

SURVEY OF ADDITIONAL TOPICS IN IP LAW

I. COPYRIGHT LAW

A. *RED LABEL MUSIC PUBL'G, INC. V. CHILA PRODS.*

Earlier this year, the United States District Court for the Northern District of Illinois upheld a fair use defense against a copyright infringement claim regarding the defendants' Super Bowl documentary, which used video excerpts from the plaintiffs' 1985 "The Super Bowl Shuffle" music video.¹ The plaintiffs' motion to strike was denied, as the court found the strike was improperly used.² In summary judgment, the court held that ultimately using eight seconds of the music video in a film chronicling the Chicago Bears' 46–10 Super Bowl XX victory did not violate the Copyright Act.³

Red Label Music Publishing, Inc., who "owns the copyrights to the words, music, sound recording, and video of the Super Bowl Shuffle," and marketing agency Renaissance sued Chila Productions for using video excerpts of the Shuffle without permission.⁴ The defendants' 2016 documentary, "'85: The Greatest Team in Football History," featured the said hip-hop song, in which the team rapped about their desire to be victorious over the New England Patriots, a feat they successfully accomplished.⁵ The film featured eight seconds of the song with video, as well as fifty-one seconds of silent video footage while commentators spoke.⁶ The producers included the video excerpts hoping to reveal the "historical record" of the Bears' nearly undefeated season.⁷

First, the court conducted a two-step analysis when denying the plaintiffs' motion to strike.⁸ It scrutinized the motion's lateness:⁹ because the plaintiffs filed their motion outside the twenty-one-day window for four of the defendants, the court held that the motion was not valid.¹⁰ Arguing in the alternative, however, the court relied on the Second Circuit's persuasive

1. *Red Label Music Publ'g, Inc. v. Chila Prods.*, 388 F. Supp. 3d 975, 979 (N.D. Ill. 2019).

2. *Id.* at 983.

3. *Id.* at 990.

4. *Id.* at 979.

5. *Id.*

6. *Id.*

7. *See id.* at 984.

8. *Id.* at 981–83.

9. *Id.* at 981–82.

10. *Id.* at 981.

approach in applying *Twombly* and *Iqbal* to affirmative defenses to deny the motion regardless, by applying the plausibility standard.¹¹ It held that the defendants “alleged facts that enable the court to draw the reasonable inference that they are not liable for the misconduct alleged.”¹²

Next, the court analyzed the defendants’ fair use defense. It held that the new purpose of the film and brief length of the video excerpts weighed in favor of fair use.¹³ The music video was “originally intended to entertain and raise money” while the documentary intended to “comment on the sport-social phenomenon that was the 1985 Chicago Bears.”¹⁴ As a result, plaintiff and defendant had different purposes in using the video.¹⁵ For the defendants in particular, the Shuffle snippets were used “not for [their] expressive content, but rather for [their] factual content.”¹⁶ In other words, the video was used to chronicle history.¹⁷ The court held that this kind of historical commentary “adds something new”¹⁸ Although the documentary was made for commercial gain, the court still reasoned that this was only incidental, since it did not compete in the same market as the music video.¹⁹ Thus, the first factor of fair use weighed in favor of the defense.²⁰

The second factor, the nature of the copyrighted work, was neutral, because the music video and documentary complemented one another.²¹ The third factor, considering the amount taken “in relation to the copyrighted work as a whole,” revealed that 17% of the music video only made up 1% of the film.²² This too weighed in favor of fair use, especially since it reinforced the earlier finding that the film was not seeking to duplicate the Shuffle.²³ Finally, the fourth factor, the market effect, was also largely neutral, as it was inconceivable that the video excerpts in the documentary would dissuade a viewer from purchasing the song.²⁴

The court ultimately concluded that the first and third factors weighed in favor of fair use, granting the defendants’ motion for summary judgment.²⁵ It

11. *Id.* at 982–83.

12. *Id.* at 983.

13. *Id.* at 983–85, 986.

14. *Id.* at 984.

