

COPYRIGHT RAGNARÖK

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INTRODUCTION: COPYRIGHT RAGNARÖK *Or Days of Future Passed?*

In Norse mythology, Ragnarök was not the resurrection of Thor's evil sister Hela, as depicted in the recent Marvel movie. Instead it was about the final battle of the old gods, their death and the rebirth of the world. Similarly (well, almost), not a year goes by that we do not hear the drumbeat for new copyright laws to replace the ones we have now. More so, we seem to be moving toward a civil law regime aimed at dealing with past technological developments which, we are told, threaten the foundations of copyright; copyright Ragnarök. Of course, history (and copyright law case books), teach us that, from their beginning with the promulgation of Statute of Anne in 1710 copyright statutes have been engaged in a mostly futile effort to keep up with technology.

The Year of Our Lord 2017 has been no different. We have again been treated to weekly calls for copyright reform. Meanwhile, lawyers and judges have had the difficult job of addressing real world copyright disputes on a daily basis and applying the law as it exists today. And this is complicated stuff. Unlike civil law systems, our courts are required to adjudicate disputes not just based on statutes, but also on the common law and the First Amendment to the United States Constitution. This is messy work because, regardless of the protections or prohibitions of any statute, they cannot trump the First Amendment or its first cousin, fair use.

This is a snapshot of the most significant copyright cases of the past year which may seem about as hard to take as a selfie. All you have to do is Westlaw "copyright", see what cases pop up, read 'em, summarize 'em, and you're done. No problemo. But what's hard is providing the context for these decisions, digesting them, and then attempt to understand which way the music is going. After going through this process, this article will recon the battlefield between copyright and fair use or "quien es mas macho?"

I. COPYRIGHT v. THE FIRST AMENDMENT AND FAIR USE: *QUIEN ES MAS MACHO?*

At first impression it appears that copyright had the upper hand this year, but that's not what happened--- there was a Joker in the game. The Joker was contract law and its presence usually determined the winner.

A. CONTRACT AND QUASI-CONTRACT CASES

1. Calling Dr. Phil

There's a tectonic difference in the cases where there was a contract between the parties in place and where there was not. Courts are enforcing contracts, such as in the Dr. Phil case, *Peteski Productions, Inc. v. Rothman*, 5:17-CV-00122-JRG (E.D. Tex. August 30, 2017). Peteski, Dr. Phil's production company, sued Rothman, a former segment director for the show, for copyright infringement. The stated reason was that Rothman had recorded copyrighted unaired footage of the show on her iPhone to memorialize a "bona fide example of Dr. Phil's conduct," which she later used to support her claims in a California state court. Peteski also argued that this was in violation of Rothman's confidentiality agreement.

When Rothman moved to dismiss Peteski's action in a Texarkana Federal Court, the Court agreed with Peteski that fair use was not a defense based primarily on the three amigos of fair use law, the United States Supreme Court's decisions in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S.539 (1985); and *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). Explaining that Rothman's actions were self-serving, not intended for the public good, and not transformative; the Court weighed the fair use factors incorporated in 17 U.S.C. §107 in favor of Peteski, denied Rothman's motion to dismiss and granted a summary judgment for Peteski, *sua sponte*, that Rothman's recording of Dr. Phil was not a fair use.

2. Baila Esta Demanda

Meanwhile, down south on I-59, Abraham Quintanilla, Jr., the father of the late Tejano Singer Selena sued her widower, Chris Perez, arguing violations of Perez' alleged agreement:

"that all rights, title and interest in and to the Entertainment Properties of every kind and nature without limitation are exclusively owned by and belong to Abraham (*Quintanilla, Jr.*), throughout the world in perpetuity without restriction. Abraham has the exclusive authority to exploit all 'Entertainment Properties,' in his sole discretion, or to refrain therefrom, subject only to an obligation to account to the Parties as set forth below." *Perez v. Quintanilla*, 2017 WL 3273774 (Tex.App.—Corpus Christi 2017) (Appellate Brief).

Quintanilla claimed that Perez violated this agreement when he wrote a book titled *To Selena With Love* in 2011 and, more recently contracted with a production company to make a film or television series based on the book. *Perez, supra*.

Perez moved to dismiss the lawsuit pursuant to the Texas Anti-SLAPP Act under Chapter 27 of the Texas Civil Practices and Remedies Code. The motion was denied by the trial court and is under appeal. *Perez, supra*.

