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2021 Year in Review: Entertainment Cases and Their Impact

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September 30, 2021

The Phillie Phanatic and Copyright's "Derivative Works Exception"

Aaron Moss

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

THE PHILLIES,

Plaintiff,

-against-

HARRISON/ERICKSON, et al.,

Defendants.

----------X

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Original

Phanatic 2.0

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©1984 Harrison/Erickson

©2020 Philadelphia Phillies

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The Derivative Works Exception

A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

17 U.S.C. 203(b)(1)

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94TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
No. 94–1476

COPYRIGHT LAW REVISION

REPORT

An important limitation on the rights of a copyright owner under a terminated grant is specified in section 203(b)(1). This clause provides that, notwithstanding a termination, a derivative work prepared earlier may "continue to be utilized" under the conditions of the terminated grant; the clause adds, however, that this privilege is not broad enough to permit the preparation of other derivative works. In other words, a film made from a play could continue to be licensed for performance after the motion picture contract had been terminated but any remake rights covered by the contract would be cut off.

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Illustration 1 — Gracen's painting

Gracen v. Bradford Exchange, 698 F.2d 300 (7th Cir. 1983)

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L. Batlin & Son v. Snyder, 536 F.2d 486 (2nd Cir. 1976)

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Original

Phanatic 2.0

Greenberg Glusker

©1984 Harrison/Erickson

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— LEGAL FILINGS

The Phillie Phanatic and Copyright Termination's Derivative Works Exception

by **Aaron Moss** · December 13, 2020

The Phillie Phanatic (2020 edition)

Can the Copyright Act's "derivative works exception" help the Phillies blunt the effect of a copyright termination notice from their mascot's designer?

Aaron Moss
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Josh Geller

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Developments in Online Marketplace Liability

REDBUBBLE

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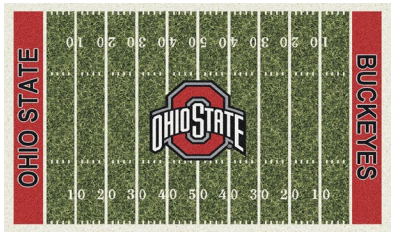
Atari Interactive, Inc. v. Redbubble, Inc. (N.D. Cal.)

REDBUBBLE

District court denied summary judgment in part (Jan. 2021)

The Ohio State University v. Redbubble, Inc. (S.D. Ohio)



REDBUBBLE

Sixth Circuit reversed and remanded appeal from summary judgment ruling (Feb. 2021)

Y.Y.G.M. SA d.b.a. Brandy Melville v. Redbubble, Inc. (C.D. Cal)

REDBUBBLE

Jury verdict against Redbubble (June 2021)

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Direct Infringement

- Is online platform "using" trademark in commerce?
- What level of involvement/control over sale creates liability?
- Packaging – danger of brand recognition

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Contributory Infringement

- What level of knowledge?
  - "Specific instances of actual infringement" vs. "constructive knowledge that users were engaging in trademark infringement"
- Failure to take reasonable steps to prevent infringement
  - Notice/takedown likely not enough
  - Repeat infringer policies

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*It's Britney, B*tch…*

Benny Roshan

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- 2007 Britney experiences a mental breakdown
- 2008 She voluntarily enters into a conservatorship agreeing to have her father manage her financial and personal affairs
- Conservatorship hums along for next 13 years

- Two die-hard Britney fans start following her Instagram account and start the “Free Britney” movement
- “Framing Britney” released in February 2021
- June 2021 Britney testifies in Court and confirms she wants out
- Media attention to the case fuels talks of termination

- In California, a conservatorship can end "If the court determines that the conservatorship is no longer required or that grounds for establishment of a conservatorship of the person or estate, or both, no longer exist." [PC 1863] This isn't exactly a road-map which means that whatever information the Court relies on in Britney's conservatorship can become the standard for other cases.

- Precedent already created by Britney's case, for example, she was allowed to chose her own counsel without a mental evaluation or court's own internal investigation
- She might have her conservatorship terminated on the basis of "changed circumstances" without a full-blown trial
- What happens will be binding precedent in California

Starstruck in Court…Chamber of Commerce v. Bonta

Dan Stone

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preempted. We therefore affirm the district court as to the application of Labor Code § 433 and Government Code § 12953 to arbitration agreements covered by § 1 of the FAA.

