

Trademark, Copyright & False Advertising Newsletter

The Case of the Public Domain: Three Lessons from Sherlock Holmes

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In *Klinger v. Conan Doyle Estate, Ltd.*, 755 F.3d 496 (7th Cir. 2014), in an opinion by Judge Posner, the Seventh Circuit clarified the interplay between copyrights in characters and derivative works, holding that characters whose copyright had expired entered the public domain even if the characters underwent development in later derivative works.

Facts

Of the 60 published works depicting Sherlock Holmes, only 10 have unexpired copyrights and are still protected—those published in 1923 or later. Plaintiff Klinger planned a collection of stories inspired by the Sherlock Holmes character. Defendant, the estate of Arthur Conan Doyle, sent a letter to plaintiff's publisher threatening to prevent distribution of any unlicensed book, convincing the publisher not to publish unless plaintiff obtained a license. Plaintiff instead sought a declaratory judgment that all story elements introduced prior to 1923 were in the public domain.

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There was an “actual controversy” because the estate had “made clear” that it would try to pressure retailers to refrain from distributing the book, and had implicitly threatened to sue plaintiff and its publisher for copyright infringement.

Jurisdiction

The estate argued that because Klinger had yet to write the allegedly infringing book, Klinger’s claim was hypothetical and, accordingly, any ruling would be an improper advisory opinion. The court disagreed, explaining that there was an “actual controversy” because the estate had “made clear” that it would try to pressure retailers to refrain from distributing the book, and had implicitly threatened to sue plaintiff and its publisher for copyright infringement. The court also rejected the estate’s argument that the suit was premature, reasoning that the question of whether the pre-1923 stories are in the public domain could be determined without any need to know the contents of the book that Klinger planned to write.

The court found no basis for the argument that later character developments could extend the protection of the earlier, “flatter” versions of the characters.

Characters in the Public Domain

The estate did not dispute that pre-1923 works were in the public domain. Instead, the estate asserted a novel theory that characters may not be copied until the copyright expires on all works “in which that character appears in a different form.” The estate argued that Holmes and Watson were complex characters, and that later stories continued to develop them. The court found no basis for the argument that later character developments could extend the protection of the earlier, “flatter” versions of the characters. “Alterations do not revive the expired copyrights on the original characters” and, therefore, the estate could claim protection “only for the incremental additions of originality” found in works written in 1923 or later. “When a story falls into the public domain, story elements—including characters covered by the expired copyright—become fair game for follow-on authors.” Accordingly, the copyrights on those elements “were not extended by virtue of the incremental additions of originality in the derivative works.”

Fees

In a later decision (2014 WL 3805116 (7th Cir. Aug. 4, 2014)), the court, using some very strong language, held that Klinger benefitted from the “very strong” presumption in favor of fees that applies following the successful defense against an allegation of copyright infringement, particularly as he accomplished a public good at personal risk to himself. The court repeatedly criticized the estate’s business model, which it called “a disreputable

business practice—a form of extortion,” and suggested that the estate’s threat to prevent distribution might have been an antitrust violation. Between the estate “playing with fire” with its threats, and a groundless, “quixotic” appeal, the court found Klinger was entitled to his appellate fees.

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TTAB Decision May Not Be Biggest Risk to Viability of REDSKINS Trademarks

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In June, in a decision widely reported in the press, the Trademark Trial and Appeal Board (TTAB) granted a petition to cancel six trademarks owned by Pro-Football Inc. and used in connection with Pro-Football's Washington Redskins football team. The TTAB held that the marks "were disparaging to Native Americans at the respective times they were registered" and, therefore, "must be cancelled." *Blackhorse v. Pro-Football, Inc.*, No. 92046185, 2014 WL 2757516, at *1 (T.T.A.B. 2014). Instead of directly appealing the TTAB's ruling to the Court of Appeals, the team's owner commenced a lawsuit on August 14, 2014 in the Eastern District of Virginia to overturn the ruling. *Pro-Football, Inc. v. Blackhorse*, 1:14-cv-01043-GBL-IDD (E.D. Va.). Unlike in an appeal, where deference would be owed to the TTAB's fact finding, in the Redskins' suit in district court, new evidence may be presented and the District Court can review the TTAB's decision *de novo*. *Swatch AG v. Beehive Wholesale, LLC*, 739 F.3d 150, 156 (4th Cir. 2014); *see also Kappos v. Hyatt*, 132 S. Ct. 1690, 1700 (2012).

