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Copyright Infringement

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Notes

COPYRIGHT INFRINGEMENT*

The owner of a copyright[1] has the statutory right to exclusively print, reprint, publish, copy and vend the copyrighted work.[2] The grant of these rights implies that others shall not exercise them without the consent of the copyright proprietor; to do so would be infringement.[3]

In *West Publishing Co. v. Edward Thompson Co.*,[4] the court, in expressing its conception of infringement, stated that infringement consists of the violation of the exclusive right, conferred by statute, to reproduce copies of the original production. There can be no infringement unless there has been copying which consists of an exact or substantial reproduction of the original.

In *Emerson v. Davies*,[5] the standard for determining whether there has been a copying was elaborated upon:

> I think, it may be laid down as the clear result of the authorities in cases of this nature, that the true test of piracy or not is to ascertain whether the defendant has, in fact, used the plan, arrangements, and illustrations of the plaintiff, as the model of his own book, with colorable alterations and variations only to disguise the use thereof; or whether his work is the result of his own labor, skill, and use of common materials and common sources of knowledge, open to all men, and the resemblances are either accidental or arising from the nature of the subject. In other words, whether the defendant's book is, quoad hoc, a servile or evasive imitation of the plaintiff's work, or a bona fide original compilation from other common or independent sources.[6]

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[1] 17 U.S.C. §5 (1958) provides for the classification of copyrightable material into the following categories: (a) books; (b) periodicals; (c) lectures, sermons and addresses; (d) dramatic or dramatico-musical compositions; (e) musical compositions; (f) maps; (g) works of art; (h) reproductions of works of art; (i) drawings or plastic works of a scientific or technical character; (j) photographs; (k) prints and pictorial illustrations; (l) motion-picture photoplays; and (m) motion pictures other than photoplays.

[2] 17 U.S.C. §1(a) (1958).

[3] United States v. Wells, 176 F Supp. 630, 633 (S.D. Tex. 1959).

[4] 169 Fed. 833, 861 (C.C.E.D.N.Y. 1909).

[5] 8 Fed. Cas. 615 (No. 4436) (C.C.D. Mass. 1845).

[6] *Id.* at 624.

Thus, unlike patent law, copyright law does not restrict or penalize one who independently creates an identical work.[7]

When considering the aspects of copying, it is to be noted that the form of expressing the idea, as opposed to the idea itself, is the copyrightable matter.[8] Once the form of expression is copied, infringement cannot be avoided by the addition of materials,[9] omission of features,[10] or other colorable changes.[11] Furthermore, it is no defense that the owner was benefitted rather than injured,[12] that there was no intention to infringe,[13] or that there was only a restricted use and distribution of the infringing copies.[14]

Since it is impractical to enumerate a universal list of all the elements involved in an infringement action, this note is limited to an elaboration of the following four elements which must always be established to prove infringement:

I. *Originality* in the plaintiff's work;
II. *Access* by the defendant;
III. *Copying* by the defendant; and
IV *Substantial appropriation* of the copyrighted material.

In discussing the aforementioned elements, emphasis will be placed upon the degree of importance attached to them and the factors considered necessary to prove their existence.

I. ORIGINALITY

Section 8 of the Copyright Act excludes the right to a copyright on any work other than an original.[15] Therefore in an infringement action it is not unusual for the defendant to challenge the plaintiff's

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[7] In Barton Candy Corp. v. Tell Chocolate Novelties Corp., 178 F Supp. 577, 581 (E.D. N.Y. 1959), the court stated:

> [T]here is no prohibition imposed upon an independent reproduction of a copyrighted work even if the two works resemble each other because there is no copying. If the two works are the result of the independent intellectual effort of two authors and are derived from common sources available to all, there can be no infringement.

[8] See, *e.g.*, National Comics Publications v. Fawcett Publications, 191 F.2d 594 (2d Cir. 1951).

[9] See, *e.g.*, Bracken v. Rosenthal, 151 Fed. 136 (C.C.N.D.Ill. 1907); Lawrence v. Dana, 15 Fed. Cas. 26 (No. 8136) (C.C.D. Mass. 1869).

