

LUZKER & LUTZKER — LLP —

Lutzker & Lutzker Newsletter August 2021

To our clients, colleagues and friends:

We hope you are enjoying the summer and keeping both cool and safe. Through this periodic newsletter we continue to explore the many new developments in the realm of IP, privacy law, cybersecurity and artificial intelligence. Though summer days may be lazy, there is no lack of activity to discuss in this sphere.

We reported on a [copyright infringement lawsuit against Instagram](#) by photojournalists, who allege that Instagram is liable for secondary copyright infringement for facilitating the embedding of copyrighted images on third-party websites. Instagram has now filed a [motion to dismiss](#) the suit, arguing that there is no allegation that third party websites infringe the copyrights, and hence there can be no secondary infringement. This will be an interesting and important case, and we will follow it closely.

In the artificial intelligence (“AI”) arena, we look at the pandemic-fueled popularity of [virtual “try-on” features](#) that allow customers to shop for clothing, makeup, eyewear, etc. from home. This technology raises serious privacy issues related to the biometric data that is being collected.

Continuing our exploration of [legal issues in the fashion industry](#), we report on newfound disputes over copyright as the industry increasingly relies on AI to create digital-only clothes, predict consumer trends and detect counterfeit products. For example, are digital clothes like physical clothes, the designs of which are protectable only to the extent they are non-functional? Or are they akin to video games whose designs are not subject to the same usefulness hurdle and fully copyrightable once they are fixed in a medium such as software? Who among the many contributors involved owns the copyright as physical clothes are converted to digital clothes? Who owns the designs in clothes created entirely by AI? There is much sorting out of rights to do here.

Given the enormous confusion surrounding the non-fungible token (“NFT”) craze, we thought it would be helpful to look at the basics of this phenomenon, which we do in our [newest set of FAQs](#). More FAQs are on the way!

We further our dive into the [copyright issues surrounding NFTs](#) with an insight on their use as a possible remedy for copyright infringement. Because blockchain technology serves as a record of authenticity and sale, using NFTs to initially sell an art work allows any work sold without that proof to be identified as a fraud. Using the example of model Emily Ratajkowski, whose photos were appropriated by artist Richard Prince, our insight explains how, with enough name recognition and publicity, an NFT creator can potentially reclaim publicity rights and profit from their own work.

Turning to the world of patent, we report on the [Supreme Court’s decision in United States v. Arthrex](#), holding that the current appointment process for administrative patent judges is unconstitutional. The Court fashioned a creative remedy by leaving the process intact, but giving the director of the USPTO the power and discretion to review and overturn final decisions of the judges by rehearing. We will follow the implementation of this decision.

Truth and fiction are coming uncomfortably close together as reported in our [insight on posthumous](#)

[digital personas](#). The world of artificial friends imagined by Kazuo Ishiguro in his newest novel, *Klara and the Sun*, isn't so far off when we realize that AI has the capacity to create a digital version of someone who has died. In a stunning example, after our insight was posted, the [media reported on a new documentary about the late Anthony Bourdain](#) in which Bourdain "recites" words that he wrote but never spoke. The digital recreations of his voice were made possible by technology "learning" from a database of his recordings. The filmmakers never disclosed the recreation. The legal and ethical questions of posthumous digital personas are profound.

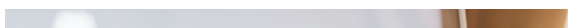
We are happy to report that [Law360 has published our article](#) by Carolyn Martin and Robert Piper examining the Epic v. Apple litigation from the trade secret point of view, with some important cautions for litigators.

Our [2016 article](#) on how a little-known provision of the Digital Millennium Copyright Act ("DMCA") can be an efficient tool for identifying anonymous online copyright infringers continues to garner attention. This provision allows copyright owners to subpoena an internet service provider ("ISP") in order to obtain "information sufficient to identify" an anonymous infringer. While costly litigation can't always be avoided, lifting the veil of anonymity can sometimes lead to removal of the allegedly infringing content and settlement of the dispute.

Finally, artists are joining the conversation about the pervasive presence of government surveillance in our lives. [We look at some contemporary examples](#) and also examine how courts are grappling with the legal issues.

Please continue to stay safe. Of course, don't hesitate to reach out to us at info@lutzker.com with any questions.

Insights from the Firm



Instagram Feed Overview



Instagram Sued Over Embedding Copyrighted Images

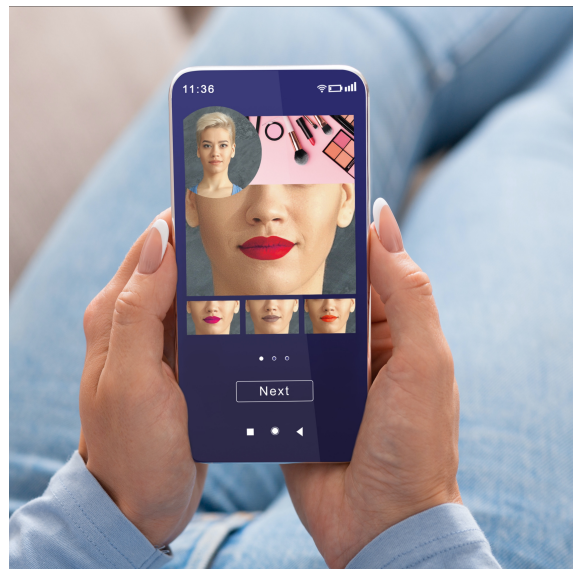
Instagram has been sued in a class action by photojournalists who allege that it is liable for secondary copyright infringement for facilitating the embedding of copyrighted images on third-party websites, offering a “buffet table of photos” for free to the detriment of the copyright owners.

