GeekLaw:
Law, Pop Culture, and Creativity

Marc Whipple – AnimeMidwest 2017

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- No, seriously, this is not legal advice, get a lawyer!
- Wow that was quick

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- No, seriously, it *isn't*
- Wow that was even quicker

You may not be interested in the law…

…but the law is interested in you.

Or rather, the law is interested in *money*.

Comic Books: 580 Million USD (US Comic Shop Direct Only)

Manga: 2.3 Billion USD (Japan Only)

Anime: 18.1 Billion USD (Japan Only)

Movies: 38.6 Billion USD (Worldwide)

Video Games: 91 Billion USD (Worldwide)

Licensing Industry: Don’t Even Ask. (Seriously.)

What do all those things have in common?

- They are *not your intellectual property*.
- They are *somebody else's intellectual property.*
- They are worth *ridiculous amounts of money*.

So regardless of how you feel about intellectual property law, if you mess with them, be prepared to get this reaction:

"You are stealing from me,

*and **I will do whatever I can to stop you."***

How Can They Stop You?

With intellectual property law, which includes:

- Patents (Inventions)
- Copyrights (Artistic Expression)
- Trademarks (Consumer Protection)
- The Right of Publicity/Privacy (Individual Identity)
- Moral Rights (Weird European Artsy Thing / Passing Off)

Patents: Almost Entirely Irrelevant

1. Utility Patents
   a) Protect novel inventions, either devices or methods.
   b) Could be relevant in some kinds of video games or other software.
2. Design Patents
   a) Protect the ornamental design of useful articles.
   b) General consensus: Real does not cross over to virtual. (Activision/PS Prod)
   c) However, virtual can form *part* of the real. (Apple/Samsung)
3. Plant Patents

No, really. However, absent Biollante, not really a concern for us in this context.

Design Patents: Real Reality vs. Virtual Reality

P.S. PRODUCTS, INC. v. ACTIVISION BLIZZARD, INC. (E.D. Arkansas, February 21, 2014.)

Real Reality

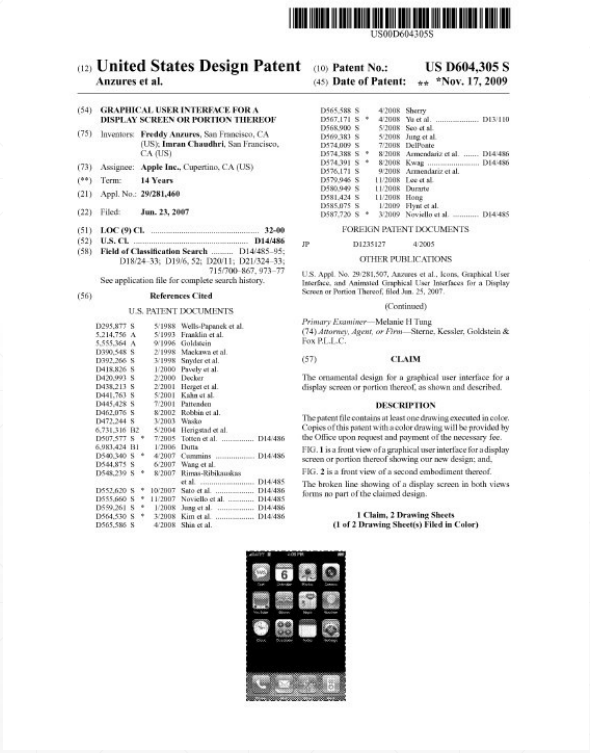
U.S. Design Patent No. D561,294 ("the D294 patent") and P.S. Product's "Zap Blast Knuckle"

Virtual Reality

Activision's Combat Suppression Knuckles[1]

Design Patents: Revenge of the Virtual

Samsung Electronics Co. v. Apple Inc. 580 U.S. (TBD) (2016)



US00D604305S

(12) **United States Design Patent**
Anzures et al.

(10) **Patent No.: US D604,305 S**
(45) **Date of Patent: ** *Nov. 17, 2009**

(54) **GRAPHICAL USER INTERFACE FOR A DISPLAY SCREEN OR PORTION THEREOF**

(75) Inventors: **Freddy Anzures**, San Francisco, CA (US); **Imran Chaudhri**, San Francisco, CA (US)

(73) Assignee: **Apple Inc.**, Cupertino, CA (US)

(**) Term: **14 Years**

(21) Appl. No.: **29/281,460**

(22) Filed: **Jun. 23, 2007**

(51) **LOC (9) Cl.** **32-00**
(52) **U.S. Cl.** **D14/486**
(58) **Field of Classification Search** D14/485–95; D18/24–33; D18/6, 52; 120/11; D21/324–33; 715/700–867, 973–77
See application file for complete search history.

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D576,171	S	9/2008	Armendariz et al.	
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U.S. Appl. No. 29/281,507, Anzures et al., Icons, Graphical User Interface, and Animated Graphical User Interfaces for a Display Screen or Portion Thereof, filed Jun. 25, 2007.