[10] See, *e.g.*, Woodman v. Lydiard-Peterson Co., 192 Fed. 67 (C.C.D.Minn. 1912).

[11] See, *e.g.*, Nutt v. National Institute, Inc., 31 F.2d 236 (2d Cir. 1929).

[12] Harms v. Cohen, 279 Fed. 276 (E.D. Penn. 1922).

[13] Toksvig v. Bruce Publishing Co., 181 F.2d 664 (7th Cir. 1950).

[14] See Ladd v. Oxnard, 75 Fed. 703 (C.C.D.Mass. 1896); Macmillan Co. v. King, 223 Fed. 862 (D. Mass. 1914).

[15] "No copyright shall subsist in the *original* text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to July 1, 1909, and has not been already copyrighted." [Emphasis added.] 17 U.S.C. §8 (1958).

copyright on the basis that his work is not original. If the defendant's contention is established, the plaintiff's copyright is invalid and the charge of infringement must fail. Thus the question of what is an "original" becomes pertinent.

Because of the limited number of basic plots and ideas, most copyrighted works are, in essence, expansions and variations of previous works. As expressed in *Alfred Bell & Co. v. Catalda Fine Arts Inc.*,[16] this truism has necessitated a liberal judicial attitude toward originality·

> 'Original' in reference to a copyrighted work means that the particular work owes its origin to the author No large measure of novelty is necessary. [17]
>
> All that is needed to satisfy both the Constitution and the statute is that the author contributed something more than a merely trivial' variation, something recognizably 'his own. Originality in this context means little more than a prohibition of actual copying. No matter how poor artistically the author s addition, it is enough if it be his own.[18]

The use of old material[19] by a subsequent writer will not prevent him from obtaining a copyright on his arrangement:

> The question is not, whether the materials which are used are entirely new, and have never been used before; or even that they have never been used before for the same purpose. The true question is, whether the same plan, arrangement and combination of materials have been used before for the same purpose or for any other purpose. [20]
>
> No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. If no book could be the subject of copy-right which was not new and original in the elements of which it is composed, there could be no ground for any copy-right in modern times, and we should be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence.[21]

Where old material has been used in producing a new work and this work is copied, the copyright has been infringed. It is only the new arrangement, however, that is infringed because the old material cannot be copyrighted.[22] The basis for making the new work copyrightable is that "the labor of making these selections, arrangements and combinations has entailed the exercise of skill, discretion and creative effort."[23] This necessary skill and creative effort was found

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[16] 191 F.2d 99 (2d Cir. 1951).
[17] *Id.* at 102.
[18] *Id.* at 102-03.
[19] Old material, as used in this article, refers to any work which is not protected by a copyright and can, therefore, be considered to be public property.
[20] Emerson v. Davies, 8 Fed. Cas. 615, 618-19 (No. 4436) (C.C.D. Mass. 1845).
[21] *Id.* at 619.
[22] Stodart v. Mutual Film Corp., 249 Fed. 507 (S.D. N.Y. 1917).
[23] Stanley v. Columbia Broadcasting Sys., Inc., 221 P.2d 73, 79 (Cal. 1950).

in *Alva Studios, Inc. v. Winninger*,[24] where the plaintiff, who was engaged in the reproduction of three-dimensional works of art, reduced an original sculpture from 37 inches to 18½ inches. A similar ruling was made where the plaintiff photographed and transferred an embroidered design, which was in the public domain, into printed form on a dress fabric.[25]

These two cases illustrate that the courts will protect the plaintiff's statutory rights if his "work contains some substantial, not merely trivial, originality."[26]

II. ACCESS

Access means nothing more than an opportunity to copy the plaintiff's work, and without proof that the defendant saw, heard, or read the copyrighted work the infringement action must fail.[27] The answer to the question of whether the defendant had access is normally dependent upon his opportunity to copy and the similarities that are present in the two works. Although proof of access is generally said to be a question for the trier of facts, certain principles of law have been developed by the courts to make a determination of this question somewhat easier.