3. (Not So) Free Bird

The court's denial of Perez' Anti-SLAPP motion to dismiss is consistent with the New York District Court's decision in the Lynyrk Skynyrd case, formally known as *Ronnie Van Zant, Inc. v. Artimus Pyle*, 17 Civ. 3360, Aug. 28, 2017. After a bench trial, the court granted the Plaintiffs a permanent injunction enforcing the "blood oath" taken by the surviving band members not to perform as Lynyrd Skynyrd ever again as modified by a later consent agreement to end a previous lawsuit between the band members, together with costs, and attorneys' fees. When the former drummer for the band became heavily involved with a film about the band's airplane crash in 1977, initially titled *Free Bird*, the drummer and the film's production company were sued.

In granting the permanent injunction, the Court found that the drummer was bound by the consent agreement and extended the injunction's application to the production company so that the injunction's purpose could not be circumvented. The Court dismissed the defendants' argument that the film was historical and entitled to first amendment protection because the drummer had bargained away his first amendment rights. The film was being produced with the unlawful help of the drummer, the film was really about Lynyrd Skynyrd, was being made without authorization to use the names of Ronnie Van Zant or Steven Gaines.

4. Preemption in the 5th

In a preemption case, the Fifth Circuit Court of Appeals affirmed a jury verdict in an unfair competition case, holding that the breach of a confidential relationship involves an extra element not found in copyright law. In an opinion written by Judge Gregg Costa, the Court in *GlobeRanger Corp. v. Software AG USA Inc.*, 836 F.3d 477 (5th Cir. 2016), ruled that a claim based on the misappropriation of inventory management software was not preempted by the copyright law. In so holding, the Fifth Circuit exhaustively reviewed the many recent cases on copyright preemption and held that trade secrets taken through the breach of a confidential relationship or via improper means were substantially different state law torts and therefore not preempted by copyright law. However, the same court—and same author of the opinion—arrives at a different result when contract law is not in play.

B. COPYRIGHT WITHOUT CONTRACT

1. Back to the 5th

When a contract is not in play, copyright law was the betting favorite and this may be a trend. Unlike the decision in *GlobeRanger, supra*, the Fifth Circuit, in another opinion by Judge Costa, held that in *Ultraflo Corp. v. Pelican Tank Parts, Inc.*, 845 F.3d 652 (5th Cir. 2017), that an unfair competition claim was preempted by copyright law. *Ultraflo* involved an unfair competition by misappropriation claim under Texas Law. The plaintiff alleged that Pelican, a competitor, "stole its drawings showing how to design valves and then used them to make duplicate valves." *Ultraflo*, at 653. After a jury rejected its other claims, the plaintiff appealed the trial court's dismissal of its claims for misappropriation of trade secrets because they were preempted by copyright law. The Fifth Circuit affirmed, while also noting that this decision was in accord with the holding in *GlobeRanger, supra*, that a claim under the Texas trade secrets law was not preempted. *Ultraflo, supra*, at 659, f.1.

2. The Turtles' Court House Tour

It also appears that copyright has the upper hand in the current War of the Pacific known as The Turtles Cases. Sound recordings of music (as opposed to music compositions) were not covered by federal copyright law until 1972. Sirius XM, which is a satellite and internet radio broadcaster, did not obtain licenses for pre-1972 sound recordings before playing them on their stations. To do this, Sirius XM also made back-up or buffer copies of these recordings.

3. New York, New York

Since they had not authorized Sirius XM to broadcast their recordings, the members of the popular 1960's band known as The Turtles, sued in various states through their corporation, Flo & Eddie Inc., for unfair competition and common law copyright infringement of their pre-1972 recordings. After the New York Court of Appeals responded to the Court's certification that New York common law did not recognize a right of public performance for creators of pre-1972 sound recordings, the Second Circuit reversed the denial of Sirius XM's motion for summary judgment and remanded the case to the District Court with instructions that Flo & Eddie's claims be dismissed with prejudice. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 849 F.3d 14 (2nd Cir. 2017).

4. Floridays

The Second Circuit's opinion, based on New York Law, was not the first reported opinion in this coast-to-coast legal battle. In 2016, after Sirius XM was granted a summary judgment against Flo & Eddie's copyright infringement claims in district court, the Eleventh Circuit weighed in on the issue of copyright protection for pre-1972 sound recordings under Florida law. After discussing a 1943 Florida case involving magic tricks, as well as Pennsylvania state law, the Eleventh Circuit certified four questions on Florida state copyright law to the Florida Supreme Court. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 827 F.3d 1016 (11th Cir. 2016).

In October 2017, the Florida Supreme Court combined the first two questions into one determinative question: "Does Florida common law recognize the exclusive right of public performance in pre-1972 sound recordings?" and answered "no." *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2017 WL 4837765 (Fla. 2017). The Florida Supreme Court cited statutes which incorporated the "general American doctrine" and provided that the public sale of a sound recording extinguished any common law rights to restrict the commercial use made of a recorded performance.

