

# LUZKER & LUTZKER — LLP —

## Lutzker & Lutzker Newsletter September 2023

To our clients, colleagues and friends:

It's hard to believe that summer is over. While life may have slowed down a bit during the last few months, there was no lack of activity in the IP world. Through this periodic newsletter, we continue to keep you informed of these relevant and exciting developments.

There are always so many interesting items to discuss that we are going to add a new feature to our website called "IP Bits and Pieces," which will contain short updates on matters previously reported on and other IP developments that we think are noteworthy. Coming soon!

First, a few updates:

- We have closely followed the [publishers' lawsuit against Internet Archive](#). On March 24, 2023, the U.S. District Court for the Southern District of New York granted summary judgment to the Publishers, rejecting Internet Archive's fair use defense. Internet Archive plans to appeal the decision.
- The decision of the U.S. Supreme Court in *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith* has sparked much discussion, with the only consensus being that the opinion was narrowly written. We examine the [state of the fair use defense in the wake of the decision](#). We also look at the [treatment of satire and parody](#) in the Warhol decision and the SCOTUS decision in *Jack Daniel's Properties v. VIP Products*.
- We have added to our series on copyright and photography with two new insights. One discusses the [options for registering multiple photographs](#) and the implications of that choice for recovering damages in cases of infringement. The other reports on the [decision of the U.S. District Court for the Central District of California in \*Vila v. Deadly Doll, Inc.\*](#) holding that a photo of a useful article of clothing with copyrighted artwork is not a derivative work.

In the realm of AI, we discuss the "[Blueprint for an AI Bill of Rights](#)" released by the White House Office of Science and Technology Policy. The Blueprint identified principles for the design, use and deployment of automated systems and artificial intelligence. These guidelines have set the stage for further discussions and actions addressed in the Insight.

Speaking of AI, [deepfake technology](#), powered by deep learning algorithms, raises significant concerns about the spread of misinformation via highly realistic and deceptive audio, images, video and text. Our insight examines ongoing efforts to safeguard against the potential harmful impact of this AI technology, asking whether such efforts will be sufficient or too late to safeguard the integrity of the 2024 elections.

Rarely does a day go by without media coverage of the [strikes by the Writers Guild of America \("WGA"\) and the Screen Actors Guild-American Federation of Radio Artists \("SAG-AFTRA"\)](#), which failed to reach new agreements with the Alliance of Motion

Picture and Television Producers (“AMPTP”). One focus of the strike is the use of artificial intelligence (“AI”) in script writing. The strike has put a spotlight on the issue of AI and its impact on the entertainment industry and the potential greater impact going forward. Our insight examines the issues at stake.

Continuing our conversation about renaming entities, we posted an insight about [Native American mascoting in K-12 schools](#). Despite the media attention given to the rebranding of professional and college sports teams and consumer products that have historically alluded to Native American culture, there are nearly 2000 K-12 schools that continue to use Native American names and imagery for their school mascots.

Our [insight on Youth Privacy](#) examines the efforts by policymakers at the federal and state levels to prioritize children’s privacy amidst the alarmingly increased risks to children’s well-being and personal information.

The [Uniform Name Dispute Resolution Policy \(UDRP\)](#) empowers trademark owners to protect their rights and regain control over domain names that infringe on their trademarks. We take a look at this efficient and cost-effective process that avoids traditional court litigation to combat trademark infringement.

Please don’t hesitate to reach out to us at [info@lutzker.com](mailto:info@lutzker.com) for more information on these developments or advice on your IP questions. And happy fall!

# Insights from the Firm

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**Fair Use Defense After  
Warhol v. Goldsmith  
SCOTUS Decision**



## By Carolyn Wimbly Martin and Sara Etemad- Moghadam

Fair use is an affirmative defense for the unlicensed use of copyrighted materials. However, fair use is a highly fact-specific analysis requiring consideration on a case-by-case basis. The Supreme Court's May 2023 decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* focused on a narrow set of issues. Following the district court's initial ruling in favor of the Andy Warhol Foundation ("AWF"), which was overturned by the Second Circuit, the Supreme Court concluded that Warhol's utilization of Goldsmith's photograph did not meet the criteria for fair use. The decision highlights the nuanced nature of fair use. Its potential implications for future cases is yet to be determined.