I

A

California Governor Gavin Newsom signed into law California Assembly Bill 51, 2019 Cal. Stats. Ch. 711 (AB 51), on October 10, 2019. Section 1 of AB 51 declares that "it is the policy of this state to ensure that all persons have the full benefit of the rights, forums, and procedures established in the California Fair Employment and Housing Act . . . and the Labor Code." AB 51. Pursuant to this policy, AB 51 was enacted with the "purpose of . . . ensur[ing] that individuals are not retaliated against for refusing to consent to the waiver of those rights and procedures and to ensure that any contract relating to those rights and procedures be entered into as a matter of voluntary consent, not coercion." *Id.* Arbitration is not singled out by AB 51. Rather, AB 51 covers a range of waivers, including non-disparagement clauses and non-disclosure agreements.

AB 51 added § 432.6 to the California Labor Code. That section provides:

> (a) A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section

> 12900) of Division 3 of Title 2 of the Government Code) or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.
>
> (b) An employer shall not threaten, retaliate or discriminate against, or terminate any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure for a violation of the California Fair Employment and Housing Act or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.
>
> (c) For purposes of this section, an agreement that requires an employee to opt out of a waiver or take any affirmative action in order to preserve their rights is deemed a condition of employment.
>
> . . .
>
> (f) Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.).

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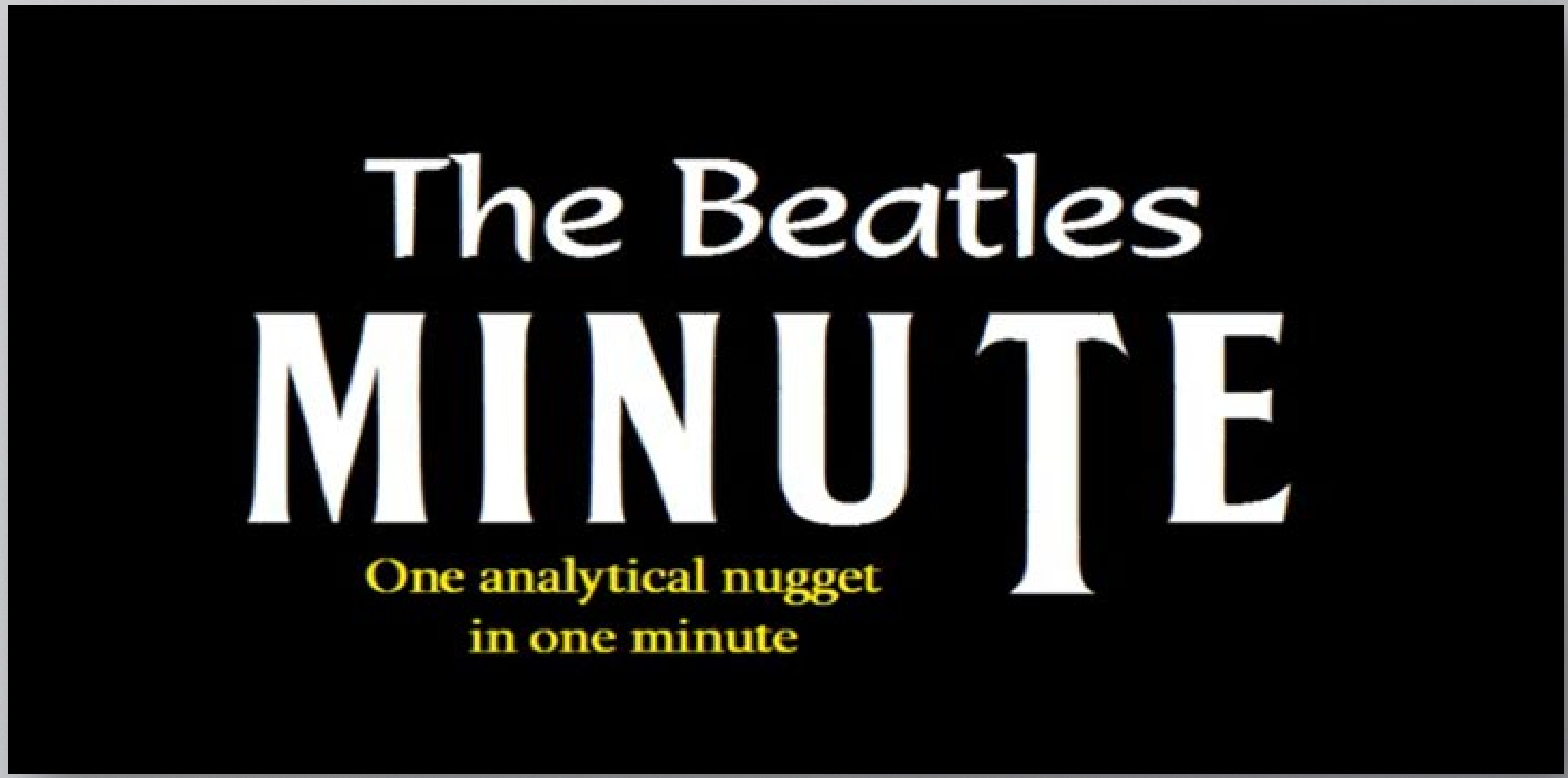

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ends up in the Billy Preston recording.