Based on this finding, the Florida Supreme Court made quick work of whether the common law prohibited Sirius XM from making back-up and buffer copies of the recordings. Based on the holding that the ultimate use of the copies was permissible, again the answer was "no." Not surprisingly, because the Court had already found that no property interest had been violated; Flo & Eddie took a third strike on the last question: "Whether there existed a common law cause of action for unfair competition/misappropriation, common law conversion, or statutory civil theft under Florida statutory law."

C. Meanwhile, in LA LA

However, aided by a 1982 California statute that specifically addressed the copyrights to pre-1972 recordings, Flo & Eddie had success in the first case of the trilogy. In *Flo & Eddie v. Sirius XM Radio, Inc.*, 2014 WL 4725382 (C.D. Cal 2014), the Court granted their motion for summary judgment against Sirius XM's unauthorized public performance of The Turtles' songs based on a statute which provided as follows:

"The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording." Cal. Civ.Code § 980(a)(2). Section 980(a)(2). *Flo & Eddie, Inc.*, at p.3.

Having no similar law in their states, the courts in New York and Florida have not followed the earlier California decision, so it's safe to say that in the absence of a statute or precedent to the contrary, courts will not create a common law prohibition against the unauthorized public performance of pre-1972 music.

1. The Cheerleader Chronicles

But enough of Flo & Eddie already! And who really cares about geeky stuff like pre-1972 recordings? Let's move on to the Super Bowl of 2017 copyright cases—the United States Supreme Court's decision in *Star Athletica v. Varsity Brands*, 137 S.Ct. 1002 (2017). Here again there was no contract on the playing field; only cheerleaders and their uniforms. Clothing and copyright have never played well together, presenting some of the most challenging cases for the courts. *Star Athletica* was no exception.

Varsity Brands was the owner of some 200 U.S. copyright registrations for its designs on cheerleader uniforms. Here are some of their designs in living color:



It sued competitor Star Athletica in U.S. District Court when it began manufacturing uniforms with similar designs. Star Athletica moved for summary judgment, arguing that the designs “did not qualify as protectable pictorial, graphic, or sculptural works” under 17 U.S.C. §101. The summary judgment was granted by the District Court and reversed by the Sixth Circuit Court of Appeals. After granting certiorari, the U.S. Supreme Court affirmed the Sixth Circuit’s decision. *Star Athletica*, at 1008.

The majority opinion by Justice Thomas first describes, and then adopts, the “separability” analysis used by the Copyright Office, meaning that only a feature that can be separately identified from, and exist independently of, a useful article (here, cheerleading uniforms) is eligible for copyright protection:

“The ultimate separability question...is whether the feature for which copyright protection is claimed would have been eligible for copyright protection as a pictorial, graphic, or sculptural work had it originally been fixed in some tangible medium other than a useful article before being applied to a useful article.” *Star Athletica*, at 1011. However, the Court was careful to limit the copyright protection available for the design on the cheerleading uniforms:

“To be clear, the only feature of the cheerleading uniform eligible for a copyright in this case is the two-dimensional work of art fixed in the tangible medium of the uniform fabric. Even if (Varsity Brands) ultimately succeed in establishing a valid copyright in the surface decorations at issue here, (Varsity Brands) have no right to prohibit any person from manufacturing a cheerleading uniform of identical shape, cut, and dimensions to the ones on which the decorations in this case appear. **They may prohibit only the reproduction of the surface designs in any tangible medium of expression—a uniform or otherwise** (emphasis added).” *Star Athletica*, at 1012.

The majority also declined to consider whether the cheerleading uniform, without the design, would still be useful, emphasizing that the focus of the statute was on the design itself and not what remained after the separated feature was extracted. *Star Athletica*, at 1013.

D. Vulcans, Klingons, And Fair Use, Oh My!

1. The Final Frontier

There are two fair use cases from the Ninth Circuit that may have legs. The first is the Star Trek case that arose out of a film being produced by a fanboy who named his company Axanar (the other defendant here) after the cosmic battle of the same name. Set as a prequel to the original Star Trek series, the movie was based on Federation hero Garth of Izar, the hero of the Battle of Axanar, a character that appeared in one episode of the original Star Trek series. Axanar was crowd-funding the film and intended to release it on YouTube before being sued by Paramount, which owns the Star Trek copyrights. *Paramount Pictures Corp. v. Axanar Productions, Inc.*, 2017 WL 83506 (C.D. Cal. 2017).

Presented with dueling motions for summary judgment, the Court denied both, but made crucial findings in favor of Paramount. The Court found that Paramount’s copyrighted characters, including Garth of Izar, the Vulcans and Klingons were sufficiently prominent and sketched sufficiently enough to merit copyright protection. It also found that there was objective substantial similarity between Axanar’s film and the Paramount copyrights, but left the question of subjective substantial similarity for the jury.

