner’s market.” Digital copies, however, can be perfectly reproduced and transmitted nearly instantaneously with little effort.

# Digital first-sale doctrine

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- ***Disney v. Redbox***, 2018 U.S. Dist. LEXIS 69103 (C.D. Cal. Feb. 20, 2018)
  - Holding (Copyright Misuse): Disney likely misusing copyright; **PI rejected**

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# STANDING TO SUE FOR COPYRIGHT INFRINGEMENT

# Standing to sue

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- **Circuit split** regarding whether **issued copyright registration** is necessary to sue for copyright infringement, or whether **filing an application** alone is sufficient

# Standing to sue

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## ***Fourth Estate Public Benefit Corp v. Wall-Street.com***

- U.S. Supreme Court should resolve circuit split
- Cert granted; pending
- But “special handling” already available...

## Standing to sue: **GOVERNMENT’S ARGUMENTS IN *FOURTH ESTATE***

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- Supreme Court solicited views of Solicitor General
- Government filed an amicus brief stating that the petition for a writ of certiorari should be granted—and that a copyright infringement suit may not be filed until the Register of Copyrights has either approved or refused registration of the work
  - The **plain text** of § 411(a) “imposes a precondition to filing a claim” of infringement, which can be satisfied via registration “only when the Register has approved an application”
  - “Where copyrighted works are involved, ‘registration’ denotes the act of the . . . Register of Copyrights in entertaining a claim of copyright into an official register.”

## Standing to sue: **GOVERNMENT'S ARGUMENTS IN *FOURTH ESTATE***

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- Section 411(a), which authorizes the Register to intervene in cases where registration has been refused, could not fully serve its intended purpose if the applicant could initiate suit
- Use of the phrase “registration has been made” (or a close variant) to refer to circumstances in which the entire registration process, including the Copyright Office’s disposition of the copyright owner’s application to register his work, has been completed
- Preregistration would be rendered unnecessary

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# COPYRIGHT OFFICE RESOURCES

# COMPENDIUM

- The *Compendium of U.S. Copyright Office Practices* is the administrative manual of the Register of Copyrights, providing expert guidance to copyright applicants, practitioners, scholars, the courts, and members of the general public regarding institutional practices and related principles of law.



# COMPENDIUM



UNITED STATES COPYRIGHT OFFICE

## COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES

THIRD EDITION

SEPTEMBER 29, 2017



**Katten**  
KattenMuchinRosenman LLP

### IN HISTORY NDIUM OF U.S. COPYRIGHT OFFICE PRACTICES

On September 29, 2017 the U.S. Copyright Office released an updated version of the *Compendium of U.S. Copyright Office Practices, Third Edition*. The following is a list of the sections that were added, amended, renumbered, or removed in this release. Sections shown in blue were renumbered, but the content remains the same. Sections shown in red were removed.

Heading	Page
Effective Date of the <i>Third Edition</i>	1
Citing to the <i>Compendium</i>	1
Standard of Deference for the <i>Compendium</i>	2
First and Second Editions of the <i>Compendium</i>	4
Relationship Between the First, Second, and Third Editions of the <i>Compendium</i>	5
How to Search the <i>Compendium</i>	5
Basic Searching with Adobe Acrobat or Adobe Reader	5-6
Advanced Searching with Adobe Acrobat or Adobe Reader	6-7

Heading	Section
History of the U.S. Copyright Office	101.1
Organization of the U.S. Copyright Office	101.2
Office of the Chief Financial Officer	101.2(f)
Office of the Chief of Operations	101.2(f)
Receipt Analysis and Control Division	101.2(h)(1)
Licensing Division	101.2(h)(2)
Copyright Acquisitions Division	101.2(h)(3)
Office of the Chief Financial Officer	101.2(f)
National Copyright Registration and Recordation System	101.3(A)
Constitutional Basis for and Purpose of Copyright Law	102.1
Timeline of Selected Historical Dates in U.S. Copyright Law	102.7

RELEASED 09/29/2017

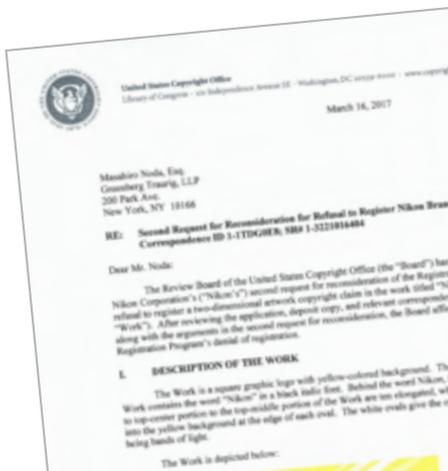
**ACC** Association of  
Corporate Counsel  
NATIONAL CAPITAL REGION