15. *Id.*

16. *Id.*

17. *See id.* at 985.

18. *Id.* at 984.

19. *Id.* at 985.

20. *Id.*

21. *Id.*

22. *Id.* at 986.

23. *See id.* at 984, 986.

24. *See id.* at 989.

25. *Id.* at 989–90.

cited the Fourth Circuit, which stated that fair use “protects filmmakers and documentarians from the inevitable chilling effects of allowing an artist too much control over the dissemination of his or her work for historical purposes.”²⁶ The court held that this was what the Copyright Act had intended when providing a shield against infringement.²⁷

B. *HIQ LABS, INC. V. LINKEDIN CORP.*

The United States Court of Appeals for the Ninth Circuit recently upheld a preliminary injunction which, in effect, allows hiQ Labs to copy information from public profiles on LinkedIn using a computer program²⁸—a practice known as “scraping.”²⁹ HiQ Labs is a data analytics company that uses information scraped from public LinkedIn profiles to power two of its products: “Skill Mapper” and “Keeper.”³⁰ “Skill Mapper” summarizes the skills of a client’s employees, enabling the client to identify “skill gaps” “so that they can offer internal training in those areas.”³¹ “Keeper” utilizes scraped data to identify the employees within a client’s company who are most likely to “[be] recruited away.”³² About one month before LinkedIn launched “a data analytics tool similar to [hiQ’s] products,” the company sent hiQ Labs a cease-and-desist letter and placed barriers on its site to prevent hiQ Labs from scraping.³³ Shortly thereafter, hiQ Labs brought an action against LinkedIn seeking to enjoin them from restricting access to the information on public profiles.³⁴ The United States District Court for the Northern District of California granted a preliminary injunction against such.³⁵

The Ninth Circuit, in determining whether to uphold the preliminary injunction, applied a four-pronged test: the plaintiff must show (1) that they will likely suffer irreparable harm if preliminary relief is not granted, (2) “that the balance of equities tips in [their] favor,” (3) that they are “likely to succeed on the merits,” and (4) “that an injunction is in the public interest.”³⁶ In administering the test, the court used a “sliding scale approach” where a

26. *Id.* at 989 (quoting *Bouchat v. Balt. Ravens Ltd. P’ship*, 737 F.3d 932, 944 (4th Cir. 2013)).

27. *See id.*

28. *HiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 991, 1005 (9th Cir. 2019).

29. *Id.* at 1004.

30. *Id.* at 991.

31. *Id.*

32. *Id.*

33. *See id.* at 991–92, 998.

34. *Id.* at 992; *see hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099 (N.D. Cal. 2017).

35. *HiQ Labs, Inc.*, 938 F.3d at 992.

36. *Id.*

“stronger showing of one element could offset a weaker showing of another.”³⁷

In analyzing the first prong, the court examined whether hiQ Labs would suffer irreparable harm if the preliminary injunction was not granted.³⁸ HiQ Labs’ business model relies entirely on access to LinkedIn’s information, as there is no viable alternative source.³⁹ LinkedIn argued that Facebook could be an acceptable alternative, but Facebook’s information is not readily accessible and therefore not equivalent.⁴⁰ The court found that hiQ Labs’ lack of access to information had already caused them to lose financing and ultimately threatened the company with total extinction absent a preliminary injunction.⁴¹ In light of this, the court concluded that the first prong was met.⁴²

Under the second prong, the court held that “the balance of the equities” tipped in favor of hiQ Labs.⁴³ LinkedIn contended that user privacy should be prioritized over hiQ Labs’ ability to conduct business, arguing that a public profile did not authorize every use of user information.⁴⁴ However, the court reasoned that users with public profiles do not have an expectation of privacy that scraping would violate.⁴⁵ Furthermore, LinkedIn undermined its argument by launching its own version of hiQ’s products.⁴⁶ By contrast, the court found significant interest in hiQ Labs staying in business and completing its contracts.⁴⁷ Thus, the court reasoned that the “balance of the equities” tipped in favor of hiQ Labs.⁴⁸

In its evaluation of the third prong, the “likelihood-of-success prong,” the court focused its inquiry on whether hiQ Labs had “raised serious questions on the merits.”⁴⁹ As a preliminary matter, the court held that hiQ Labs could likely establish all the elements required to show tortious interference with a contract.⁵⁰ In an attempt to raise an affirmative defense, LinkedIn cited the Computer Fraud and Abuse Act (CFAA), asserting that hiQ’s scraping violated

37. *Id.* (internal quotations omitted) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)).

