

## The Biggest Copyright Rulings Of 2022

By **Tiffany Hu**

*Law360 (December 16, 2022, 7:57 PM EST)* -- The U.S. Supreme Court laid out when copyright registration errors can be excused in a decision reviving an infringement verdict against fast-fashion giant H&M, while the Ninth Circuit was left unimpressed by alleged similarities between a Christian rapper's song and Katy Perry's "Dark Horse." Here are Law360's picks for the top copyright rulings of 2022.

### **Unicolors v. H&M**

The Supreme Court in February reinstated a copyright infringement verdict that fabric designer Unicolors Inc. won against fast-fashion chain H&M, holding that a lack of factual or legal knowledge can excuse mistakes on copyright registrations.

The high court's 6-3 ruling interpreted a part of copyright law that states registrations can be invalidated if the owner knowingly included inaccurate information, overturning the Ninth Circuit's decision to vacate the verdict Unicolors won against H&M.

The case is significant because it extends protections to those who aren't lawyers, who the court held may be forgiven for their "often esoteric" legal mistakes in completing copyright application forms, according to Benjamin Fox, a partner at Morrison Foerster LLP.

"Going forward, a copyright applicant's 'knowledge' of a mistake in a registration means 'actual, subjective awareness of both the facts and the law,'" Fox said.

The ruling also invites litigants to "marshal circumstantial evidence to show that the copyright applicant was actually aware of, or willfully blind to, inaccurate information," including by referring to the registrant's relevant experience, according to Fox.

"Lawyers and subject matter experts filing applications may be held to a higher standard," Fox said.

The case is Unicolors Inc. v. H&M Hennes & Mauritz LP, case number 20-915, in the Supreme Court of the United States.

### **Gray v. Hudson**

The Ninth Circuit in March affirmed a lower court's decision to throw out a \$2.8 million copyright verdict

against singer Katy Perry over her 2013 hit "Dark Horse," finding the disputed portions of a Christian rapper's song consist of "manifestly conventional" elements.

The lawsuit came from rapper Marcus Gray, who in 2014 accused Perry of ripping off his 2009 song "Joyful Noise." A California federal jury had found Perry liable for infringement and awarded \$2.8 million in damages, but the district judge vacated the award after finding the disputed series of notes in Gray's song were not "particularly unique or rare."

The Ninth Circuit handles the bulk of music cases — making the ruling at hand an interesting one, with "lots of dicta that will likely be cited [or improperly cited] for years to come," according to Hugh Marbury of Cozen O'Connor.

Marbury added that the language involving the "basic musical building blocks" also evokes Oracle Corp. v. Hewlett Packard Enterprise Co., in which a California federal jury found in June that an HP unit owed Oracle \$30 million for knowingly stealing Oracle's customers by offering software updates that ripped off Oracle's copyrights. That case is ongoing.

The case is Marcus Gray et al. v. Katheryn Hudson et al., case number 20-55401, in the U.S. Court of Appeals for the Ninth Circuit.

### **Alexander v. Take-Two**

An Illinois jury in September found that World Wrestling Entertainment and video game maker Take-Two Interactive did not make fair use of a tattoo artist's designs in the WWE 2K video game series, in a first-of-its-kind tattoo copyright trial.

The jury verdict awarded tattoo artist Catherine Alexander nearly \$4,000 in damages, finding that the portrayal of five distinctive tattoos on professional wrestler Randy Orton in the video game did not constitute fair use. However, the jury did not find any of the defendants' profits attributable to their use of the artist's tattoos.

It seems unlikely that the case will have "significant real-world impact with respect to depictions of tattoos in video games," said Ajay Krishnan of Kecker Van Nest & Peters LLP, who noted that a different federal judge previously ruled that such tattoo-based claims are not legally viable.

"Even if future district court judges opt to allow such cases to be tried, a jury could easily find that depiction of a celebrity's tattoo in a video game was impliedly licensed or a fair use," Krishnan said. "And damages were low because it is hard to convince a jury that the depiction of the tattoo was causal in getting customers to buy and play the game."

The low damages — as well as the many years of expensive litigation — don't set a worthwhile precedent for litigation, said Megan Bannigan of Debevoise & Plimpton LLP. Take-Two has also filed post-trial motions seeking to overturn the verdict, and an appeal is still possible, she noted.

Still, "it is possible we'll see [similar] cases pop up before the Copyright Claims Board, which was specifically designed as a low-cost option for low-value copyright disputes," Bannigan said.

