

The SCOTUS Nominee on IP

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by Tiana Towns



Earlier this month Brett Kavanaugh was nominated to be the next United States Supreme Court justice. If confirmed, he will replace the retiring Justice Anthony Kennedy. Politics aside, Kavanaugh has lodged a lengthy stint as judge on the U.S. Court of Appeals for the D.C. Circuit, and is no stranger to deciding tough trademark and copyright disputes.

Related Capabilities

- Trademark, Copyright + Advertising
- Intellectual Property Litigation

In the copyright arena, Kavanaugh weighed in on the following:

In *Soundexchange, Inc. v. Librarian of Congress*, 571 F.3d 1220 (D.C. Cir. 2009), he joined the court in affirming the Copyright Royalty Board's rates for songs played on satellite radio stations. He also wrote a brief concurring opinion suggesting that the Board is unconstitutional because it is made up of "principal officers" of the government that should be confirmed by the Senate, not appointed by the Library of Congress alone.

In *Recording Indus. Ass'n of Am., Inc. v. Librarian of Cong.*, 608 F.3d 861 (D.C. Cir. 2010), Kavanaugh wrote a decision upholding the Copyright Royalty Board's rates for ringtones and late payments penalties, stating the Board adequately explained the reasoning behind setting both rates.

Kavanaugh also authored the opinion in *Indep. Producers Grp. v. Librarian of Cong.*, 792 F.3d 132 (D.C. Cir. 2015), affirming the Copyright Royalty Board's rates for retransmitting cable broadcasts of sports programs. But later in 2015, in *Settling Devotional Claimants v. Copyright Royalty Bd.*, 797 F.3d 1106 (D.C. Cir. 2015), he joined the court in determining that the Board's royalty rates for retransmitting religious and devotional programming was "quintessentially arbitrary and capricious."

And on the trademark side:

In *Estate of Coll-Monge v. Inner Peace Movement*, 524 F.3d 1341 (D.C. Cir. 2008), he joined the court in reversing the determination that a non-profit corporation could not be a related company whose use of a trademark was controlled by a trademarks registrant,

under the “related company” provision of the Lanham Act.

In *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dept. of Treasury*, 638 F.3d 794 (D.C. Cir. 2011), *cert. denied*, 566 U.S. 986 (2012), in a 2-1 decision, Kavanaugh wrote the opinion ruling that a company owned by the Cuban government did not have a vested right to perpetual renewal of its trademark after the amendment to the Cuban Assets Control Regulations removed the trademark exception. According to the opinion, the regulations stated that exceptions were revocable at any time, despite the assumption that U.S. trademark registrants acquire a perpetual right to renew their marks so long as they continue to be in commercial use when the marks are first registered.

Kavanaugh’s views appear to support the administrative decision-making process, particularly that of the Copyright Royalty Board. We will have to stay tuned to learn if these views also support the administrative powers of the U.S. Patent and Trademark Office.