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The Biggest Copyright Decisions Of 2024: A Midyear Report

By **Ivan Moreno**

Law360 (July 25, 2024, 3:03 PM EDT) -- The justices ruled there's no time limit for how far back copyright plaintiffs can pursue infringement damages as long as their claims are timely, and an Ohio jury said video game developers didn't infringe a tattoo artist's works by depicting the images on basketball players. Here's a look at some of the most notable copyright decisions so far in 2024.

Warner Chappell Music Inc. et al. v. Sherman Nealy et al.

The only copyright case the U.S. Supreme Court considered this term had intellectual property attorneys on the edge of their seats about a question that has long been a topic of debate: Does the Copyright Act limit potential damages to the three-year statute of limitations to bring a suit, or can plaintiffs reach for more under the judicially created discovery rule, which says the clock starts ticking the moment an alleged infringement is discovered, rather than when it happened?

The justices have never directly addressed the propriety of the discovery rule, and they skipped the question again in this case, much to the chagrin of some attorneys. The justices in May **concluded** instead that the Copyright Act "includes no time limit on monetary recovery," provided a plaintiff files a timely claim — and that could be within three years of discovering an alleged infringement that occurred 10 years prior, for example.

"That really does expand the potential for lawsuits, but it kicks the can down the road as to when a copyright claim accrues and the viability of the discovery rule," said Matt Rizzolo, a partner at Ropes & Gray LLP.

Florida music producer Sherman Nealy and his company sued Warner Chappell Music Inc. and Artist Publishing Group LLC in 2018 after his release from prison, claiming the music companies used songs he owns without his permission. The music companies had licenses for the songs, but Nealy maintained in his complaint that his former business partner finalized those licenses without his knowledge during his imprisonment from 1989 to 2008 and 2012 to 2015.

The justices affirmed an Eleventh Circuit ruling that said Nealy could recover damages for injuries that allegedly happened more than three years before he sued. That ruling created a split with the Second Circuit, which held in 2020 that there was a three-year cap on damages even if the discovery rule applied.

"There was a lot on the line in terms of whether or not the court was going to say whether the discovery rule applies. I think there was some hope that there would be clarification on that issue, but then [the justices] punted," said Ivy Estoesta, director of the mechanical and design practice group and trademark and brand protection practice at Sterne Kessler Goldstein & Fox PLLC.

However, a dissenting opinion from Justice Neil Gorsuch, joined by Justices Samuel Alito and Clarence Thomas, strongly suggested that they're ready to take a case that directly addresses the discovery rule and questioned whether it even exists.

"Nothing requires us to play along with these particular parties and expound on the details of a rule of law that they may assume but very likely does not exist," Justice Gorsuch said.

The case is Warner Chappell Music Inc. et al. v. Sherman Nealy et al., case number 22-1078, in the Supreme Court of the United States.

Griner et al. v. King et al.



Former Iowa Rep. Steve King's campaign committee was ordered to pay \$750 to Laney Griner, whose son became known as the fist-pumping "Success Kid," for using the copyrighted image for political fundraising. (Court Documents)

Former Iowa U.S. Rep. Steve King ran into legal trouble with the wildly popular fist-pumping "Success Kid" meme when he used it for campaign fundraising, prompting an Eighth Circuit panel to conclude that the former congressman did not have a fair use defense after last year's Supreme Court's decision in [Andy Warhol Foundation v. Goldsmith](#).

In June, an Eighth Circuit panel said in a precedential decision that King's campaign was primarily using the image for a commercial purpose, seeking "to exploit the copyrighted material, for financial gain, without paying the customary price."

"Because the [campaign] committee's meme was a 'commercial use' of the Success Kid template, a 'particularly compelling justification is needed'" for a fair use defense to make it through the courts, wrote U.S. Circuit Judge Duane Benton for the majority, citing a line from Justice Sonia Sotomayor's majority opinion in last year's Warhol decision.

"I was a little surprised that the court ruled in favor of the plaintiff in this particular case because it's a political ad. Of course political ads are not in the preamble to fair use, but there's at least in my mind some First Amendment leeway for using things in political ads," said Dori Hanswirth, a partner who co-leads Arnold & Porter Kaye Scholer LLP's technology, media and telecommunications industry group.

The Eight Circuit affirmed an Iowa jury's verdict against King, which directed his campaign committee to pay the statutory minimum of \$750 to Laney Griner, the mother of the "Success Kid."