The case is Alexander v. Take-Two Interactive Software et al., case number 3:18-cv-00966, in the U.S. District Court for the Southern District of Illinois.

## **Starz Entertainment v. MGM**

In July, the Ninth Circuit **rejected** MGM Domestic Television Distribution's request to toss a lawsuit brought by Starz Entertainment over licensing agreements, splitting from the Second Circuit in determining how far back copyright holders can recover damages.

Starz sued the MGM unit in May 2020 alleging copyright infringement and breach of contract and saying it had discovered dozens of movies and television episodes had been licensed to rivals in violation of a 2013 agreement giving Starz exclusive rights to the works. In its bid to dismiss the lawsuit, MGM Domestic Television Distribution had contended that the lawsuit should be thrown out for being untimely.

A copyright claim generally accrues when the infringement occurs, but under the "discovery rule," a claim can accrue when the copyright holder becomes aware of the infringement, which the Ninth Circuit said allows copyright holders to recover damages for infringing acts that happened before they discovered the infringement.

The panel also found that the U.S. Supreme Court's 2014 *Petrella v. Metro-Goldwyn-Mayer Inc.* ruling — which holds that accused infringers can't invoke the laches defense against copyright lawsuits when the claims were brought within three years — did not touch the discovery rule, noting that "the overwhelming majority of courts" use the discovery rule for determining accrual in copyright cases.

The Ninth Circuit's holding that plaintiffs can recover all damages that may have arisen during the period before they had knowledge or reason to know of the alleged infringement is a "plaintiff-friendly reading of *Petrella*, and an issue that has led to different results among the circuits," Dale Cendali of Kirkland & Ellis LLP said.

"Exactly what the Supreme Court had in mind by *Petrella* may not be ascertained until and if the Supreme Court chooses to accept a case to resolve the issue," Cendali said.

The case is *Starz Entertainment LLC v. MGM Domestic Television Distribution LLC*, case number 21-55379, in the U.S. Court of Appeals for the Ninth Circuit.

## **McGucken v. Pub Ocean**

The Ninth Circuit in August revived photographer Elliot McGucken's copyright lawsuit over a digital publisher's use of his photos of an ephemeral lake in Death Lake, California, finding that the publisher did not make fair use of the photos by embedding them in articles.

In a published opinion, the panel reversed a California federal judge's decision granting summary judgment to Pub Ocean Ltd. in McGucken's lawsuit over its unlicensed use of 12 of his photos in a March 2019 article.

The district judge found that Pub Ocean was entitled to a fair use defense as a matter of law, but the panel disagreed, saying that the lake in McGucken's photos was "undoubtedly" the subject of the article and did not "present [his] photos in a new or different light."

The photos were also not transformed by being embedded within the text of the article, the panel said,

concluding that the article used the photos for the same purpose for which they were taken and function for which the photos had been licensed to other websites.

The case is important because it "isolates the transformative factor in fair use analysis, making clear that simply including a photo in an article — along with other third-party photos and text that simply discusses the same topics as shown in the photos — does not provide a fair use defense," according to Britt Anderson of Perkins Coie LLP.

It's "a big win for owners of photographic works, particularly independent photographers who often find their published works copied," said Anderson, noting that the appellate court's opinion "clearly explains that straightforward copying of a photo with only modest cropping and a sprinkling of associated text is not transformative for purposes of fair use analysis."

The case is *McGucken v. Pub Ocean Ltd. et al.*, case number 21-55854, in the U.S. Court of Appeals for the Ninth Circuit.

### **Bungie v. Aimjunkies.com**

Bungie Inc., the developer of multiplayer video game "Destiny 2," in July convinced a Washington federal judge to temporarily block Aimjunkies.com's sales of cheat codes, with the judge finding that Bungie would likely succeed on claims that the codes illegally reproduce its product.

Bungie filed the lawsuit in June 2021, alleging that Aimjunkies' cheat codes known as "Destiny 2 Hacks" infringed four registered copyrights on code and audiovisual creations, as well as several of the company's registered trademarks.

Aimjunkies argued the preliminary injunction bid was moot, as it hadn't distributed the codes since December 2020. But the judge found the available evidence demonstrates Aimjunkies had access to "servers from which future purchasers could download the cheat software."

In November, the district judge dismissed without prejudice counterclaims that Bungie breached the terms of service by using an alias and fake address to hide its purchase of the cheat software. The case is ongoing.

The case is *Bungie Inc. v. Aimjunkies.com et al.*, case number 2:21-cv-00811, in the U.S. District Court for the Western District of Washington.

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