"A SCREENWRITER'S GUIDE TO COPYRIGHT LAW"
by Glenn T. Litwak, Esq. and Sharon Glancz

Introduction:

There is an old joke that asks: What is the difference between plagiarism and research? The answer is: Plagiarism is copying from one source while research is copying from many sources.

This article discusses some fundamentals of copyright law and the elements of a copyright infringement claim. It is not meant to provide comprehensive coverage of this complex area of law. For advice regarding any particular legal question or problem, it is recommended that the reader seek the advice of an experienced attorney.

What is Copyright?

Copyright is a form of federal protection granted by Title 17 of the United States Code to the authors of "original works of authorship that are fixed in a tangible medium of expression." Fixation can be in any written or visual form and does not need to be perceptible to the naked eye, so long as it can be communicated with the aid of a machine or device. A work must have a "minimal degree of creativity" to be considered original.

What is Copyrightable?

The Copyright Act (17 U.S.C. § 102) gives a non-exhaustive list of copyrightable works, including the following categories:

(1) literary works

(2) musical works, including any accompanying words

(3) dramatic works, including any accompanying music

(4) pantomimes and choreographic works

(5) pictorial, graphic and sculptural works

(6) motion pictures and other audiovisual works

(7) sound recordings

(8) architectural works

These categories are broadly construed by the courts and by the

Registrar of Copyrights. There are also several categories of works that are not eligible for federal copyright protection, including: (a) works that have **not** been "fixed in a tangible medium of expression;" (b) titles, names, short phrases, and slogans; (c) familiar symbols or designs; mere listings of ingredients or contents; (d) **ideas** (only expressions of ideas are copyrightable), procedures, methods, systems, processes, concepts, principles, discoveries, or devices; (e) works consisting **entirely** of common information and containing no original authorship.

Registration:

Registration of copyright is not necessary in order to have copyright protection under the Copyright Act of 1976. Registration, however, is a fairly mechanical process. In order to register, you need to call the Copyright Office and ask them to send you an application. There are different types of applications for the different types of subject matter. If you have a question on which form you need, the operators at the Copyright Office may be able to help you if you describe the work that you are trying to copyright. The current rate for copyright registration is $20. With the application, you also need to deposit copies of the work.

What are the benefits of registration?

Though registration is not necessary for federal protection, there are benefits to registering your work with the Copyright Office.

(1) In order to bring a claim of infringement, owners of US works must register. If you do not register, then you cannot bring an infringement claim.

(2) If you register before the infringement, then you are allowed to recover attorney fees and costs under section 412. You can also recover statutory damages, where the judge awards a monetary amount even if profits or damages cannot be shown.

(3) If you register within 5 years of publication, the certificate becomes "prima facie" evidence of what is stated on the certificate under section 410. This means that you have proof that you own whatever the copyright certificate says that you own. Therefore, the burden of proof will be on the defendant to prove that you do not own the copyright in the subject work.

What is Copyright Infringement?

Copyright infringement occurs when someone copies substantial portions of your work without authorization from you or your authorized agent. The elements of a copyright infringement are:

(1) Plaintiff's ownership of a valid copyright;

(2) Copying by the Defendant of a Plaintiff's copyrighted work.

Copying can be proved in two ways:

(a) Direct proof of copying, which is rare; and

(b) Circumstantial evidence of access to the copyright material and substantial similarity between the copyrighted work and the infringer's work.

(3) Substantial similarity between the works proves the defendant copied your expression. This test generally deals with the amount of similarities between the two works. This test is generally thought to be a subjective test based on the reasonable person standard, where the court basically uses an "I know it when I see it" type of rationale. However, in the 9th Circuit, including Califomia, there is a two-part analysis for substantial similarity.

(a) "Extrinsic Test:" this is an objective test of both ideas and of the specific expression of those ideas. Under this test, a court will look to whether, as an objective matter, the works are substantially similar in protected expression. Further, a court will decide whether a plaintiff wants to protect only non copyrightable elements. To help with the objective test, expert witnesses and their analyses can be used. This test looks at the "mood evoked by the work as a whole." See v. Durang, 711 F.2d 141, 144 (9th Cir. 1983). The court will examine similarity in plot, themes, dialogue, mood, setting, pace, characters and sequence of events.