What has been overlooked in much of the commentary on the TTAB's ruling is that the ruling only addresses the registrability of the REDSKINS trademarks under the federal Lanham Act. Accordingly, if the district court or, ultimately, the Fourth Circuit or Supreme Court affirms the TTAB ruling, it will result in only the cancellation of the marks' federal registrations and will not affect the marks' owner's federal or state common law trademark rights in the marks. J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 20:68 (4th ed. 2013) (collecting cases).

Federal registration of a trademark does not create trademark rights but, instead, provides substantive and procedural rights to trademark owners. Notably, registration establishes useful presumptions that make enforcing rights considerably easier. Registration of a mark on the Principal Register serves as "prima facie evidence of the validity of the registered mark . . . , of the owner's ownership of the mark, and of the owner's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate." 15 U.S.C. § 1057(b). After five years, the registration of a mark on the Principal Register becomes "incontestable" and serves as *conclusive* evidence of the mark's validity and ownership. 15 U.S.C. §§ 1064, 1115(b). Once a registration becomes incontestable, a defendant may not challenge

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the validity of the mark on certain grounds, such as mere descriptiveness or priority and likelihood of confusion. (Some other grounds, such as genericness and functionality, remain available. 15 U.S.C. § 1115(b).)

Additionally, registration can effectively serve to nationalize trademark rights even though the mark had not been used nationwide. Registration provides constructive notice of ownership nationwide, 15 U.S.C. § 1072, and, under the federal trademark law in effect since 1989, registration can be used to establish a constructive “use date” as of which a registrant can be treated as using the mark nationwide. 15 U.S.C. § 1057(c). As a practical matter, this means that a federal trademark registrant can enforce its mark against even a remote geographical user who first commenced use after the registrant’s federal trademark application date; in contrast, a common law trademark owner might be susceptible to a defense that the remote geographical user has prior rights in its geographical area of operations.

The primary harms to a trademark owner of an established, well-known mark, if its mark is cancelled, are the loss of the special remedies for stopping importation of infringing marks and the ability to seize counterfeit goods in an *ex parte* proceeding.

Registration also provides access to additional enforcement mechanisms. Federally registered trademarks can be recorded with U.S. Customs and Border Protection, and unauthorized goods bearing recorded marks can be seized at the border without the need to bring a lawsuit. 15 U.S.C. § 1124. Similarly, registration allows trademark owners to seek *ex parte* orders directing the seizure of counterfeit goods and allows for statutory damages to be recovered in cases involving counterfeit marks. 15 U.S.C. §§ 1116(d), 1117(c). Finally, registration provides a number of other subsidiary benefits, such as serving as a basis for foreign registration and permitting the registrant to participate more readily in certain “sunrise” early registration periods for new top-level domain names. Trademark Clearinghouse, *Trademark Clearinghouse Guidelines* ([Version 1.2](#), Nov. 2013).

Where a party owns an established, well-known trademark that is actively used nationwide, only a few of these added benefits of registrations are substantive. The absence of the favorable presumptions can be overcome without much effort and actual use nationwide can eliminate the benefit of the constructive-notice and use-date provisions. As a result, the primary harms to a trademark owner of an established, well-known mark, if its mark is cancelled, are the loss of the special remedies for stopping importation of infringing marks and the ability to seize counterfeit goods in an *ex parte* proceeding.

The biggest risk to the viability of the REDSKINS marks, thus, may not be the potential loss of the lawsuit challenging the TTAB ruling, but the impact of the controversy dragging on and remaining in the public spotlight. Some sports announcers and members of the press have already stated that they will no longer use the marks in referring to the team, raising questions about the long-term viability of the mark, regardless of how the lawsuit is finally resolved.



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Third Circuit: No Presumption of Irreparable Harm in Lanham Act Suits

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In a recent ruling, the Third Circuit held that there is no presumption of irreparable harm at the preliminary injunction stage in a Lanham Act suit. Although the case before the court involved false advertising brought under Section 43(a) of the Lanham Act, the court's ruling appears to apply to all Lanham Act claims, including claims for trademark infringement.

