Intellectual Property 2020

General Practice Review

November 20, 2020

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THE LUNCH HOUR!

We all know how this goes. A CLE over the lunch hour, our one hour "away" from the online meetings and the constant screen time. I am lucky if 50% of you are still sitting at your computer. But don't worry, I have prepared for this.

Rules:

- You MAY turn the volume on your computer up and move to the kitchen to prepare lunch.
- You MAY feel free to enjoy this learning experience.
- You SHOULD ask questions.
- You SHOULD learn just as much from listening to me as you will from reading the slides (the slides have resources for later).
- You MAY NOT unmute yourself and make us all listen to you eat your potato chips or crunchy carrots with hummus.

Intellectual Property Updates

Copyrights
17 USC

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Public Domain Day 2020

What is Public Domain Day?

Public Domain Day is the day that ~~all Intellectual Property attorneys get together and celebrate that Copyright Law gives us something to do~~ copyrighted content (books, movies, songs, etc.) enters the public domain each year. In *most* cases, this day is 95 years after the date of publication or initial copyright protection and is recognized on January 1st of each year.

Duke Law runs a "Center for the Study of the Public Domain" and they have a Web Resource that lists many "well-known" materials entering the public domain.

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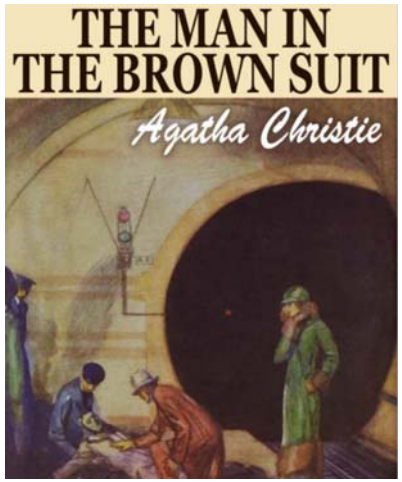
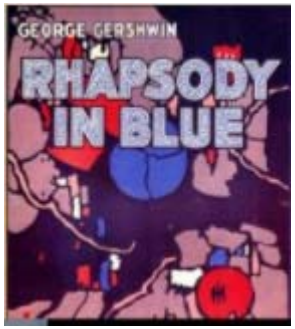
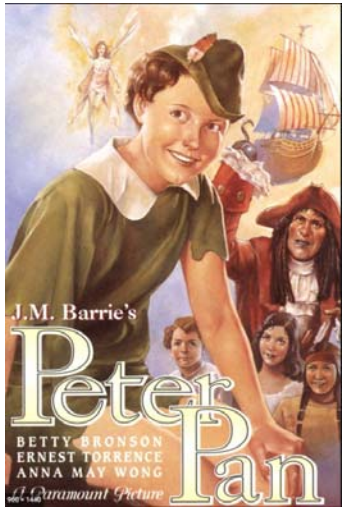
Copyright Day Resources

What content entered the public domain in 2020?







Note: Yes, I put this potentially distracting and interesting link at the beginning of my presentation because if you are going to be distracted (and that is very easy in this digital environment) it makes sense that you would be distracted by Intellectual Property content.

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Digital Meetings and ©

As we move away from in person meetings and conferences and towards digital meeting environments, we are seeing more and more use of music and other copyrighted content broadcast via Digital Meeting Services (Zoom, Teams, Skype, etc.).

Issue: Content licenses do not necessarily cover *online broadcast* or *reproduction of the content in a digital format* (i.e. – recording and saving the live content to be viewed later).

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Digital Meetings and ©

Make sure you:

- Understand your client's practices and procedures for reviewing content permissions;
- Review your client's content license agreements for permissions related to *online performance* and *digital reproductions*; and
- (Optional) Send your clients a scary list of the headlines related to ASCAP and BMI enforcing rights in live and digital venues across the country in the last 10 years.

Check out this BLOG.

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Digital Accessibility

WARNING: Not an IP issue.

Digital Accessibility

Digital Accessibility is the accessibility of content on digital devices (phone, computer, tablet, etc.) that is provided in a digital format (web, mobile application, desktop application, PDF).

Issue: As your clients move to a digital model for providing services or increase their digital offerings, make sure you are reminding them to follow ADA/WCAG (and Section 508 for federal government) requirements and best practices for Digital Accessibility.