# CIRCULARS

- Circulars are publications covering a wide variety of topics that intend to provide a general audience with up-to-date and authoritative copyright information



# COPYRIGHT REVIEW BOARD



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Review Board Letters Online | U.S. Copyright Office

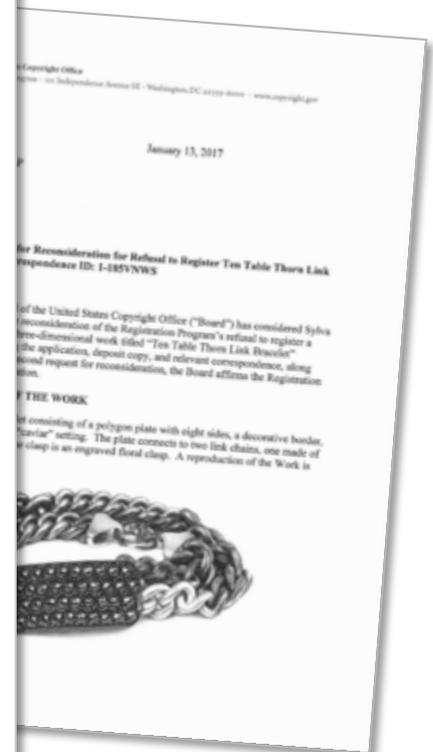
## Review Board Letters Online

Select category or categories to search

- Two-dimensional artwork
- Three-dimensional artwork
- Sound recording
- Idea/expression dichotomy
- Human authorship
- Text
- Computer program
- Musical work
- Typography
- Labels and logos
- Choreography
- Compilation
- Useful article
- Common shapes/symbols/designs
- Layout and format
- Derivative work
- Jewelry design
- Originality
- Words and short phrases
- Rule of doubt

Select/Deselect All

Title	Year	Categories	Outcome
3-Dimensional Pattern 6 - Gradient Smooth, 3-Dimensional Pattern 7 - Knights Smooth, 3-Dimensional Pattern 8 - Oats Smooth, 3-Dimensional Pattern 20 - Laundry Knit	2016	Three-dimensional artwork, Originality, Common shapes/symbols/designs, Useful article, Textile	Affirmed Refusal
2013 Basketball Ring Chassis	2016	Jewelry design, Originality, Typography, Common shapes/symbols/designs	Affirmed Refusal
2015 EHIM Essentials List	2016	Text, Compilation, Originality, Derivative work	Affirmed Refusal
adidas 3-Bars logo	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Labels and logos	Affirmed Refusal
American Flag Bat Display	2016	Two-dimensional artwork, Three dimensional artwork, Originality, Derivative works, Common shapes/symbols/designs	Affirmed Refusal
Apple icon IAD	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Labels and logos	Affirmed Refusal
Arms of Love LAR08-08C3-1, Arms of Love LAR08-08C3-3, Arms of Love LAR08-08C3-4, and Arms of Love LAR08-08C3-5	2016	Jewelry design, Originality, Common shapes/symbols/designs, Compilation	Affirmed Refusal
Aviator Sculpture and Navigator Sculpture	2016	Three-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Affirmed Refusal
Aviator Tom Cat Chair, Blackhawk Chest, Blackhawk Coffee Table, Blackhawk Square Side Table, Odeon Chandelier Small, Odeon Chandelier Medium, Odeon Table Lamp, Stonyhurst Lamp Table and Arnpieforth Chest	2017	Three-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Affirmed Refusal
Aviator Valkyrie Desk and Mars Chair	2016	Three-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Affirmed Refusal
B291 Dresser and B291 Bed	2016	Three-dimensional artwork, Useful article, Originality, Common shapes/symbols/designs	Affirmed Refusal
BBM icon	2016	Two-dimensional artwork, Originality, Common shapes/symbols/designs, Labels and logos	Affirmed Refusal



# COPYRIGHT REVIEW BOARD

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## 1<sup>st</sup> Request for Reconsideration

\$250 per claim

Reasons/legal arguments supporting applicant's request for registration

Review by attorney in the Office of Registration Policy & Practice

## 2<sup>nd</sup> Request for Reconsideration

\$500 per claim

Must address reasons for upholding the refusal to register

Review by 3-member Review Board (Register and GC (or their designees) and another Register designee)

Decision is final agency action; can be challenged (for abuse of discretion) in federal district court under Administrative Procedure Act



# Technology and IP Forum: Copyright Law Updates & Best Practices

**July 31, 2018**

**Presenters:**

Anna Chauvet, *U.S. Copyright Office*

Regina Thomas, *Oath Inc.*

Brian Westley, *PBS*

Michael Justus, *Katten Muchin Rosenman LLP*