In *Arnstein v. Porter*,[28] in attempting to show the relationship between similarities and access and their effect upon proof of copying, the court stated:

> Of course, if there are no similarities, no amount of evidence of access will suffice to prove copying. If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying. If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result.[29]

As this case indicates, the greater the similarities between the two works, the easier it is for the trier of facts to find access, assuming of

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[24] 177 F Supp. 265 (S.D. N.Y. 1959).

[25] Millworth Converting Corp. v. Slifka, 276 F.2d 443 (2d Cir. 1960). The injunction against the defendant was dissolved because it was found that he had copied from the work in the public domain as opposed to plaintiff's mode of expression.

[26] Chamberlin v. Uris Sales Corp., 150 F.2d 512, 513 (2d Cir. 1945).

[27] In Burns v. Twentieth Century-Fox Film Corp., 75 F Supp. 986, 987 (D. Mass. 1948), the court stated: "I find that there is no credible evidence that at the time of preparing or publishing the motion picture defendant had actual access to or had even heard of plaintiff's book. For that reason alone plaintiff's suit should be dismissed." See, *e.g.*, Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); Twentieth Century-Fox Film Corp. v. Dieckhaus, 153 F.2d 893 (8th Cir. 1946).

[28] 154 F.2d 464 (2d Cir. 1946).

[29] *Id.* at 468.

course that the copyrighted work is in general circulation. Where the work has not been circulated proof of access is more difficult, because of the principle that if a comparison of the two works is the only means of establishing access, the similarities must raise more than a doubt or suspicion to stand against the oaths of witnesses who know the facts.[30]

It can be concluded that access may be inferred from the surrounding circumstances, may be found from the similarities in the plan, arrangement and combination of materials or may be established by showing identity of phraseology [31]

III. COPYING

To constitute infringement there must be a copying in some form of the copyrighted work. Ordinarily the question of whether or not there has been a copying is dependent upon a comparison of the inference (of copying) to be drawn from the similarities with the direct evidence of non-access and non-copying. If the similarities are so insubstantial as to be incapable of rationally affording the basis for an inference, obviously the question of copying must be answered in the negative. However, where the use of a common source is not a satisfactory explanation for the similarities, and where all possibilities of access are not excluded by the physical facts, there is a strong inference of copying.

Generally stated, a copy is that which comes so near to the original as to convey the same idea created by the original.[32] To satisfy this definition the copying does not have to be literal, but instead may consist of imitation, paraphrasing, or any other colorable alteration.

Imitation is normally thought to be a likeness designed to reproduce the style or manner of another artistic work. Although every imitation does not constitute infringement, the courts will treat an imitation as a copying if it is nothing more than an attempt to disguise a piracy of the copyrighted work. For determining when the imitation becomes a piracy the following standard has been enunciated:

> It is true the imitation may be very slight and shadowy. But on the other hand, it may be very close, and so close as to be a mere evasion of the copyright, although not an exact and literal copy.[33]

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[30] See Twentieth Century-Fox Film Corp. v. Dieckhaus, 153 F.2d 893 (8th Cir. 1946).

[31] See, *e.g.*, Kovacs v. Mutual Broadcasting Sys., 221 P.2d 108 (Cal. 1950).

[32] See, *e.g.*, White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1, 17 (1908).

[33] Emerson v. Davies, 8 Fed. Cas. 615, 622 (No. 4436) (C.C.D. Mass. 1845).

The difficulty of drawing the line between permissible and infringing imitation is illustrated by the following two cases, which involve the impersonation of an entertainer singing a copyrighted song. In both cases it was the combination of actions, gestures, and tones of the entertainer that was being represented, and the use of the song was only incidental to the impersonation. The basic factual difference between the two cases was that in one the entire song was sung,[34] while in the other only the chorus.[35] In the former the court found infringement but in the latter the impersonation was held to be permissible. This seems to indicate that the quantity of the work imitated is a primary consideration in finding the presence or absence of copying.