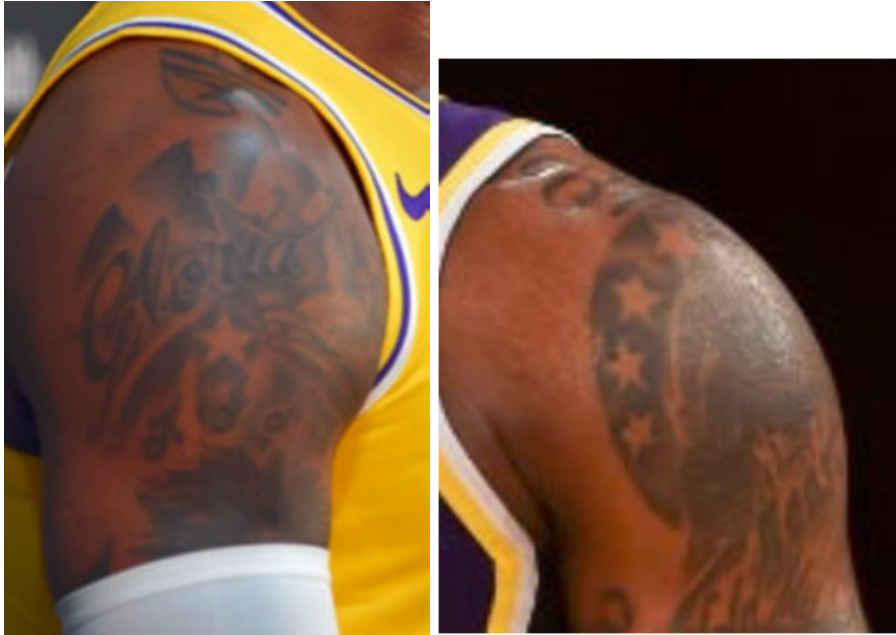
Griner took the photo of her then 11-month-old son in 2007, and it quickly became a popular internet meme. She registered a copyright of the photo and has licensed it to several companies, including Microsoft and Coca-Cola, according to the appeals panel. At the same time, internet users have also used it "billions" of times, the panel said.

King argued in his appeal that his committee "had an implied license" as a result of the meme's widespread use, but the appeals panel didn't buy it.

"Regular people putting memes up on their socials, should they worry? I mean, probably not," Hanswirth said. "But once you associate that use with any kind of money-making venture, even if it is purely a fundraiser for an extremely good cause, you have triggered the commercial use aspect of this."

The case is Griner et al. v. King et al., case number 23-2117, in the U.S. Court of Appeals for the Eighth Circuit.

Hayden v. 2K Games Inc. et al.



The makers of the video game series NBA 2K won a trial in April when jurors rejected arguments from a tattoo artist who said the depiction of images he inked on players shown in the game infringed his copyrights. Two tattoos of superstar LeBron James were at issue — the first bearing the name of James' mother, Gloria, and the second one showing five stars on his left shoulder to signify each of the superstar's best friends. (Court Documents)

An Ohio federal jury concluded in **April** that the makers of the video game series NBA 2K had an implied license to include the tattoos that appear on LeBron James in the game, rejecting claims of copyright infringement from the artist who inked the images on the basketball superstar.

James Hayden sued 2K Games Inc. and Take-Two Interactive Software Inc. in 2017 over six tattoos he inked on three NBA players — James, Danny Green and Tristan Thompson. By the time the trial started, however, the only tattoos that remained in dispute were two that Hayden drew on James after the court **ruled** that the other tattoos were improperly registered when Hayden filed his complaint.

Hayden's case marked the first time a jury found that a tattoo artist granted an implied license to the person being tattooed to publicly show the tattoo, according to Darius Gambino, partner and chair of the sports and entertainment practice at Saul Ewing LLP.

"The court found that LeBron James could transfer his implied license to the NBA and [National Basketball Players Association], and that those organizations could license the game developer Take-Two," Gambino said. "I think going forward we will see more game developers charged with copyright infringement raising implied license as a defense. The ruling also clears the way for more photorealistic depictions of individuals within games."

It was not the first time Take-Two was sued for including tattoos of an athlete in a video game. In **2022**, an Illinois jury found that World Wrestling Entertainment Inc. and Take-Two had to pay a tattoo artist nearly \$4,000 because the depiction of her tattoos on professional wrestler Randy Orton in a game was not fair use.

"That jury decision was completely opposite the one in Hayden," said Barry Werbin, counsel at Herrick Feinstein LLP. "Based on pre-trial motions and decisions in these cases, there's a split among district courts on fair use defenses in these video game cases, which will have to await future circuit decisions."

The case is Hayden v. 2K Games Inc. et al., case number 1:17-cv-02635, in the U.S. District Court for the Northern District of Ohio.

Larry Philpot v. Independent Journal Review

A three-judge panel of the Fourth Circuit held in a published **February** opinion that a conservative news website did not make fair use of a Ted Nugent photo, reversing a Virginia federal judge's finding that the Independent Journal Review could avoid copyright infringement.

The IJR used a picture from Larry Philpot to accompany an article titled "15 Signs Your Daddy Was a Conservative." Nugent's photo was placed with "Sign 5," which said, "He hearts 'The Nuge.'" U.S. District Judge Anthony John Trenga concluded that was enough to find the IJR's use of Philpot's photo "transformative" because it had placed the picture in a new context with the article's list.

The Fourth Circuit was not convinced. Saying the Supreme Court's Warhol opinion provided "helpful guidance," the panel's decision was straightforward.

"Here, as in *Warhol*, Philpot took the photo to capture a 'portrait' of Nugent, and IJR used the photo to 'depict' the musician. Accordingly, the two uses 'shared substantially the same purpose,'" said U.S. Circuit Judge James Andrew Wynn, writing for the panel. Judge Wynn added that IJR did nothing to transform the photo "beyond cropping the negative space."

Those facts made it an easy call for the Fourth Circuit, said Hanswirth of Arnold & Porter.

"All the newspaper did here was take his picture and kind of comment on Ted Nugent's conservative values or positions," she said. "They didn't add any new meaning to the photograph itself. They were just using the photograph as an illustration about who they were talking about."

The case is *Philpot v. Independent Journal Review*, case number 21-2021, in the U.S. Court of Appeals for the Fourth Circuit.

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