Ferring and Watson manufacture directly competing progesterone inserts for pregnant women, which are pharmaceutical products available only by prescription. Ferring alleges that one of Watson's paid consultants made various false comparative claims regarding the products during a pair of promotional webcasts directed toward doctors and other health care professionals.

The court rejected Ferring's argument that injuries to goodwill or reputation protected by the Lanham Act, being less quantifiable than an injury in a patent infringement case, warranted a different irreparable injury standard for trademark and false advertising cases.

Ferring sued Watson for false advertising under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and moved for a preliminary injunction to enjoin Watson from making further false statements. In response, Watson

conceded that certain statements were inaccurate and submitted a certification from its consultant stating that he would no longer make the statements at issue. The district court denied Ferring's motion for a preliminary injunction, holding that Ferring had failed to make a showing of irreparable harm. The Third Circuit affirmed. The court held that there was no presumption of irreparable harm in cases involving false comparative advertising, as several courts had recognized in the past. According to the Third Circuit, such a presumption is no longer viable in light of the US Supreme Court's rulings in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (holding that there was no presumption of irreparable harm when considering a motion for a permanent injunction in a patent case) and *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008) (holding that a party seeking a preliminary injunction must show that irreparable harm is "likely," not merely a "possibility"). The court rejected Ferring's argument that injuries to goodwill or reputation protected by the Lanham Act, being less quantifiable than an injury in a patent infringement case, warranted a different standard for trademark and false advertising cases. The court found that Congress intended to incorporate, rather than depart from, traditional principles of equity when it crafted the injunctive remedies available under the Lanham Act. Thus, consistent with *eBay* and *Winter*, the Third Circuit concluded that a

party seeking a preliminary injunction in a Lanham Act case must “demonstrate that she is likely to suffer irreparable harm if an injunction is not granted.” Given that Watson’s consultant had stopped making the statements at issue, and that there was no evidence that the statements were still available to consumers, the court held that there was no error in the district court’s finding that Ferring failed to demonstrate irreparable harm.

The Third Circuit’s decision is the latest in a string of decisions from federal appellate courts that have held that presumptions of irreparable harm are no longer viable after *eBay* and *Winter*. Parties seeking injunctive relief—whether preliminary or permanent, and regardless of the subject matter involved—must be prepared to make an affirmative showing that irreparable harm is likely based on the particular facts and circumstances of the case.

The case is *Ferring Pharms., Inc. v. Watson Pharms., Inc.*, No. 13-2290, 2014 WL 4194094, 2014 U.S. App. LEXIS 16426 (3d Cir. Aug. 26, 2014).

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***HathiTrust* Provides Important Guidance on “Transformative” Use and Its Relationship to Other Fair-Use Factors**

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In a significant decision addressing copyright fair use in the context of digital libraries, the United States Court of Appeals for the Second Circuit, in *Authors Guild, Inc. v. HathiTrust*, held that it was fair use for research universities to digitize full copies of millions of works to enable users to determine the number of times a particular word appears or to provide full replacement copies of the work to persons with disabilities. In doing so, the court clarified the concept of “transformative” use and its relationship to the other statutory fair-use factors. The court also analyzed issues of standing and ripeness affecting how and when authors may sue for infringement.

Background

The University of Michigan and several other research universities created the HathiTrust Digital Library (HDL), a repository for digital copies of books from the collections of colleges, universities and other nonprofit institutions that become members of HDL. The HDL made digital copies of more than 10 million works, published over many centuries and written in multiple languages. The HDL offers three uses of the copyrighted works in its collection: (1) the general public may search for a term in HDL to determine the number of times the term appears in the work, but **cannot** see any of the work’s text; (2) member libraries may provide persons with “print disabilities”—i.e., persons whose disability prevents them from effectively reading printed material (e.g., blindness)—full access to the entire

work; and (3) HDL preserves complete copies of works for its member libraries to create replacement copies of works that were lost, destroyed or stolen and cannot be obtained at a “fair” price. Separately, the University of Michigan developed the Orphan Works Project to identify and make available out-of-print works with no known copyright holder, but the university indefinitely suspended the project before launch. The district court granted summary judgment of noninfringement, based largely on HDL’s transformative uses of the copyrighted works, and dismissed several plaintiffs and the infringement claims directed at HDL replacement copies and the orphan works project on grounds of standing and ripeness.