* * * * * *

"Mr. Harrison: . . . [Billy Preston] might have put that there on every take, but it just might have been on one take, or he might have varied it on different takes at different places."

The Billy Preston recording, listing George Harrison as the composer, was thereafter issued by Apple Records. The music was then reduced to paper by someone who prepared a "lead sheet" containing the melody, the words and the harmony for the United States copyright application.[9]

Seeking the wellsprings of musical composition—why a composer chooses the succession of notes and the harmonies he does—whether it be George Harrison or Richard Wagner—is a fascinating inquiry. It is apparent from the extensive colloquy between the Court and Harrison covering forty pages in the transcript that neither Harrison nor Preston were conscious of the fact that they were utilizing the He's So Fine theme.[10] However, they in fact were, for it is perfectly obvious to the listener that in musical terms, the two songs are virtually identical except for one phrase. There is motif A used four times, followed by motif B, four times in one case, and three times in the other, with the same grace note in the second repetition of motif B.[11]

What happened? I conclude that the composer,[12] in seeking musical materials to clothe his thoughts, was working with various possibilities. As he tried this possibility and that, there came to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener; in other words, that this combination of sounds would work. Why? Because his subconscious knew it already had worked in a song his conscious mind did not remember. Having arrived at this pleasing combination of sounds, the recording was made, the lead sheet prepared for copyright and the song became an enormous success. Did Harrison deliberately use the music of He's So Fine? I do not believe he did so deliberately. Nevertheless, it is clear that My Sweet

9. It is of interest, but not of legal significance, in my opinion, that when Harrison later recorded the song himself, he chose to omit the little grace note, not only in his musical recording but in the printed sheet music that was issued following that particular recording. The genesis of the song remains the same, however modestly Harrison may have later altered it. Harrison, it should be noted, regards his song as that which he sings at the particular moment he is singing it and not something that is written on a piece of paper.

10. Preston may well have been the "composer" of motif B and the telltale grace note appearing in the second use of the motif during the recording session, for Harrison testified:

"The Court: To be as careful as I can now in summing this up, you can't really say that you or Billy Preston or somebody else didn't somewhere along the line suggest these; all you know is that when Billy Preston sang them that way at the recording session, you felt they were a successful way to sing this, and you kept it?

"The Witness: Yes, I mean at that time we chose what is a good performance.

"The Court: And you felt it was a worthy piece of music?

"The Witness: Yes . . . ."

11. Even Harrison's own expert witness, Harold Barlow, long in the field, acknowledged that although the two motifs were in the public domain, their use here was so unusual that he, in all his experience, had never come across this unique sequential use of these materials. He testified:

"The Court: And I think you agree with me in this, that we are talking about a basic three-note structure that composers can vary in modest ways, but we are still talking about the same heart, the same essence?

"The Witness: Yes.

"The Court: So you say that you have not seen anywhere four A's followed by three B's or four?

"The Witness: Or four A's followed by four B's."

The uniqueness is even greater when one considers the identical grace note in the identical place in each song.

12. I treat Harrison as the composer, although it appears that Billy Preston may have been the composer as to part. (See fn. 10 *supra*). Even were Preston the composer as to part, this is immaterial. *Peter Pan Fabrics, Inc. v. Dan River Mills, Inc.*, 295 F.Supp. 1366, 1369 (S.D. N.Y.), *aff'd*, 415 F.2d 1007 (2d Cir. 1969).

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College Athletes Cashing In…
NCAA v. Alston

Ricardo Cestero

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NCAA v. Alston

- NCAA Has a Monopoly Over College Athletics
- NCAA Required to Show that its Compensation Policies Have Pro-Competitive Benefits
- NCAA Claimed Protecting Amateurism Justified its Policies
- Given the Commercial Nature of the NCAA, this Defense Failed
- Justice Kavanaugh's Concurrence Suggests the Court will Fully Strike Down NCAA Compensation Rules

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NCAA v. Alston

- Schools Can Offer Enhanced "Education-Related" Benefits to Athletes
- Athletes Can License their Name, Image and Likeness
- NCAA Adopted a New Policy Expressly Allowing NIL Licenses Consistent with State Laws

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Individual Licenses

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Group Licenses

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Questions?

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