38. *Id.* at 993.

39. *Id.*

40. *Id.*

41. *Id.* at 993–94.

42. *Id.* at 994–95 (quoting *CTIA-The Wireless Ass’n v. City of Berkeley*, 928 F.3d 832, 852 (9th Cir. 2019)).

43. *Id.* at 994.

44. *Id.*

45. *See id.*

46. *Id.* at 994–95.

47. *Id.* at 995.

48. *Id.* at 994–95.

49. *Id.* at 995.

50. *Id.* at 999.

the provision⁵¹ that prohibited “intentionally access[ing] a computer without authorization or exceed[ing] authorized access, and thereby obtain[ing] . . . information from any protected computer.”⁵² However, the court rejected LinkedIn’s defense on two grounds.⁵³

First, the court concluded that, for the purposes of the CFAA, “[a]uthorization is an affirmative notion” where access is granted to selected parties.⁵⁴ LinkedIn could not claim that access to its public profiles required authorization, since the profiles are accessible by anyone with a computer.⁵⁵ Therefore, hiQ Labs’ scraping did not “exceed authorization”⁵⁶ because no authorization was required to begin with.⁵⁷

Secondly, the court concluded that the legislative intent behind the CFAA was to prohibit the computer equivalent of “breaking and entering.”⁵⁸ As hiQ Labs merely gleaned information which was open and available to the public and did not breach any protective barriers, such as passwords, to access the information, the court reasoned that their scraping was not analogous to “breaking and entering.”⁵⁹ Thus, the CFAA did not apply as an affirmative defense and accordingly, the court determined that hiQ Labs had raised serious questions on the merits.⁶⁰

Finally, the court found that public interest factors tipped in favor of hiQ Labs.⁶¹ Though LinkedIn argued that its ability to prevent “malicious” attacks on its servers constituted a substantial public interest, hiQ Labs countered that the greater public interest was in allowing the collection of information.⁶² The court sided with hiQ Labs, reasoning that LinkedIn’s barriers were not preventing a malicious attack, but denying access to information that the company did not even own.⁶³ Furthermore, striking the preliminary injunction down would be antithetical to public interests because LinkedIn would gain a monopoly over publicly available information.⁶⁴ Conversely, the court agreed with hiQ Labs that data scraping serves a significant public interest since many

51. *Id.*

52. *Id.* (quoting 18 U.S.C. § 1030(a)(2)(C) (2019)).

53. *HiQ Labs, Inc.*, 938 F.3d at 1000.

54. *Id.*

55. *See id.* at 1001–02.

56. 18 U.S.C. § 1030(a)(2)(C).

57. *HiQ Labs, Inc.*, 938 F.3d at 1003–04.

58. *Id.* (quoting H.R. REP. NO. 98-894, at 20 (1984)).

59. *Id.* at 1001, 1003–04.

60. *Id.* at 1004.

61. *See id.* at 1005.

62. *Id.* at 1004–05.

63. *Id.* at 1005.

