Sometimes Just Say No: Assessing a Potential Plaintiff's Copyright Infringement Claim

By Brian D. Caplan

The United States Copyright Act protects expression but not concepts, ideas or scénes à faire (sequences of events that result from the choice of a setting or situation). This legal principle is easier said than understood. An example will illustrate the doctrine. If you were to write a one-page summary or "treatment" for a potential show called *Seinfeld* and listed the character traits of the four featured characters as follows:

Jerry Seinfeld: a neurotic, self-doubting, stand-up comedian, who cannot maintain a steady relationship;

Elaine: quirky, frequently puzzled, ditzy, critical, not easily impressed;

George: uncomfortable in his own skin and on occasion a buffoon, awkward, brazen, prone to say the wrong thing at the wrong time;

Kramer: a zany, slapstick goofy looking guy who always gets into trouble.

You would have *no rights* in the show called *Seinfeld*.

Your one-page treatment is simply a concept or idea that can be expressed differently a thousand times over. Nobody has a monopoly on concepts and ideas, and they are not copyrightable. Yet each *episode* of the show *Seinfeld* would be a different protectable and copyrightable expression based upon its plot line and dialogue.

William Roger Dean was a famous artist and designer who produced work in various media, including architecture, design, and painting. His work has hung in museums and he is well known for creating cover art and logo designs for rock bands, including the group Yes.

Many of his works were also featured in coffee-table art books.

When the blockbuster hit movie *Avatar* was released, many bloggers and commentators took to the internet and opined that aspects of the film's ecosystem, including mountains, stone arches, trees, and wildlife, were similar to or copied from works done by Dean. To compound matters, James Cameron, the talented writer and film director whose works include *The Terminator*, *True Lies*, and *Titanic*, was rumored to have been "inspired" by Dean.

Dean had created paintings with floating land masses, rock, moss, and trees ascending into heaven, solid arches in the mist, flat-topped trees, floating jungles, and flying dragons. Cameron's movie also had floating land masses, rock, moss, and tree structures ascending into the sky called "Hallelujah, Mountains," stone arches, a "hometree" resembling a flat-top tree from Africa, a "tree of voices," and a horse-like creature called a "banshee" that could fly.

A side-by-side comparison of Dean's creations and Cameron's work revealed that no works were identical, but some had a similar "look and feel." However, as stated above, one cannot get a monopoly on various ideas and concepts that can be expressed differently by hundreds of different graphic artists. Floating land masses, stone steps covered in moss going into the sky, solid-mass arches, funny-shaped trees and animal configurations are general concepts and ideas.

After watching *Avatar* three times and doing a detailed analysis of Dean's work, I politely declined the opportunity to represent Dean in a significant, high-visibility copyright infringement case against James Cameron and Twentieth Century Fox Film Corporation, the writer/director, and motion picture company, respectively, behind *Avatar.*

In September of 2014, United States District Court Judge Jesse Furman in the Southern District of New York dismissed Dean's copyright infringement claim against Cameron and Twentieth Century Fox, that had been commenced by another attorney, finding that no substantial similarity existed between *Avatar* and copyrightable elements of Dean's artworks. Judge Furman noted in his decision that:

- Dean did not have a monopoly on the idea of floating or airborne land, an idea that has been around since at least 1726, when Jonathan Swift published his classic, *Gulliver's Travels*;
- The shapes of some of the land masses and features such as foliage on waterfall, to the extent these elements appear in nature, are in the public domain and "free for the taking";
- Ideas, such as flying dragon-like creatures, and other features taken from nature (stone arches, acacia trees, willow trees, and colorful amphibians and reptiles) were not subject to copyright protection; and

- dissimilarities between many aspects of the work out-weighted any similarities.

When I read the 14-page court decision, it reaffirmed my belief that sometimes the best decision you can make is to turn down taking a new case.

How to Assess a Copyright Infringement Claim

Assessing a copyright infringement claim in the entertainment industry can be a challenging endeavor. While the fundamental elements of an infringement claim appear to be straightforward enough – namely the ability of a plaintiff to prove (1) that an alleged infringer had access to the plaintiff's work before creating the allegedly infringing work and (2) that there is substantial similarity of protected copyrightable expression from the original work incorporated in the claimed infringing work – many impediments to a successful infringement claim may not be readily apparent on day one of an analysis.

