

Media, Entertainment and First Amendment Newsletter, May 2021

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PRACTICES Anti-SLAPP and First Amendment Rights, Intellectual Property Litigation, Patents, Media and Entertainment Litigation, Streaming Media, Copyright, Intellectual Property, Litigation, Media Entertainment and Sports

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A Balancing of 'Incomparable Interests:' The *Pickering* Test and First Amendment Rights of Government Employees

Once used mainly to describe a discontinued television show or rained-out event, “cancelled” has now taken on a new meaning. In today’s “cancel” culture, “a careless comment can ruin reputations and crater careers that have been built over a lifetime.” *Moser v. Las Vegas Metro. Police Dep’t*, 984 F.3d 900, 911–12 (9th Cir. 2021) (Lee, J.). Of course, “for private employers, it is their prerogative to take action against an intemperate tweet or a foolish Facebook comment. But when the government is the employer, it must abide by the First Amendment.” *Id.* So what happens when government employees make divisive comments? Well, courts say, “it depends.”

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Copyright Case of the Century Decided: Supreme Court Rules in Google’s Favor in \$9 Billion Software Dispute

At long last, and after more than a decade of litigation, the United States Supreme Court has ruled in the multi-billion dollar copyright dispute between Google LLC and Oracle America, Inc. In a matchup that could be described as Goliath vs. Goliath, the technology giants waged war for years over Google’s unlicensed use of Oracle’s Application Programming Interfaces (“API”) in early versions of its Android smartphone platform. In a case involving two jury trials, two Federal Circuit appeals, and two petitions for certiorari to the Supreme Court, both sides had wins and losses along the way, but Google ultimately prevailed before the Supreme Court and was absolved of liability.

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Federal Courts of Appeals Paring Down Transformative Use: Two Recent Copyright Fair Use Decisions (Not Named *Google v. Oracle*)

Although the Supreme Court’s decision in *Google v. Oracle* may be commanding most of the spotlight these days, it is not the only recent decision likely to have a significant impact on copyright fair use. Over the past few months, the Second and Ninth Circuit Courts of Appeals have also waded into the legal morass of fair use, providing additional guidance regarding this notoriously murky area of copyright law. In both cases, the appellate courts reversed lower court summary judgments based on fair use, and taken together, these cases may further define the outer limits of the fair use defense, especially in the context of “transformative uses” of underlying works.

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What Are Standard Essential Patents and Why Do I Need to Know About Them?

When you woke up this morning, you probably unplugged your cell phone from its charger, looked at it, and saw a Wi-Fi icon at the top. Maybe over breakfast, you watched a couple of clips from the news. Just like that, without even thinking about it, you have used multiple technologies covered by standards, and those everyday actions implicated hundreds of standard essential patents, or SEPs. Broadly speaking, a standard is a document or a technology that is defined by a standards body in a standard-setting process.

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