The Statutory Fair Use Factors

Courts evaluating fair use under Section 107 of the Copyright Act, 17 U.S.C. § 107, must analyze four factors: the “purpose and character” of the defendant’s use of the allegedly infringed work; the “nature” of the infringed work; the “amount and substantiality of the portion used in relation to the copyrighted work as a whole”; and “the effect of the use on the potential market for or value” of the work.

Transformativeness and the Nature of the Use

Turning to the first factor, the Second Circuit found that HDL’s text-searchable database is a “quintessentially transformative” use, in that “it does something more than repackage

or republish the original copyrighted work” by “add[ing] something new, with a further purpose or different character, altering the first with new expression, meaning or message.” Users do not see any of the work’s actual text or images, and authors do not “write with the purpose of enabling text searches of their books.” Although the court affirmed the district court’s holding that the use was transformative, it rejected the district court’s reasoning, making clear that “a use does not become transformative by making an ‘invaluable contribution to the progress of science and cultivation of the arts.’” “Added value or utility is not the test: a transformative work is one that serves a new and different function from the original work and is not a substitute for it.”

“Added value or utility is not the test: a transformative work is one that serves a new and different function from the original work and is not a substitute for it.”

By contrast, the court reversed the district court’s holding that HDL’s making available full copies of works for disabled users was transformative, holding that changing the format of the works so that the disabled could access them merely “enables a larger audience to read those works, but the underlying purpose of HDL’s use is the same.” The court, however, held that, while not transformative, accessibility for the disabled was still a valid fair use purpose because both the Supreme Court, in the *Sony Betamax* case (464 U.S. at 455 n.40), and the Copyright Act’s legislative history so indicated.

Remaining Factors

With respect to the remaining factors, the court held that the nature of the copyrighted work was of limited relevance as to the transformative use of the works to search for terms within HDL, but weighed against fair use because works of all kinds (e.g., fiction and nonfiction) were copied.

Regarding the third factor—the amount and substantiality of the work used—the court held that the copying was “not excessive” because it was “reasonably necessary” to enable the full-text search function and for use by the disabled. The court further held that the making of four copies—for two servers to avoid overburdening a single server and for two backup tapes, which are disconnected from the Internet and placed in separate secure locations so the data could be restored in the event of a disaster causing large-scale data loss—was “neither excessive or unreasonable in relation to the purposes” of the multiple copies.

The circuit court affirmed that, under the Copyright Act, third parties lack standing to sue on behalf of other copyright holders.

The court held that the fourth factor—the effect of the use upon the potential market for the copyrighted work—also weighed in favor of fair use. This factor “is concerned with only one type of economic injury to a copyright holder: the harm that results because the secondary use serves as a substitute for the original work,” meaning “impairment to a

traditional, as opposed to a transformational, market.” Even if libraries were willing to pay for licenses, such lost license fees would not constitute harm under the fourth factor “because the full-text function does not serve as a substitute for the books that are being searched.” As for making copies available to the disabled, that use did not adversely affect the market for the copyrighted works because the court found that publishers rarely make books available for readers with disabilities, and authors often forgo royalties from such books.

Standing and Ripeness

The court also resolved several issues of standing and ripeness that may guide future plaintiffs. The *HathiTrust* plaintiffs included both individual authors and authors’ associations. The circuit court affirmed that, under the Copyright Act, third parties lack standing to sue on behalf of other copyright holders. Four associations representing foreign copyright holders, however, did have standing, because foreign law granted to them the exclusive right to enforce copyrights of their members. The court held that the plaintiffs lacked standing to challenge HDL’s providing replacement copies to libraries because there was no showing that any particular works of the plaintiffs would be “irreplaceable” at a fair price, such that they might be replaced by HDL.

Finally, because the Orphan Works Project had been suspended prior to its launch, the court determined that the plaintiffs’ claims were not yet ripe for adjudication.