Numerous fact specific and nuanced defenses to a copyright infringement claim may exist, each of which can require thoughtful study and investigation. Such defenses may include, but are not limited to:

- Lack of originality;
- lack of copyrightability;
- independent creation;
- fair use;
- de minimis taking;
- lack of substantial similarity of protectable expression; and
- lack of access.

Cases involving music, books, photography and motion pictures/television productions each present their own issues relating to protectable expression. Proving the first element of a copyright infringement case, access, for each of these creative genres will not differ significantly as the plaintiff will need to prove that the defendant had a reasonable opportunity to hear, see or read the plaintiff's creative work before creating the later work. Normally, direct evidence of copying is not available, so the plaintiff must prove access through the wide dissemination of his/her/their work or through a third-party intermediary who would be likely to have shared the plaintiff's work with the defendant.

Music

Generally speaking, similarity of melody or lyrics is a requirement for a successful copyright infringement case in the music industry, although on rare occasions a unique combination of otherwise non-protectable elements in a song can rise to the level of copyrightable expression.

Often two songs sound similar to the naked ear. However, an infringement assessment does not stop there. If the lyrics and melody of two compositions are dissimilar, and the only similarities between two works relate to structure, instrumentation, tempo, "feel" and the genre of music (i.e., country, salsa, urban), then no protectable copyrightable elements would be wrongfully misappropriated by the secondary creator.

If similarity of melody or lyrics can be identified between two works, however, a number of fundamental questions still must be answered:

1. Has the subject music or have the lyrics been used in prior compositions (so-called "prior art");
2. Is the nature of the subject music or lyrics such that they lend themselves to a claim of independent creation (i.e., that the defendant would not have had to rely on the plaintiff's pre-existing work when creating his/her/their own); and
3. Is the subject music or lyrics trite or commonplace?

Additionally, until a thorough review of prior art can be conducted by a worthy musicologist to determine the originality of the claimed infringed material, the practitioner will not know the actual strength of the claim.

Books

Copyright does not protect an idea, but only the expression of an idea. Determining the distinction between an idea and its expression can often be a challenge. A two-page summary of a novel containing a story line and a brief description of each character would generally not be subject to much protection, as the novel could be expressed in numerous fashions and the summary would simply reflect an idea. When assessing the similarities between two books, one must determine whether there is similarity of protectable expression.

"Copyright protection doesn't not extend to historical or contemporary facts, material traceable to common sources or in the public domain and scénes à faire."[1] Scénes à faire, also known as sequences of events that "necessarily result from the choice of a setting or situation" do not enjoy copyright protection.[2] While consideration can be given to the total concept and feel of a work, similarities in theme, setting, characters, time sequence, plot and pace are generally more important.[3]

Showing that two literary works contain substantial similarities of protectable expression is not an easy undertaking. A review of the case law reflects that most infringement claims relating to literary works fail. The practitioner should be careful to separate non-copyrightable subject matter from protectable expression before taking on an infringement claim and understand that it will be an uphill battle.

Photographs

The nature of copyright protection in photographs differs from other forms of creative expression. An individual who takes a generic photograph of the Statue of Liberty would not have protectable copyrightable expression in his/her/their work to support a claim against a subsequent photographer who takes a similar photo. Since originality is the "sine qua non of copyright,"[4] "copyright protection may extend only to those components of a work that are original to the author."[5] While only a minimal degree of creativity is necessary to establish such "originality," it is required nonetheless. As one court has noted:

> ...the photographer of a building or tree or other pre-existing object has no right to prevent others from photographing the same thing. That is because originality depends upon independent creation, and the photographer did not create that object. By contrast, if a photographer arranges or otherwise creates the subject that his camera captures, he may have the right to prevent others from producing works that depict that subject.[6]

Generally, a photograph may be original in three different respects: the manner in which the photograph is rendered, also known as "rendition," the timing of the photograph, and the creation of the subject.[7]

- "Rendition" relates to the angle of a photographic shot, light and shade, exposure and effects achieved by means of filters and developing techniques, and does not depend upon the scene or object being photographed.
- "Timing" relates to the fortuitous timing of taking a photo not previously taken.