On Axanar’s fair use defense, the Court found that the Axanar film was not transformative. It considered each of the factors in 17 U.S.C. §107 and found them all to weigh against a finding of fair use, leaving Axanar with

only the lifeline of a jury finding that there was no subjective substantial similarity. Otherwise, the Axanar film would be a derivative work for which Paramount could protect via copyright.

2. You Angel You

Tell the truth. Don't you wish that you could edit your favorite movies so that you could take out all the parts that you didn't like and made them hard to watch? Yes, please! For me, it would be removing the most annoying characters and actors like any Kardashian, Jar Jar Binks in Star Wars, the razor scenes in Clint Eastwood's *Unforgiven*, Sofia Vergara, and Eddie Albert from every show that he was ever in. Well, thanks to the Ninth Circuit's decision in *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F3d 848 (9th Cir. 2017), we cannot do that.

In *VidAngel*, the Fair Use defense took another hit and, again, there was no contract aboard the ship. VidAngel developed a service that would have allowed me to remove Eddie Albert and other objectionable content from movies and TV shows. VidAngel sent movie and television studios a letter describing its service and eliciting feedback. The studios did not respond, but waited until the service got off the ground to sue for "copyright infringement in violation of 17 U.S.C. § 106(1), (4), and circumvention of technological measures controlling access to copyrighted works in violation of the Digital Millennium Copyright Act of 1998 ("DMCA"), 17 U.S.C. § 1201(a)(1)(A). VidAngel denied the statutory violations, raising the affirmative defenses of fair use and legal authorization by the Family Movie Act of 2005 ("FMA"), 17 U.S.C. § 110(11). The Studios moved for a preliminary injunction, and after expedited discovery, the district court granted the motion." *VidAngel*, at 855.

The Ninth Circuit rejected all of VidAngel's defenses and affirmed the District Court's injunction. It held that the FMA did not apply because the objectionable content was not being removed from an authorized video but from a copy of a copy made by VidAngel. It also agreed with the District Court that VidAngel's use was commercial and non-transformative and weighed all four factors against a finding of fair use. *VidAngel*, at 861.

CONCLUSION: TURN OUT THE LIGHTS, THE PARTY'S OVER

Unfortunately, Dandy Don Meredith was not with us for the 2015 Super Bowl when the New England Patriots defeated the Seattle Seahawks after a last-minute interception by rookie cornerback Malcolm Butler in the end zone. This incomprehensible pass play was called from the sidelines by Seattle head coach Pete Carroll. But surely Meredith is laughing about the jokes that resulted from that now iconic play, one of which became the subject of an important, albeit short, ruling by the U.S. Copyright Office.

After the game, Patriots quarterback Tom Brady was named the Super Bowl's Most Valuable Player and won the customary truck. Brady, who already had two MVPs under his belt and, as one of the highest paid players in the NFL; was the last Patriot to need a truck, said that he was going to give the truck to the underpaid rookie for having won the game for the Patriots and a joke was born:

"Tom Brady said he wants to give his MVP truck to the man who won the game for the Patriots. So enjoy the truck, Pete Carroll."

When the joke's author requested copyright registration, this brought to the fore another facet of the issue of copyright eligibility than what was at bar in the *Axanar/Star Trek* case. At first, the Copyright Office refused to register this joke but, on a second motion for reconsideration, the Copyright Office Review Board found that it exhibited "copyrightable authorship." U.S. Copyright Office, Second Request for Reconsideration for the Refusal to Register A LITTLE BIT BAD, Blog Content, Brady Joke, February 3, 2015; Correspondence ID1-25KMZ9Z; SR #: 1-2752094070 (July 17, 2017). Citing the landmark case of *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 345 (1991), the Board opined that it met "the threshold of copyright protection articulated in *Feist*." However, it also found that the copyright was "thin" and because it was composed of elements in the public domain, "only the organization of those elements that is protectable." *Ibid*, quoting *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 210 F.S. 2d 147, 163 (E.D. N.Y. 2002). Hence, another small victory for copyright over the First Amendment, yet barely so.

As Don McLean said in his mega-hit song, *American Pie*, "there we are all in one place, a generation stuck in space, with no time left to start again." And so it is in the Winter of 2018 as the war between copyright, fair use, and the first amendment continue, just as they have done for over 300 years. Like the battle for the Pacific in World War II, these concepts battle for each and every island, one at a time. However, unlike the Pacific front, there will be no clear victory for either side, only the ebb and flow of the jurisprudence that seeks to accommodate these forever frenemies. And so it goes.