64. *See id.*

researchers use it to gather information.⁶⁵ In all, the court reasoned that the public interest factors favored hiQ Labs.⁶⁶

The Ninth Circuit thus concluded that all four prongs of the preliminary injunction test were met, upheld the District Court's preliminary injunction enjoining LinkedIn from prohibiting hiQ Labs' scraping, and remanded for further proceedings.⁶⁷

II. TRADEMARK LAW

A. *PATAGONIA, INC. V. ANHEUSER-BUSCH, LLC*

The United States District Court for the Central District of California denied a motion to dismiss brought by Anheuser-Busch, LLC regarding several of Patagonia, Inc.'s claims for violations of state and federal trademark law.⁶⁸ Patagonia's claims arose from Anheuser-Busch's use and procurement of the trademark PATAGONIA in the beer industry.⁶⁹

Patagonia regards its PATAGONIA trademark and P-6 logo as among "the most identifiable brands in the world."⁷⁰ The company has also built a brand around environmental consciousness, in part through an environmental non-profit established by Patagonia's CEO.⁷¹ Patagonia and its related companies have predominately used the trademark and logo in the context of apparel.⁷² However, Patagonia has used its PATAGONIA PROVISIONS mark to identify and promote food items, including beer.⁷³

The story of how Anheuser-Busch came to regard itself as the owner of the PATAGONIA trademark as it pertains to beer is hazy.⁷⁴ An Anheuser-Busch attorney filed a Statement of Use on behalf of their competitor—another beer importer—to avoid termination of the trademark, which the competitor held at the time.⁷⁵ The competitor had exhausted its ability to request extensions to show the use of the trademark from the United States Patent and Trademark Office (USPTO).⁷⁶ Prior to the termination of the final

65. *See id.* at 1004.

66. *Id.* at 1005.

67. *See id.*

68. *Patagonia, Inc. v. Anheuser-Busch, LLC*, No. 2:19-cv-02702-VAP-JEMx, at *20 (C.D. Cal. Sept. 3, 2019).

69. *Id.* at 3.

70. *Id.* at 2. The P-6 logo depicts six mountains with "Patagonia" written at the base of those mountains. *Id.* at 4.

71. *Id.* at 2.

72. *See id.*

73. *Id.*

74. *See id.* at 2–3.

75. *Id.* at 4.

76. *Id.*

extension window, the Anheuser-Busch attorney pointed to a single bottle of PATAGONIA beer in the aforementioned Statement of Use filed on behalf of the competitor.⁷⁷ The USPTO, regarding this showing as proof of the use of the trademark in interstate commerce within the requisite time window, issued the trademark to the competitor, who then assigned it to Anheuser-Busch.⁷⁸

Years later, Anheuser-Busch brewed up and acted on a plan to launch a PATAGONIA beer.⁷⁹ The promotional launch of the beer took place at a ski resort.⁸⁰ The beers were sold out of a stand bearing a logo with several mountain peaks and the text “Patagonia Cerveza” at the base of those mountains.⁸¹ The beer bottles had the same logo.⁸² The Anheuser-Busch staff selling the beer wore jackets with the same logo as well.⁸³ Finally, the promotion also included a pledge from Anheuser-Busch to “plant one tree for every case of beer purchased.”⁸⁴

Patagonia brought several trademark-related claims against Anheuser-Busch in response to Anheuser-Busch’s use and procurement of the trademark.⁸⁵ Anheuser-Busch filed a Federal Rules of Civil Procedure Rule 12(b)(6) motion to dismiss the federal trademark dilution claims, California trademark statutory law claims, and the federal Lanham Act claims.⁸⁶

The court reviewed the trademark dilution claim by assessing whether Patagonia sufficiently pleaded that the PATAGONIA trademark was “famous and distinctive.”⁸⁷ The court considered four non-exclusive factors in its review: the duration of the publicity of the mark, the volume of sales conducted under the mark, the public’s recognition of the mark, and the registration status of the mark.⁸⁸ Patagonia argued that their decades-long use of the trademark, bolstered by the company’s “enormous” investments in advertisement and promotion, qualified PATAGONIA as famous since well before its use by Anheuser-Busch.⁸⁹ In holding the allegations as true and construing the facts in favor of Patagonia, the court held that Patagonia had

77. *Id.* at 18.

78. *Id.* at 5.

79. *Id.* at 3.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 4.

84. *Id.* at 3.

85. *Id.* at 5.

86. *Id.* at 8, 10–11.