(b) "Intrinsic Test:" this test asks the question "would an ordinary, reasonable person think that there was a substantial taking of protected expression?" Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1397 (9th Cir. 1996). The amount of similarity needed for a substantial similarity finding may depend on the type of work at issue. For example, for factual works, the similarity of expression must "amount to verbatim reproduction or very close paraphrasing." For artistic and fictional works, there is substantial similarity when the defendant's work usurps the "total concept and feel" of the plaintiff's work. Expert witnesses and their analyses are not permitted under this test.

What are Some Common Copyright Defenses?

There are several common defenses to copyright infringement, including statute of limitations (§ 507), and consent by the author or author's authorized agent (which is an absolute defense). There are also other defenses:

(1) Fair Use: this doctrine depends on the facts of each case and must be determined on a case-by case basis. There are four statutory factors listed in section 107 that must be balanced against each other:

(a) Purpose and character of defendant's use: a commercial use of a copyrighted work is more likely to be considered unfair than a non-commercial use.

(b) The nature of the copyrighted work: an unauthorized use is more likely to be fair if the nature of the copied material is mainly informational and "serve[s] the public interest in the free

dissemination of information." On the other hand, an unauthorized use will be considered less fair if the copied work is mainly entertainment in nature.

(c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole: this analysis deals with both the quantity of the work taken and also the quality of the material used by the defendant.

(d) The effect of the use upon the potential market for or value of the copyright work: if defendant's use is commercial, then the defendant has the burden of proving that his use will not effectuate harm to the potential market for or value of the plaintiff's work. If defendant's use is not commercial, the plaintiff has the burden of proving that *defendant's* use will harm the potential market for the plaintiff's work.

(2) Other Sections of the Copyright Act: sections 108 through 118 of the copyright act set out limitations upon the plaintiff's copyright rights which can effectively be used to prove that defendant's use was not an infringing one. For example, section 110 exempts certain performances and displays of a copyrighted work. One performance or display of a work that is not considered an infringement is one by teachers or students in classroom teaching activities in a nonprofit school. See 17 U.S.C. §110(1).

(3) Innocent Intent: though not a defense to liability for copyright infringement, it may however, go to the remedies that the plaintiff has available to him. Innocent intent is basically when a person accidentally copies a work that they did not know was copyrighted because of lack of notice.

(4) Public Domain: works that have lost federal copyright protection or those that were never able to gain federal protection (due to age) are said to be in the "public domain."

If a work is in the public domain, it can be used without liability for copyright infringement. Whether a work is in the public domain or not can sometimes be difficult to decipher because of the different rules that a work is subject to depending on when it was published or created.

What Remedies are Available?

There are several remedies available, depending on the circumstances. A sampling of these remedies are listed below.

(1) Permanent Injunction: in general, a plaintiff may be entitled to an injunction when he can prove the probability of success on his copyright infringement action. Courts also look at whether monetary damages would be adequate and balance the hardships to the parties. A permanent injunction gives the plaintiff the right to stop the defendant's infringing use. However, in certain situations, a permanent injunction could cause great public injury. In those cases, a court could withhold the injunction as long as the defendant pays royalties or a percentage of profits.

(2) Statutory Damages: a copyright owner who has registered in a timely fashion can elect to collect statutory damages between $500 and $20,000, instead of actual damages and plaintiff's damages can be raised up to $100,000.00 for intentional infringement.

(3) Actual Damages: among these damages is "the lost fair market value." Direct profits (i.e. those which would have been realized from sales of plaintiff's work but for defendant's infringing use) and indirect profits (i.e. those from the sales of non-infringed products that would have been generated by sales of the infringed work) are also actual damages.

(4) Defendant's Profits: plaintiff is entitled to any profits, not taken into account in calculating actual damages, that the infringing defendant received because of the infringement.

(5) Attorney Fees: the court can, in its discretion, award attorney fees to the prevailing party in an infringement suit, plaintiff or defendant.

Law Offices of Litwak & Havkin
468 North Camden Drive, Suite 200
Beverly Hills, CA 90210
Phone: 310-858-5574 Fax: 310-207-4180