WCAG Resource

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Digital Accessibility

WARNING: Not an IP issue.

Digital Accessibility

"alleged inaccessibility of Domino's website and app impedes access to the goods and services of its physical pizza franchises—which are places of public accommodation."
Robles v. Dominos Pizza LLC, Case No. 17-55504, (9th Cir. Jan. 15, 2019).

Ask Dominos

2200 Digital Accessibility cases filed in 2018.

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Copyrights
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Case Update

Google LLC v. Oracle America, Inc.

Dkt. No. 18-956

Question: Whether Oracle's APIs (Application Programming Interfaces) are protected under Copyright law and, whether Google's unauthorized use of Oracle APIs constitutes copyright infringement.

Issues:

- Is software "functional" to the point that it is a "method of operation" and, thus, not covered by Copyright law (perhaps by Patent Law)?
- Does the merger doctrine (only a limited number of ways to express an idea) require that software cannot be copyrighted?

Google LLC v. Oracle America, Inc.

Dkt. No. 18-956

Oral Arguments: Oral arguments were held before the Supreme Court on October 7, 2020.

Analogy to QWERTY Keyboard:

- Patented in 1867.
- Idea vs. expression.
- Compared APIs to Blueprint; even if the objective is similar (idea) they will not be constructed/designed in an identical manner (expression).

What's at Stake? A lot, probably.

- This case will determine how companies and individuals protect software development.
- Oracle claims upwards of $8.8 billion dollars in damages.

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Case Update

Georgia v. Public.Resource.Org, Inc.,

Case No. 18-1150, 590 U.S. ___ (2020).

Facts: In 2013 Carl Malamud purchased the Official Code of Georgia Annotated and published the entirety of its contents on the website public.resource.org/. Claiming copyright in the annotated code (which sold for anywhere from $400 - $1000 per copy), the Georgia Code Revision Commission filed a Copyright infringement lawsuit.

https://public.resource.org/

Spoiler Alert!

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Case Update

Georgia v. Public.Resource.Org, Inc.,

Case No. 18-1150, 590 U.S. ___ (2020).

Lower Courts:

NDGA: Because the annotations were not enacted into law; the government edicts doctrine was not applicable, fair use didn't protect the use, and the documents were not in the public domain. *The Court entered an injunction.*

11th Circuit: Relied on case law and the government edicts doctrine to find that, because the annotations "clearly have authoritative weight in explicating and establishing the meaning and effect of Georgia's laws," this was "intrinsically public domain material." *Overturned District Court ruling.*

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Case Update

Georgia v. Public.Resource.Org, Inc.,

Case No. 18-1150, 590 U.S. ___ (2020).

Question: Whether the judicially created "edicts doctrine" prevented the government officials from being considered "authors" of works if they are creating such work in their capacity to speak with the force of the law.

Holding (5-4): No valid copyright claim of protection can be asserted over the code. This would not apply to a private party that produces an annotated copy nor does it apply to certain "non-law making" government employees (professors, librarians, etc.).

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Case Update

Georgia v. Public.Resource.Org, Inc.,

Case No. 18-1150, 590 U.S. ___ (2020).

Takeaway: If you are justified in saying, "I am the law," you are not likely able to claim copyright protection in your works related to that law.

I do not endorse this as a response if you do happen to meet the fictional character, Judge Dredd.

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Copyrights
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Case Update

Frederick L. Allen v. Roy A. Cooper, III,

589 US ____ (2020).

Facts: Allen and Nautilus Productions (Allen's Company) were produced pictorial and video content related to the Queen Anne's Revenge Shipwreck.

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Case Update

Frederick L. Allen v. Roy A. Cooper, III,

589 US ____ (2020).

Facts: The State of North Carolina used Allen's videos without his consent and the two parties entered into a settlement agreement for compensation for the state's uses prior to the settlement. Allen then discovered that not only did the state continue to use his content without compensation, but the state also passed a low making all content in the state's custody a matter of public record, without restriction or limitation on use.

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Case Update

Frederick L. Allen v. Roy A. Cooper, III,

589 US ____ (2020).

Issue: Whether the Copyright Remedy Clarification Act of 1990 (CRCA) abrogated the doctrine of Sovereign Immunity with respect to copyright infringement.