87. *Id.* at 8.

88. *Id.* at 9.

89. *Id.*

adequately made out its claim by alleging a trademark registration date of 1982, \$10 billion in sales since 1985, and a global market for Patagonia products.⁹⁰

For the California trademark law claims, the court analyzed whether Patagonia's allegations sufficiently put Anheuser-Busch on notice of specific state law claims.⁹¹ According to Anheuser-Busch, Patagonia cited "inapplicable statutes" and, furthermore, failed to provide facts supporting claims under potentially relevant statutes.⁹² Patagonia asserted that the substance of their complaint sufficed for notice and that discovery could resolve any issues in identifying the proper statutes.⁹³ The court sided with Patagonia's view and denied the motion.⁹⁴

Finally, the court addressed the motion to dismiss three of Patagonia's Lanham Act claims.⁹⁵ The claims pertained to (1) the "anti-trafficking" rule, (2) the bar against the use of a trademark in a manner that falsely suggests a connection with another entity, and (3) the ban of use of fraudulently procured trademarks.⁹⁶

The anti-trafficking rule within the Lanham Act prohibits assigning an intent-to-use application before the applicant files a verified statement that they are using the mark.⁹⁷ Patagonia pleaded that Anheuser-Busch actually was assigned the intent-to-use application prior to its competitor filing a Statement of Use.⁹⁸ The court found Patagonia's anti-trafficking and abandonment claims sufficient to overcome Anheuser-Busch's motion to dismiss.⁹⁹

Anheuser-Busch contested Patagonia's arguments for two reasons.¹⁰⁰ First, they argued that "[Patagonia] cannot offer allegations that are 'merely consistent with' their favored explanation"¹⁰¹ But the court held that the allegations did more than support Patagonia's favored explanation because they tended "to exclude the possibility that Anheuser-Busch's explanation . . . is true."¹⁰² Second, Anheuser-Busch denied that Patagonia had adequately alleged abandonment of the trademark.¹⁰³ Here, the court agreed with

90. *Id.* at 9–10.

91. *Id.* at 10.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 11. The Lanham Act permits federal courts to cancel an invalid trademark registration. *Id.*

96. *Id.* at 14–17.

97. *Id.* at 11.

98. *Id.* at 12–13.

99. *Id.* at 15.

100. *Id.* at 13–14.

101. *Id.* at 13.

102. *Id.* at 13–14.

103. *Id.* at 14.

Patagonia that the several years between Anheuser-Busch's registration of the trademark and its use of the trademark evidenced discontinuance.¹⁰⁴

The court likewise denied Anheuser-Busch's motion to dismiss the false suggestion claim.¹⁰⁵ Anheuser-Busch contested two of the four elements of Patagonia's claim: the second element—that the mark was a near approximation of that used by Patagonia, and the fourth element—that Patagonia had attained enough fame to infer that someone viewing Anheuser-Busch's PATAGONIA trademark would presume a connection with Patagonia.¹⁰⁶ Regarding the second element, the court determined that a 12(b)(6) motion did not facilitate the “fact-intensive inquiry” required for evaluating the approximation; therefore, the court held Patagonia's allegation that PATAGONIA “uniquely and unmistakably identified Patagonia” as true and denied the motion.¹⁰⁷ Regarding the fourth element, Anheuser-Busch argued that Patagonia failed to allege sufficient facts to show that consumers, at the time of the registration of the mark, would assume the mark belonged to Patagonia.¹⁰⁸ But Patagonia's showing of how U.S. consumers regarded the trademark sufficed to convince the court otherwise.¹⁰⁹

The court denied Anheuser-Busch's motion to dismiss the false procurement claim because Patagonia pleaded with sufficient particularity.¹¹⁰ For example, the court cited as specific enough Patagonia's evidence that Anheuser-Busch falsely asserted the trademark was being used in a commercial context.¹¹¹ The specificity standard for that evidence was met because a single bottle of beer in a white-walled room could be alleged to not indicate commercial use.¹¹² Hence, based on the photo and similar specific evidence, the court did not find fault with the particularity of Patagonia's fraud allegations.¹¹³

In a war between Big Beer and Big Vest, it appears the first battle went to Big Vest.