Conclusion

The court’s decision in *HathiTrust* provides important guidance as to the meaning and scope of “transformative” use and how the transformative nature of a use relates to the other fair use factors. The court’s limitation of the “lost license” theory to only those uses that could substitute for the original work may make it more difficult to demonstrate market harms in cases involving transformative uses. Left for another day are other issues involving libraries’ digitization of copyrighted works, such as whether the for-profit use of digitized copies that do not substitute for the original can be fair use or whether providing copies to replace lost, stolen or destroyed copies can meet the standards of fair use.

The decision is *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).



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Supreme Court to Decide Whether Trademark “Tacking” Is an Issue of Fact or Law

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Courts have long recognized the trademark “tacking” doctrine, which allows a party to make minor changes to its mark over time while maintaining priority rights dating back to the original mark’s first use. Courts generally agree that to qualify for tacking, the new mark must be the “legal equivalent” of the old mark and the marks must create the same continuing commercial impression. But courts are split as to whether the issue is properly characterized as one of fact (for the jury’s determination) or one of law (for the court’s determination). During its October Term 2014, the US Supreme Court is poised to resolve the split when it decides *Hana Financial, Inc. v. Hana Bank* (No. 13-1211).

Under Ninth Circuit precedent, tacking is considered an issue of fact.... The Sixth and Federal Circuits both consider it to be an issue of law.

In *Hana Financial*, respondents began doing business in the United States in 1994 under the mark HANA OVERSEAS KOREAN CLUB. (Respondents’ ads from that time displayed “Hana Bank” in Korean, but not in English.) The following year, petitioner began using

(and later obtained US trademark registration for) the mark HANA FINANCIAL. In the early 2000s, respondents attempted to register HANA BANK as a trademark, but the application was denied by the U.S. Patent and Trademark Office, at least in part, as a result of a likelihood of confusion with petitioner’s HANA FINANCIAL mark. Nevertheless, respondents began operating in the United States under the name HANA BANK. Petitioners sued respondents for trademark infringement, seeking to enjoin respondents’ use of the HANA BANK mark.

Under Ninth Circuit precedent, tacking is considered an issue of fact. Accordingly, the issue of priority was tried to a jury, which returned a verdict for respondents. The Ninth Circuit affirmed, holding that petitioner had not met the high standard of showing that the jury’s verdict was unreasonable in light of the evidence presented at trial. The Ninth Circuit acknowledged that there was a circuit split on the characterization of the tacking doctrine—the Sixth and Federal Circuits both consider it to be an issue of law—and noted that the result might have been different if the court were considering the issue as a matter of law.

In June, the Supreme Court granted the petition for a writ of *certiorari*. The case will be argued on December 3, 2014. Depending on how the Court rules, it could have implications for another longstanding circuit split in federal trademark law: whether the likelihood-of-confusion inquiry is an issue of fact or whether it is, at least in part, an issue of law. This issue, which has been addressed by all regional circuits and the Federal Circuit, is currently the subject of a 10–3 circuit split. (See Respondents’ Brief in Opposition at 16–17.)



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Supreme Court to Consider Preclusive Effect of TTAB Ruling on Likelihood of Confusion

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If the Trial Trademark and Appeal Board (TTAB) has found a likelihood of confusion between two marks, should that finding have preclusive effect—or, alternatively, be given some deference—in a subsequent trademark infringement case in federal court? The Supreme Court will weigh in on that question in *B&B Hardware v. Hargis Industries, Inc.* (No. 13-352). The district court in the case declined to give preclusive effect (or any deference at all) to the TTAB's ruling that there was a likelihood of confusion between the parties' marks, a ruling that was affirmed by the Eighth Circuit. Earlier this year, while a petition for a writ of *certiorari* was pending, the Supreme Court asked the Solicitor General's office to file a brief expressing the views of the United States. The Solicitor General's *amicus* brief, which was filed in May, takes the position that the Eighth Circuit erred in declining to apply claim preclusion to the likelihood of confusion analysis performed by the TTAB. The Supreme Court thereafter granted the *cert.* petition, and the case is now scheduled to be argued in the Court's October Term 2014.



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Trademark, Copyright & False Advertising

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