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## Satire and Parody in the Recent SCOTUS Decisions

By Carolyn Wimbly Martin  
and Dana Sussman

Claiming that an infringing work is a parody or satire of a copyrighted or trademarked work is an affirmative defense to infringement claims under



the fair use doctrine. In the recent Supreme Court decisions, *Andy Warhol Foundation for Visual Arts v. Goldsmith* and *Jack Daniel's Properties v. VIP Products*, the Court provided some clarification on the balance to be struck in these situations.

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## **Compilations v. Individual Copyright Registrations of Photographs**

By [Carolyn Wimbly Martin](#)  
and Dana Sussman

While not a requirement for establishing a copyright, there are many reasons for photographers to protect the intellectual property rights in their photographs through registration with the U.S. Copyright Office. Furthermore, in cases of infringement, whether the infringed images are considered a single infringement of a compilation or multiple infringements of individual photographs impacts the damages awarded. Here we discuss the registration options and the advantages of registration.

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## Copyright and Photography: Vila v Deadly Doll Holds That Photo of a Useful Article of Clothing with Copyrighted Artwork is Not a Derivative Work

By [Carolyn Wimbly Martin](#) and Dana Sussman

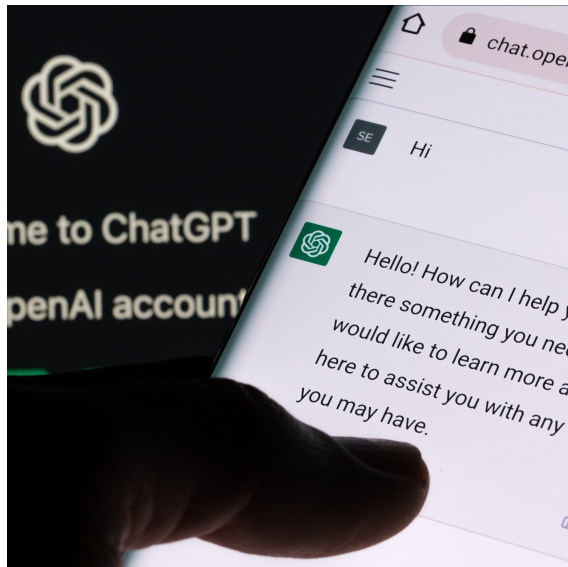
In *Vila v. Deadly Doll, Inc.*, the United States District Court for the Central District of California granted a double victory to photographer Carlos Vila on his claims for direct copyright infringement and on Deadly Doll's counterclaim that the photograph was a derivative work infringing its copyright in the artwork on the pants. The Court held that Vila's photograph is not a derivative work because it features a model wearing pants that include copyrightable artwork, but the artwork itself is not the focus of the photograph.

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## The Blueprint for an AI Bill of Rights and Its



## Impact

By [Carolyn Wimbly Martin](#)  
and Sara Etemad-Moghadam

The White House Office of Science and Technology Policy has released a “Blueprint for an AI Bill of Rights” and identified five principles for the design, use and deployment of automated systems and artificial intelligence: (1) Safe and Effective Systems; (2) Algorithmic Discrimination; (3) Data Privacy; (4) Notice and Explanation; and (5) Human Alternatives, Consideration and Fallback. While the principles laid out in the Blueprint are not enforceable, as guidelines they have set the stage for further discussions and actions. These include Senate hearings to introduce related legislation, plans by the National Institute of Standards and Technology (“NIST”) to address AI standards and Vice President Kamala Harris’s engagement with major technology companies.

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## Deepfakes and the 2024 Election

By [Carolyn Wimbly Martin](#)  
and Sara Etemad-Moghadam

Deepfake technology, powered by

deep learning algorithms, raises significant concerns about the spread of misinformation via highly realistic and deceptive audio, images, video and text. The ease of access and user-friendly nature of deepfake creation tools raise considerable risk for widespread dissemination of false information and the potential to shape the outcomes of critical elections. There are ongoing efforts by researchers, public and private institutions and the government to develop deepfake technologies and safeguard against the potential harmful impact of this AI technology. Will those efforts be sufficient or too late to safeguard the integrity of the 2024 elections?