Text: "To amend chapters 5 and 9 of title 17, United States Code, to clarify that States, instrumentalities of States, and officers and employees of States acting in their official capacity, are subject to suit in Federal court by any person for infringement of copyright and infringement of exclusive rights in mask works, and that all the remedies can be obtained in such suit that can be obtained in a suit against a private person or against other public entities." The CRCA amended 17 USC 511(a).

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Case Update

Frederick L. Allen v. Roy A. Cooper, III,

589 US ____ (2020).

Holding: Much like their holding in Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U. S. 627 (1999) (holding that states were not liable for patent infringement despite the PPVPRCA), the Supreme Court held that there must be (a) a clear congressional intent to abrogate, *and* (b) a constitutional underpinning for the abrogation. Here, while the Fourteenth Amendment may be an appropriate basis for abrogation (due process before depriving citizen of copyright rights, property), there was no pattern of copyright infringement such that the abrogation was "congruous and proportional" to the injury being prevented.

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Case Update

Frederick L. Allen v. Roy A. Cooper, III,

589 US ____ (2020).

Takeaway: The Supreme Court has shown Congress the way to correct these two Acts (limit to willful infringement or states that don't provide an alternate remedy). Whether Congress chooses to do so remains to be seen.

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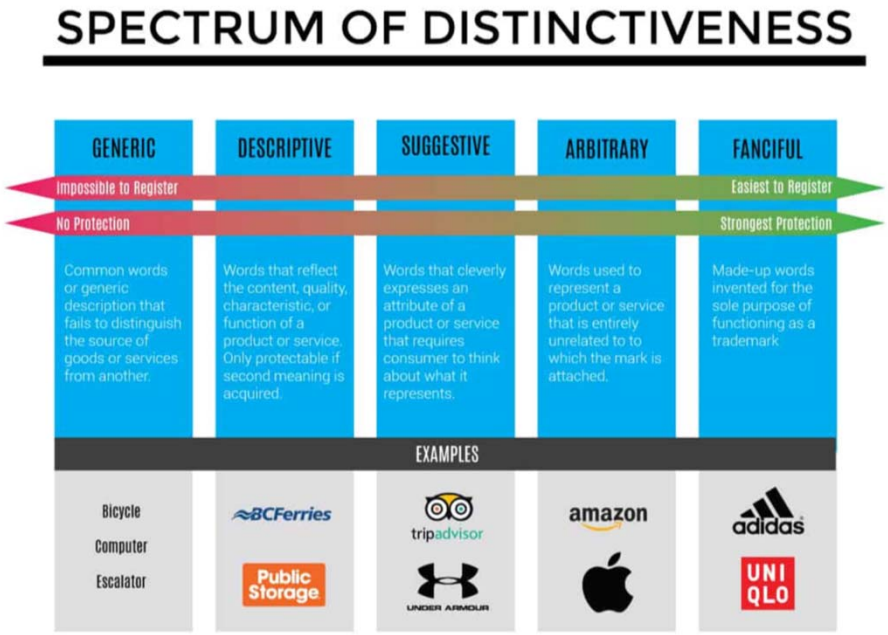
Trademarks
15 USC

Case Update

USPTO v. Booking.com B.V.

591 US ___ (2020).

Question: Whether a generic term, paired with ".com" is sufficient to qualify for trademark protection under the Lanham Act.



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Trademarks
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Case Update

USPTO v. Booking.com B.V.

591 US ___ (2020).

Holding:

The Supreme Court found that the question of the generic nature of a mark turns on consumer perception as opposed to a "per se" rule against protection for a generic ".com." The "primary significance test" (which measures the significance of the mark to the relevant public) is applicable and because 74.8% of relevant consumers saw booking.com as a brand, and not a generic name, it was entitled to trademark protection.

Trademarks
15 USC

Quick Hits

Romag Fasteners, Inc. v. Fossil, Inc., et al.,

590 US ___ (2020).

Under the Lanham Act, proof of willful infringement is not a prerequisite for recover of infringer's profits. (Romag failed to safeguard against counterfeit, Chinese fasteners being incorporated into Fossil products.

Luxottica Group v. Airport Mini Mall, LLC,

No. 18-10157 (11th Cir. 2019).

Eleventh Circuit held that a landlord can be responsible for contributory trademark infringement under the Lanham Act if the landlord has actual or constructive (willful blindness) knowledge of trademark infringement taking place on the property.

Questions?

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Thank you

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