[Read Here >>](#)

Virtual Try-On Features: Augmented Reality Technologies Highlight Evolving Compliance Hurdles Under U.S. Privacy Laws

Augmented reality virtual try-on features have been available publicly for years, but the COVID-19 pandemic has caused this technology to surge in popularity. More brands are using virtual try-on experiences to encourage customers to shop from home and increase conversion and sales rates, but there are regulatory hurdles that must be addressed to avoid liability related to biometric data.

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AI and Copyright in the Fashion Industry



Fashion Industry

As fashion becomes more intertwined with the digital world, artificial intelligence has emerged as a useful tool in the creation of garments, prediction of consumer trends and detection of counterfeit products. The introduction of AI to the fashion industry allows for incredible advancements, but it does come with the possibility of newfound legal disputes, specifically related to copyright.

[Read Here >>](#)

Copyright Infringement of Photographs and Reclaiming Publicity Rights Through NFTs

In the world of cryptocurrency, NFTs have been infiltrating mainstream markets and making headlines. NFTs present a variety of copyright issues because they are associated with images, videos, music, and other digital content. While NFTs do not address some arguments of fair use, they could be a possible remedy for copyright infringement due to their use of blockchain technology and ability to generate profit.

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United States v. Arthrex: Supreme Court Crafts a Creative Remedy for the



Creative Remedy for the Appointment of Patent Judges

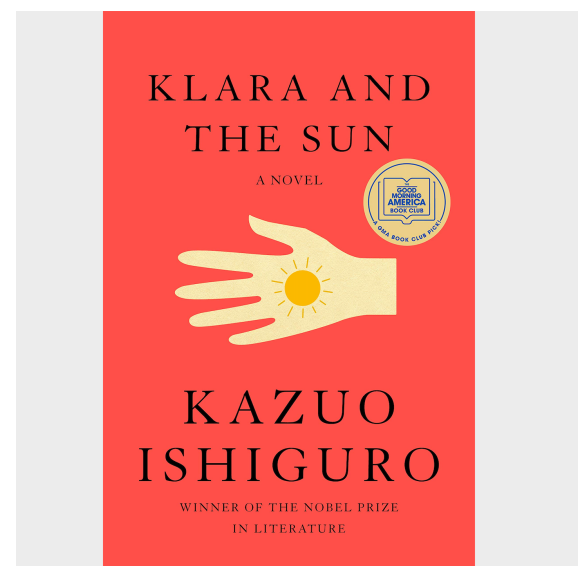
Holding that the current appointment process for administrative patent judges is unconstitutional, the Supreme Court in *United States v. Arthrex* fashioned a creative remedy by leaving the process intact but giving the director of the USPTO the power and discretion to review and overturn final decisions of the judges by rehearing. It remains to be seen how this process will be implemented. The judicial appointment process of the Trademark Trial and Appeal Board is unaffected by the decision.

[Read Here >>](#)

AI and Posthumous Digital Personas

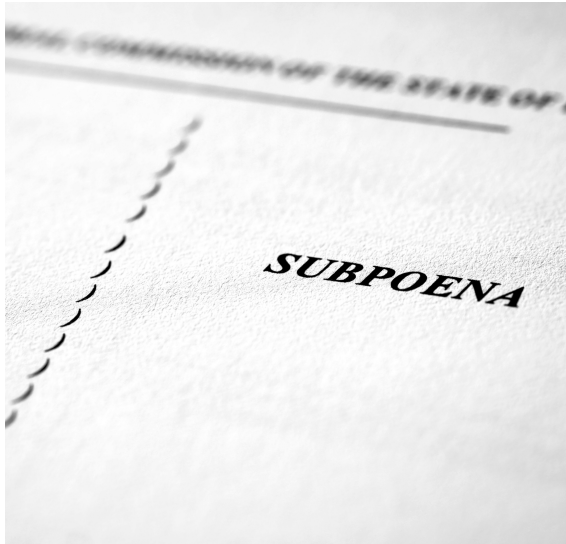
Our IP system may be ill-equipped to address emerging issues as tech companies work to create digital versions of individuals, and the ethical issues are profound. Kazuo Ishiguro's newest work of fiction is startlingly on point.

[Read Here >>](#)



The DMCA Subpoena Process: An

Unidentified Tool for



Underutilized Tool for Identifying Anonymous Infringers

An underutilized provision of the Digital Millennium Copyright Act offers copyright holders an economical alternative to filing a “John Doe” infringement suit against anonymous infringers.

[Read Here >>](#)

Artists Use Their Media to Voice Concerns About Privacy Intrusions

Sam Durant’s drone sculpture above New York’s High Line and the stunning photographs of Trevor Paglen are stark representations of the pervasive presence of government surveillance in our lives. While courts are grappling with the legal boundaries of such surveillance, artists are joining the debate.

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New From Lutzker & Lutzker LLP: FAQs

Don't forget to check out the new FAQ feature on our website. The first FAQs focus on [Privacy Law](#), [Technology and the K-12 Classroom](#), and [NFTs](#).

New topics coming soon!

Connect with us online



Arnold Lutzker and Susan Lutzker founded Lutzker & Lutzker LLP in 1998 to provide high-quality, cost-effective legal services to businesses, creative professionals and their lawyers in the creation, strategic exploitation and defense of intellectual property assets.

Drawing on their experiences in law, business and the arts, our firm's lawyers have stayed on the leading edge of digital-era issues, including online content, social media, mobile applications, cybersecurity and data privacy requirements. We advise corporate counsel on challenging intellectual property matters and also help more than 300 clients protect and manage their traditional copyright and trademark portfolios.

Questions: please email us at info@lutzker.com



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