Examples include photographer Tom Mangelsen's "Catch of the Day" (the well-known photo of a salmon jumping up a waterfall into the open mouth of a bear) and "V-J Day in Times Square," the iconic Alfred Eisenstaedt photo of a young sailor kissing a woman on VJ-Day in Times Square.

With respect, to both rendition and timing, the underlying subject of the photo does not qualify for copyright protection, i.e., another photographer can photograph an image of a bear about to catch a salmon swimming upstream at a waterfall or a young sailor kissing a woman.

Where a photographer creates the scene or subject to be photographed, he/she/they may claim originality and protection over the precise scene or subject created, as long as it was original.[8] When comparing two photographs for a potential copyright infringement case one must distinguish what elements of the original image are subject to protection in order to determine whether a viable claim exists.

Motion Pictures and Television

Authors of screenplays and treatments for television shows often bring claims against works that embody the ideas contained in their submissions. Without significant similarity of an elaborate plot, characters, and dialogue, such claims are usually destined for failure. A reality television show treatment about a nude resort on a small island will not be subject to copyright protection as each episode of the produced reality show will have different characters and different dialogue, which would be the expression of the idea contained in the treatment. Similarly, screenplay authors usually have a difficult row to hoe demonstrating infringement. Further, similarity of a general plot line alone will never be enough as that plot can be expressed in many different ways through different characters in different settings using different dialogue.

Both *Willams* and *Chase-Riboud v. Dreamworks*[9] are instructive in showing the difficulties in sustaining claims against a motion picture for copyright infringement. While both cases involve plaintiffs' claims of infringement of novels, when stripped of the non-protectable elements of their novels, no substantial similarity was found relating to any protectable expression.[10]

Conclusion

As indicated above, different forms of creative expression have different levels of protectability under existing copyright law. Claims relating to music, books, photographs, and motion pictures/television shows each present their own issues relating to protectable expression as well as the process by which to conduct a copyright infringement analysis. Given the fact specific nature of many defenses to copyright infringement claims, many of which are not readily apparent at the early stages of assessment, the practitioner must be wary of jumping to a premature conclusion about the viability of a claim. Further analysis and substantive investigation can often undermine the viability of a claim. Apprising a client of the difficulties inherent in prosecuting a copyright infringement claim and tempering a client's expectation until a thorough analysis had been completed is advisable.

Endnotes

1. *Walker v. Time Life Films Inc.*, 615 F. Supp. 430, 435 (S.D.N.Y. 1985).
2. *See generally Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986) (scénes à faire would, among other things, include the setting, commonplace experiences, and tools used in a particular trade, i.e., policemen, firemen, zookeepers, etc.).
3. *See Williams v. Crichton*, 84 F.3d 581 (2d Cir. 1996).
4. *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991).

5. *Id.* at 348.
6. *Mannion v. Coors Brewing Company*, 377 F. Supp.2d 444 (S.D.N.Y. 2005) (citing *Cararzas v. Time Life, Inc.*, No. 92 Civ. 6346 (PKL); 1992 WL 322033 (S.D.N.Y. 1992); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992)).
7. *See Mannion*, *supra*.
8. *See Rogers v. Koons*, *supra* (a photograph of a husband and wife sitting on a park bench with eight puppies arranged on their laps was subject to protection); *Gross v. Seligman*, 212 F. 930 (2d Cir. 1914) (a photo of a model in an identical pose to the original photo, with the only exception being that she had a smile and cherry stem between her teeth infringed the original work).
9. *Williams v. Crichton*, *supra*; *Chase-Riboud v. Dreamworks*, 987 F. Supp. 1222 (C.D. Cal. 1997).
10. *Williams v. Crichton* (author of multiple children's fictional dinosaur books brought action against novel and movie "Jurassic Park"); *Chase-Riboud v. Dreamworks* (author of historical fiction novel *Echo of Lions* about the slave ship Amistad brought action for infringement relating to the motion picture *Amistad*).

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