(Continued)

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(57) **CLAIM**

The ornamental design for a graphical user interface for a display screen or portion thereof, as shown and described.

DESCRIPTION

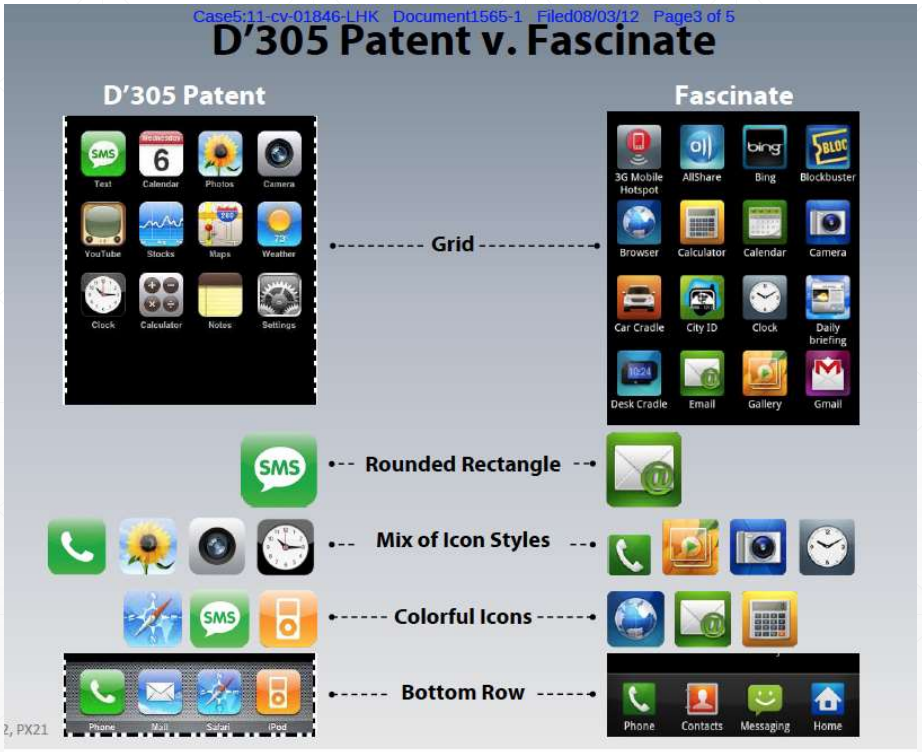
The patent file contains at least one drawing executed in color. Copies of this patent with a color drawing will be provided by the Office upon request and payment of the necessary fee.

FIG. **1** is a front view of a graphical user interface for a display screen or portion thereof showing our new design; and,

FIG. **2** is a front view of a second embodiment thereof.

The broken line showing of a display screen in both views forms no part of the claimed design.

1 Claim, 2 Drawing Sheets
(1 of 2 Drawing Sheet(s) Filed in Color)



Copyrights: Now We're Talking

Copyrights protect *artistic works fixed in a tangible medium of expression.*

A few points to highlight:

- Copyright comes into effect the moment the work is fixed in a tangible medium. Registration is not necessary to perfect the copyright. (But lawsuit.)
- For practical purposes, copyrights are enforceable worldwide.
- Yes, electronic media counts as a tangible medium.
- The "bundle of rights:" Reproduction, distribution, performing, ***derivative works***.
- For Pete's sake stop it with the mailing yourself things.
- Also with the "No Copyright Infringement Intended." That is *actively bad*. Cut. It. Out.
- Bottom Line: Copyright is an *exclusive right*. I don't have to have a reason to stop you. You have to have a reason I *can't* stop you.

Hey, but what about Fair Use?

It's Never Fair Use.

Well, okay sometimes it is:

- Legit Reviews (NOT complete Let's Plays.)
- PARODY.
  a) Parody is not "wouldn't it be funny if I dubbed in a burp every time Malachite talks."
  b) Parody is not satire. If you are using the work to comment on ANYTHING ELSE, it's not parody.
  c) Parody is incorporation of the work into a new work *designed to comment on the content of the original work.* If you're not sure, assume it's *not* parody!
- Completely Transformational Use – It isn't, don't go there. *I said don't go there.*
- "Other" – the Four Factors, Plus One.

Fair Use Factors: Proceed At Your Own Risk

Fair Use is an *affirmative defense.* It means, "Yes, I infringed the copyright, but here's why that's okay." If you are using a defense, *you are already in trouble.* That said, the factors are:

1) The purpose and character of your use.

    Added new value? Scholarship, research, commentary? (*Different* value.)

2) The nature of the copyrighted work.

    Facts v. Fiction, *Scenes a Faire*, Published v. Unpublished

3) The amount and substantiality of the portion taken.

    Fairly straightforward, but "substantiality" is tricky. How *important* is it?

4) The effect of the use upon the potential market.

    Note that word POTENTIAL. It doesn't matter if they're NOT in a market.