While imitation involves copying the form or style of the original work, paraphrasing involves a reproduction of the substance of the work in other terms. The fact that the identical language and illustrations were not used will not justify the appropriation of the literary work. Paraphrasing or copying with evasion is an infringement, even though there may be little or no conceivable identity between the two works.[36]

The degree of paraphrasing necessary to constitute infringement was set forth in *Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys., Inc.*[37] The court said:

> It is our conception of the area covered by the copyright statute that when a study of the two writings is made and it is plain from the study that one of them is not in fact the creation of the putative author, but instead has been copied in substantial part exactly or in transparent rephrasing to produce essentially the story of the other writing, it infringes.[38]

In summary, where the internal sequence of ideas and language compels the conclusion that the copyrighted material is the source of the alleged infringing work, paraphrasing has been shown.

IV SUBSTANTIAL APPROPRIATION

Regardless of the form of copying, whether it be imitation or paraphrasing, there must be a substantial appropriation of the copyrighted work before liability for infringement arises. The factors most often taken into consideration by the courts in answering the question of whether or not there has been a substantial appropriation are:

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[34] Green v. Luby, 177 Fed. 287 (C.C.S.D.N.Y. 1909).
[35] Bloom & Hamlin v. Nixon, 125 Fed. 977 (C.C.E.D.Pa. 1903).
[36] Ansehl v. Puritan Pharmaceutical Co., 61 F.2d 131, 138 (8th Cir. 1932).
[37] 216 F.2d 945 (9th Cir. 1954).
[38] *Id.* at 950.

(a) the decrease in value of the copyrighted work; (b) whether the author's labor has been appropriated; (c) the value of the part copied; and (d) the relative value and purpose served in each work by the part copied.[39]

In *Warren v. White & Wyckoff Mfg. Co.*,[40] the court emphasized the importance of some of the above mentioned factors:

> I think it also entirely plain that the publication of defendant's calendar did not in any manner affect the sale of plaintiff's book, has not caused plaintiff any actual damage, and by its very nature could not cause him any, because the two publications could not reasonably be said to be competitive, and, were it not for the fact of the deliberate, unacknowledged, appropriation of material from plaintiff's book, I should be inclined to treat the whole matter as a tempest in a teapot, and, while finding for plaintiff for the minimum statutory damages, let him have his trouble for his pains.[41]

Since publications and presentations of works are made in order that they may reach the general public, there are forms of use, and even of copying, that can be made without constituting infringement. These uses are permissible by virtue of the doctrine of "fair use," which can basically be defined as that amount of copying permitted by law which does not constitute infringement.

In drawing the line between fair use and substantial appropriation, it has been stated that the quantity taken is not necessarily the decisive factor:

> With reference to the *quantity and quality* taken, of course no general rule can be laid down, applicable to all cases. One writer might take all the vital part of another's book, though it might be but a small portion of the book in quantity. In many valuable books, particularly of a scientific character, the leading ideas of the author may be very few in number, the greater part of the work being devoted either to the illustration or amplification of these ideas, or to the reproduction of the ideas of other authors upon the same subject. The person who could seize these leading ideas, or, to use an expression attributed to Macauley, who could tear the heart out of the book, though it involved the republication of only a single paragraph, might do the author substantial damage, while another might republish pages without imparting the same information. It is not only quantity, but value and quality, that are to be regarded in determining the question of piracy.[42]

In attempting to decide whether there has been a substantial appropriation, it must be kept in mind that "the basic test of plagiarism

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[39] *E.g.*, Carr v. National Capital Press, Inc., 71 F.2d 220 (D.C. Cir. 1934); West Publishing Co. v. Edward Thompson Co., 169 Fed. 833 (C.C.E.D.N.Y. 1909).

[40] 39 F.2d 922 (S.D. N.Y. 1930).

[41] *Id.* at 923.

[42] Farmer v. Elstner, 33 Fed. 494, 495-96 (C.C.E.D.Mich. 1888).

is whether the resemblance between the two works in question could be recognized by ordinary observation and not by fine analysis or by argument and dissection by experts."[43]

Conclusion

The decisive factor in all infringement actions is nothing more than a factual comparison of the works involved. Necessarily, therefore, there is no workable definition of infringement, but instead it appears that the courts attempt to maintain a flexible attitude in this field so that the copyright proprietor will be protected and at the same time future work in the various fields will not be stifled.

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[43] Greenbie v. Noble, 151 F Supp. 45, 70 (S.D. N.Y. 1957).