104. *Id.* The court also agreed that Anheuser-Busch failed to show any commercial intention to use the trademark during that window, as indicated by a lack of press releases and promotional statements relating to Anheuser-Busch's intent to use the trademark. *Id.*

105. *Id.* at 17.

106. *Id.* at 15.

107. *Id.* at 15–16.

108. *Id.* at 16.

109. *Id.* at 16–17.

110. *Id.* at 19.

111. *Id.*

112. *Id.*

113. *Id.*

B. BANKSY'S FAKE STORE

On October 1, 2019, famed international street artist Banksy announced he was opening a shop in London named Gross Domestic Product.¹¹⁴ Banksy claimed he had to open shop and sell his artwork in order to protect his name in a legal dispute against a greeting card company named Full Colour Black.¹¹⁵ He alleged that Full Colour Black was contesting the trademark to his art, while also attempting to take custody of his name so the company could “sell their fake Banksy merchandise legally.”¹¹⁶ The three-person company photographed Banksy's public graffiti art to place on greeting cards.¹¹⁷ Full Colour Black claimed its purpose was to make Banksy's official canvases available to “the public,” who cannot afford his art because “Banksy never makes anything available to his fans.”¹¹⁸

The trademark dispute began in March 2019 when Full Colour Black commenced invalidity proceedings to cancel an E.U. trademark on one of Banksy's famous murals, *Rage, The Flower Thrower*.¹¹⁹ Pest Control Office Limited, the entity which authenticates his art, registered the trademark for this piece in August 2014.¹²⁰ In the European Union, if an entity does not use its

114. Banksy (@Banksy), INSTAGRAM (Oct. 1, 2019), https://www.instagram.com/p/B3FAJKonJ_z/ [<https://perma.cc/83DA-PY2U>].

115. Lisette Voytko, *Banksy Puts His Art Up For Sale In London, Starting at \$12*, FORBES (Oct. 1, 2019), <https://www.forbes.com/sites/lisettevoytko/2019/10/01/banksy-puts-his-art-up-for-sale-in-london-starting-at-12/#79f1b3213d51> [<https://perma.cc/DY3T-GZEN>]; see Tim Lince, “*A frankly pointless step*” – *Why Banksy pop-up shop could hinder trademark case*, WORLD TRADEMARK REV. (Oct. 2, 2019), <https://www.worldtrademarkreview.com/brand-management/frankly-pointless-step-why-banksy-pop-shop-could-hinder-trademark-case> [<https://perma.cc/2ZF4-UGQK>].

116. Lanre Bakare, *Banksy launches homewares shop in dispute over trademark*, GUARDIAN (Oct. 1, 2019), <https://www.theguardian.com/artanddesign/2019/oct/01/banksy-launches-homewares-shop-in-dispute-over-trademark> [<https://perma.cc/RR7A-PPDES>]; see Lince, *supra* note 2.

117. See Full Colour Black, @FullColourBlack, FACEBOOK (Oct. 4, 2019), <https://www.facebook.com/notes/full-colour-black/public-statement-release/2557627524344258/> [<https://perma.cc/Z8B5-WQYT>].

118. *Id.*

119. Enrico Bonadio, *How Banksy's latest trademark row could backfire*, CONVERSATION (Oct. 10, 2019), <https://theconversation.com/how-banksys-latest-trademark-row-could-backfire-124919> [<https://perma.cc/BR9A-ZZ5W>]. The European Intellectual Property Office does not have a name on file for the art piece. The name is often interchangeable between *Rage, the Flower Thrower*, *Flower Thrower*, and *Love Is In The Air*. See (*Trade mark without text*) 012575155, EUROPEAN UNION INTEL. PROP. OFF., <https://euipo.europa.eu/eSearch/#details/trademarks/012575155> [<https://perma.cc/ET63-2ZHN>] (last visited Dec. 13, 2019); see also *Banksy Artworks*, ART STORY, <https://www.theartstory.org/artist/banksy/artworks/> [<https://perma.cc/5BN5-DH8J>] (last visited Dec. 13, 2019) (referring to the piece as “*Rage, the Flower Thrower*”).