- AND -

0) Is It Bad?

Bonus Question: What kind of Fair Use are we soaking in right now?

The Seen, and the Unseen

What, by the way, did we *not* see in those Fair Use factors?

1) Charging/Making a profit.

   The fact that you are not charging is not a defense to copyright infringement. The fact that you are not making a profit is not a defense to copyright infringement. Those *may* be relevant to calculation of damages. When do we start calculating damages? WHEN WE HAVE LOST.

2) Disclaimers.

   You cannot, I repeat and emphasize *can not*, avoid a claim of copyright infringement with a disclaimer or a citation. Copyright infringement IS NOT PLAGIARISM. Sometimes something is both, sometimes something is one but not the other. But they are not the same.

3) Failure to exploit.

   Yes, I know your favorite manga would make an awesome game and they just NEVER DID.

   I. Don't. Care. Don't do it.

Fan-Related Copyright Questions

- Translations

  A translation is a derivative work. It is separately copyrightable, but completely subordinate to the original work.

- Unauthorized Sequels/Side Stories/Fan Works.

  These are also derivative works. To the extent that they are transformative or contain original work, they are separately copyrightable.

- Media Shifts

  I think you see where this is going.

- “Orphan Works”

  Don’t confuse “can’t find the owner” with “in the public domain.” Consult an attorney.

Trademarks: Show Me the Market

Trademarks exist to protect *consumers* by identifying the source of a good or service. Trademarks are not *automatically* worldwide, but it's not hard to move them between countries.

There are two ways to get in trouble regarding trademarks:

1) Infringement

Use of a trademark in such a way that a reasonable consumer would likely be confused as to the source of the associated good or service is *trademark infringement.*

2) Dilution

Use of a "famous" (don't ask) trademark in a way that would tend to lessen its value is *trademark dilution*. Mostly this occurs by implied association: if the mark is famous, consumers will associate it with *any* usage, even in a market where the mark's holder does not operate.

Do Not Talk To Me About Trademark Fair Use.

- Trademarks are meant to protect the *public.* Bless their easily confused hearts.
- Therefore, there is no such thing as “fair use” for a trademark. If your use is likely to cause confusion, it is bad, and you should feel bad.
- UNLIKE patents and copyrights, this is easy to fix: ***Just don’t cause confusion!***
- Disclaimers disclaimers disclaimers disclaimers disclaimers disclaimers disclaimers.
- You can’t disclaim away a confusing use so don’t get cute.
- You can use trademarks in ways the mark holder doesn’t like so long as you don’t cause confusion or dilution. Sometimes this is called *sigh* Nominative Fair Use. It has *nothing to do* with the four Copyright Fair Use Factors.

The Right Of Publicity

Or, “Why Artist’s Alley Is A Lawyer’s Worst Nightmare.”

The Right Of Publicity (for stupid historical reasons, sometimes called the Right of Privacy) protects an individual’s right to control the use of their identity for commercial purposes.

“Identity” can include:

1) Name
2) Signature
3) Photograph
4) Image
5) Likeness
6) Voice

Traditional Right Of Publicity

Under the common law in most states and in some other countries, individuals have the right to prevent you from unfairly using their identity for commercial activities in two specific ways:

1) Endorsement

   You can't use someone's identity to imply that they are endorsing your activity. Putting someone's picture on your product label with a big smile and a "thumbs up" would imply that they were endorsing the product.

2) Association

   You can't use someone's identity to imply that they are associated with your activity if they are not. Saying "$BIGSTAR will be at SuperDuperCon!" would imply that they were part of SuperDuperCon, even if the actual reason they're there is just because they bought a ticket and are attending.

Statutory Right Of Publicity

Some states *cough*Illinois*cough* have statutes that extend the common-law right of publicity.

Primary difference: Includes ALL commercial usage, not just association or endorsement, unless that usage is explicitly allowed.

Examples of Allowed Usage:

1) Biographical fine arts. (Limited usage.)
2) News reporting.
3) Truthful association (identifying a creator.)
4) Other. (Varies.)

Most of these statutes include statutory damages and/or fees and costs. So if you use it commercially, even if you make no profit you are looking at serious money!

Moral Rights: Just Because We Can

"Moral Rights" are the rights of an artist to have their work presented without modification to preserve their artistic vision. They're also referred to as the "right to preservation of artistic integrity."

They're big in Europe, not so much in the US.

However, they sort of snuck into US law in:

Gilliam v. American Broadcasting Co., 538 F.2d 14 (2d Cir. 1976)

Yes, *that* Gilliam: ABC edited some episodes of "Monty Python's Flying Circus" and the Pythons sued under the Lanham Act, which makes it illegal to "pass off" adulterated products.

The Pythons argued that the editing constituted unlawful passing off, and they won. So at least in a commercial context, we kinda sorta have moral rights. (Hence those dumb disclaimers at the beginning of broadcast movies.)

Thank You!

For More Information:

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