EXAGGERATED FEATURES

THE CARICATURIST'S QUARTERLY

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Infringement of Your Copyright

Determining Whether You Have a Claim and Enforcing that Claim

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Caricature by Court Jones

In the last issue, we discussed steps you can take before infringement to increase your changes of prevailing if someone infringes your work. In this article, we discuss how to evaluate whether you have a claim for copyright infringement and what you should do if you have a valid claim. The two basic elements of a claim of copyright infringement are that (1) you own a valid copyright and (2) that someone infringed that copyright.

Do You Own a Valid Copyright?

A valid copyright requires that a work be original (you created it without copying another) and minimally creative (a fairly low standard that excludes such things as listing names in alphabetical order as in the telephone book). Furthermore, it must be a "work of authorship" (such as a drawing, painting, song, computer program) and it must be "fixed" (on paper, on disk, in stone, etc.) rather than simply in your mind. You must also own the copyright in the work in order to enforce it. Ownership was discussed in more depth in the last issue, but in sum, you should consider whether you created this work in the scope of your employment (your employer will own it), whether it was commissioned as a work for hire and the appropriate documents were executed (then the commissioner may own it), or whether there was some other transfer of ownership, such as through an assignment. Note that ownership of a valid copyright does not require that the copyright is registered with the Copyright Office (though there are substantial benefits to registering your work, as discussed in the previous issue). Remember though that ownership of a copyright is separate and distinct from the ownership of the work. In other words, transfer of the physical embodiment of the work (i.e., the caricature itself) does not transfer the copyright in the work. (For those of you who asked for a citation for this rule at the NCN/ISCA Convention, it is 17 U.S.C. §202.) If you do own a valid copyright, you then should then consider whether it has been infringed.

Has Your Copyright Been Infringed?

Infringement requires that you show that the person had (1) access to your work and (2) that the infringing work is substantially similar to your work. "Access" to the copyrighted work can be either actual or inferred. If you know that the alleged infringer had a copy of the work or had direct access to it (i.e., they commissioned it from you and have exceeded the terms of the license), there is actual access. Inferred access can exist where the work is publicly available (i.e., on your website, in a catalog), and it is reasonably probable that the alleged infringer would have access. "Substantial similarity" is an amorphous test that varies from state to state and is very subjective. It requires that the "ordinary observer" – i.e., the judge or jury through the eyes of the general public – find that your work and the defendant's work are "substantially similar." If a licensee who had access to your work and has gone outside the scope of the license by reproducing excessive copies of your work, you can quite easily demonstrate both access and substantial similarity. On the other hand, if an unknown person on the other side of the world has created a work that uses certain elements of your work, you will have a harder time demonstrating access and substantial similarity.

Remember also that copyright protects the expression of an idea and not the underlying idea, concepts or facts. Someone may have knocked off your idea – i.e., to caricature a certain celebrity in a certain pose – but they may not have necessarily infringed your copyright if they did not copy the expression – i.e., the actual caricature that you created of the celebrity in that particular pose. You should consider whether the expression has been copied or whether only "noncopyrightable" elements have been copied (ideas, concepts, facts), in which case, you may not have a claim for infringement.

Does the Infringer Have Any Possible Defenses?

If you are confident that you own a valid copyright that has been infringed, take a moment to consider whether the infringer may have an obvious defense. For example, are they a licensee or could they have somehow legitimately obtained permission to use your work? There are numerous other more convoluted defenses that a potential infringer may raise, such as fair use, "estoppel" (delay and reliance), independent creation, "merger" (merging of ideas and expression) and others. These are issues that your attorney can discuss with you when and if they are raised.

Talk to an Attorney

Speaking of attorneys, if you believe you have a claim of infringement after considering the above, you should seriously think about contacting an experienced copyright attorney who can help you evaluate your claim, potential damages, and the best ways to proceed. There are various ways to proceed against an infringer, the most common being a "cease and desist" letter that notifies the infringer of their illegal actions and demands an appropriate response of your choosing (i.e., cessation, a license, or damages), or a lawsuit filed against the infringer seeking appropriate relief such as an injunction and damages. Note that before filing a lawsuit you must register your copyright – it is not required for a claim to exist, but it is required to get into court.

Do Not Wait Too Long

If you do think you have a claim of copyright infringement, do not wait too long to do something about it. Copyright owners sometimes think that if they wait until the infringer is successful in selling the infringing article before suing, there is a greater chance of recovering profits. First, they may never sell anything. Second, if you registered the work before the infringement, you can seek statutory damages for the infringement, so multiple sales are not necessary for damages. Third, and most importantly, there are defenses available to an infringer if you wait too long to file your lawsuit. A copyright lawsuit must be commenced within three years from when the claim "accrued." Depending on the state, this can be measured from when you learned of the infringement or when the injury occurred. In addition, a delay can raise defenses such as implied license and equitable estoppel if you lead the infringer to believe they may use your work but you actually intend to assert a claim of copyright infringement. Furthermore, if you sit on your rights, a delay may limit the damages a court will allow you to recover. So, if you believe someone is infringing your work, take action and protect your rights.

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