120. Bonadio, *supra* note 6.

trademark in commerce, the trademark may be transferred to someone who will use it for commercial purposes.¹²¹ Banksy has not used Rage, the Flower Thrower, in any commercial endeavors and therefore has a questionable trademark title to this piece.¹²² To prevent the trademark transfer, Banksy's legal team advised him to open up Gross Domestic Product to fulfill the trademark requirements under E.U. law.¹²³ The shop's doors never opened, as Banksy conducted the sales through an online server with prices starting at \$12.¹²⁴

Full Colour Black's attorney, Aaron Wood, argued that opening up shop is "frankly pointless" because the company was not attempting to revoke the trademark, but rather to challenge its legitimacy.¹²⁵ Wood further alleged that the shop strengthened the trademark challenge because Full Colour Black is not arguing that the trademark fails for lack of use in commerce.¹²⁶ Instead, the greeting card business was challenging the legitimacy of Banksy's trademark entirely, claiming that Banksy is using trademark law to skirt the requirements of copyright law and to "monopolise his work in bad faith."¹²⁷ Because artwork is generally protected through copyright law, the company alleges that Banksy's trademark registrations were done in bad faith to avoid exposing himself through copyright law.¹²⁸

Banksy pushes the protection of his name through trademark law rather than copyright law, claiming that "copyright is for losers."¹²⁹ Note that Banksy is famous in part for his ability to reach a global audience while keeping his identity hidden.¹³⁰ If Banksy were to begin a copyright suit, this would require Pest Control to reveal his true identity in order to prove his ownership over his art.¹³¹ Moreover, Full Colour Black has allegedly written Banksy and his legal team on multiple occasions since 2010 to suggest paying him royalties,

121. See Lince, *supra* note 2.

122. *Id.*; see (*Trade mark without text*), *supra* note 7 (demonstrating adversarial proceedings against the piece).

123. Ellie Harrison, *Banksy attacked for 'tricking fans' in ferocious statement by company at centre of trademark row*, INDEPENDENT (Oct. 5, 2019), <https://www.independent.co.uk/arts-entertainment/art/news/banksy-full-colour-black-custody-claim-trademark-merchandise-london-store-a9144231.html> [<https://perma.cc/FD92-QBD6>].

124. Voytko, *supra* note 2.

125. Lince, *supra* note 2.

126. See *id.*

127. *Id.*

128. Sharon Kirby, *Copyright is for losers, trade marks are for Banksy – the Banksy trade mark case explained*, LEXOLOGY (Oct. 23, 2019), <https://www.lexology.com/library/detail.aspx?g=3ce410d3-e5a2-4cd2-917d-b1ff02e755be> [<https://perma.cc/B8AF-2B5Y>].

129. See Bonadio, *supra* note 6.

130. *Id.*

131. *Id.*

which Banksy declined.¹³² By refusing to accept these royalties, Full Colour Black alleges that Banksy has refused his copyright and trademark rights to these art pieces.¹³³

As the legal battle ensues, several questions remain unanswered, specifically, whether Banksy's artwork, or anyone's art piece, can provide a trademark right.¹³⁴ Furthermore, it is uncertain if Banksy's quick actions will be seen as a genuine use of the trademark and whether it matters that the artist began using the art as commerce after the trademark was registered.¹³⁵ If Banksy knew that the work did not act as a trademark, but deliberately sought trademark protection to circumvent copyright law, the E.U. Intellectual Property Office may find the registration invalid.¹³⁶

132. Full Colour Black, *supra* note 4.

133. *See* Bonadio, *supra* note 6.

134. Lince, *supra* note 2.

135. *Id.*

136. *See id.*