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## The Writers Guild of America Strike, the Creative Industry and Artificial Intelligence

By [Carolyn Wimbly Martin](#) and Dana Sussman

Having failed to reach a new agreement between the Writers Guild of America (“WGA”) and the Alliance of Motion Picture and Television Producers (“AMPTP”) the WGA membership began a strike on May 2, 2023. The WGA was later joined by the Screen Actors Guild-American Federation of Radio Artists (“SAG-AFTRA”). One focus of the



strike is the use of artificial intelligence (“AI”) in script writing. The strike has put a spotlight on the issue of AI and its impact on the entertainment industry and the potential greater impact going forward.

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## Native American Mascoting in K-12 Schools

By [Carolyn Wimbly Martin](#) and Sara Etemad-Moghadam

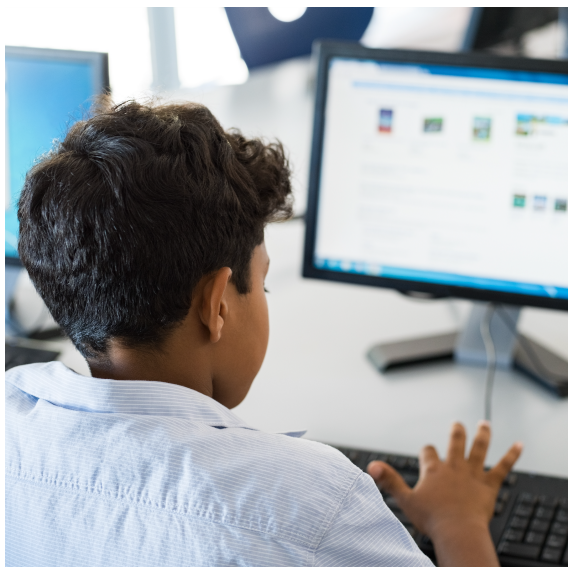
Despite the media attention given to the rebranding of professional and college sports teams and consumer products that have historically alluded to Native American culture, there are nearly 2000 K-12 schools that continue to use Native American names and imagery for their school mascots. Here we address the progress and the work that remains to be done at the state level to eliminate the use of Native American names and iconography that negatively impacts young students.

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## Youth Privacy and Data Collection Online



## By [Carolyn Wimbly Martin](#) and Sara Etemad-Moghadam

The growing Internet usage by children at alarmingly younger ages has prompted policymakers to prioritize children's privacy. While technology may offer social connection, it also poses risks to children's well-being and personal information. Children and their parents do not have a clear understanding of data collection, hindering their ability to provide meaningful consent. President Biden's 2023 State of the Union Address emphasized the need for legislation to limit Big Tech's data collection from children, ban child-targeted advertising and impose stricter data collection limits. Since then, legislation at both the federal and state level has been introduced and enacted, including California's Age-Appropriate Design Act.

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## How to Protect Your Domain Name Using UDRP Proceedings

By [Jeannette Maurer Carmadella](#) and Sara Etemad-Moghadam

The Uniform Name Dispute Resolution Policy (UDRP) empowers trademark owners to protect their rights and regain control over



domain names that infringe on their trademarks. Since its inception, the UDRP has gained significant traction for its efficiency and cost-effectiveness compared to traditional litigation in courts. When faced with the challenge of trademark infringement in the digital landscape, trademark owners have a range of options before resorting to lengthy and costly legal battles or alternative dispute resolution processes. Trademark owners can also implement best practices to fortify and protect their marks.

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## Lutzker & Lutzker LLP: FAQs

Don't forget to check out the new FAQ feature on our website, focusing on [Privacy Law](#), [Technology and the K-12 Classroom](#), [Copyright Law](#), [Trademark Law](#), [NFTs](#), [Patent FAQs](#), and the [TEACH Act](#).

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# Connect with us online







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## LUTZKER & LUTZKER — LLP —

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, artificial intelligence and data privacy. 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](mailto:info@lutzker.com)



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