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Recent Development

**RECENT DEVELOPMENTS IN COPYRIGHT LAW**  
Cases Reported In Volumes 25 Through 27 U.S.P.Q.2d

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## I. Introduction

The last few months have seen several intriguing appellate copyright decisions. The stream of computer software infringement cases continues with the Ninth Circuit's controversial *MAI Systems Corp. v. Peak Computer, Inc.* decision, which casts doubt on the continued viability of the independent software maintenance industry.<sup>1</sup> Ownership issues also continue to infiltrate many cases, with the Tenth Circuit \*74 explicitly settling the open (but often overlooked) question of whether the Supreme Court's interpretation of the work made for hire rules in *Community for Creative Non-Violence v. Reid*<sup>2</sup> applies retroactively to all works created under the 1976 Copyright Act.<sup>3</sup> And, just as interestingly, the Supreme Court has granted certiorari in two copyright cases -- one testing the boundaries of parody fair use<sup>4</sup> and the other concerning whether plaintiffs and defendants should be treated evenly in awarding attorney fees to prevailing parties.<sup>5</sup>

We have reported below, by topic, selected appellate copyright decisions reported in volumes 25 through 27 of the United States Patent Quarterly.

## II. Case Reviews

### *A. Fair Use: Twin Peaks Productions, Inc. v. Publications International Ltd.*<sup>6</sup>

A publisher's attempt to capitalize on the public's fascination with the cryptic television program "Twin Peaks" provided an opportunity for the Second Circuit to examine the factors used to analyze a defendant's entitlement to a fair use defense. The Second Circuit ruled that a book that copied 89 lines of actual dialogue and contained extensive and highly detailed plot summaries of several episodes of "Twin Peaks" was not a fair use, but rather an unlawful abridgement that infringed the copyrights in the program's teleplays and televised episodes.<sup>7</sup> In examining the first of the four § 107<sup>8</sup> fair use factors (the "purpose of the use" test), the Court observed that "[t]he issue is not simply whether a challenged work serves one of the non-exclusive purposes identified in section 107, such as comment or criticism, but whether it does so to an insignificant or substantial extent."<sup>9</sup> The Court also noted that the weight to be ascribed to the first factor is a "more refined assessment than the relatively easy decision that a work serves a purpose illustrated by the categories listed in section 107."<sup>10</sup> The Court concluded that the first test did not favor the defendants, since the work was best described as an abridgement that served "no transformative function and elaborates in detail far beyond what is required to serve any legitimate purpose," such as scholarship or criticism.<sup>11</sup> The second factor also weighed in favor of the plaintiff, as the "nature of the copyrighted work" test tends to favor creative and fictional works.<sup>12</sup> Having already found that the defendants had appropriated a substantial portion of the copyrighted work (the third test),<sup>13</sup> the Court moved on to the fourth and critical "effect on the market" test.

The Court stated that "in cases where we have found the fourth factor to favor a defendant, the defendant's work filled a market niche that the plaintiff simply had no interest in occupying."<sup>14</sup> For example, copyright holders rarely write parodies or reviews of their own works, and are even less likely \*75 to analyze their underlying data from the opposite political perspective.<sup>15</sup> "On the other hand, it is the safe generalization that copyright holders, as a class, wish to continue to sell the copyrighted work and may also wish to prepare or license such derivative works as book versions or films."<sup>16</sup> In this case, the book was so detailed it could serve as a substitute for authorized derivative works (such as books regarding the program), and could even interfere with the primary market for the work (e.g., the market for videotapes of the programs themselves).<sup>17</sup> Since the Court determined that none of the four tests weighed in favor of the use, the work was held infringing.<sup>18</sup>

### *B. Infringement*

#### *1. Apparent Authority.-- Pinkham v. Sara Lee Corp.*<sup>19</sup>

Innocent (and not so innocent) infringers continue to look for creative ways to avoid claims of infringement. In a recent Eighth Circuit case, Sara Lee found itself as an unwitting infringer. In that case, Pinkham had authorized Camex to promote Pinkham's book to manufacturers for use as "premiums" for distribution with the manufacturer's products. Camex sold 13,000 copies of the book to Sara Lee for use as a test premium. Camex later advised Pinkham that Sara Lee decided not to purchase additional copies when in fact, Camex sold Sara Lee an additional 300,000 copies.<sup>20</sup>

Pinkham sued Camex and Sara Lee for copyright infringement. Pinkham moved for summary judgment against Sara Lee based on its distribution of the unauthorized copies. The district court denied Pinkham's motion, finding that Sara Lee might not be liable for infringement because Camex may have had "apparent authority" to authorize Sara Lee to distribute the 300,000 copies.<sup>21</sup>

The Eighth Circuit reversed, holding that even if Camex had apparent authority from Pinkham, as a matter of law, apparent authority is not a defense to copyright infringement.<sup>22</sup> The Court reasoned that as between the copyright owner and an innocent infringer, the innocent infringer should suffer since it has the opportunity to protect against infringement through an indemnity agreement with its supplier or through insurance.<sup>23</sup>

## **2. Computer Programs -- Infringement Test.-- Autoskill, Inc. v. National Education Support Systems, Inc.<sup>24</sup>**

The Tenth Circuit has affirmed the grant of a preliminary injunction by a district court which employed a three-step infringement test to compare two computer programs for infringing similarity. The test, recommended in NIMMER ON COPYRIGHT<sup>25</sup> and much like the one used in *Computer Associates International, Inc. v. Altai, Inc.*<sup>26</sup> uses three steps -- an "abstractions" step to identify protect ideas, a \*76 "filtration" step to remove protect ideas and other protect elements prior to the comparison for infringing similarity, and a "comparison" step to compare the protectable expression that remains after filtration.<sup>27</sup> The Tenth Circuit, however, refused to rule in the context of the case before it whether the infringement test set forth in *Altai* is "precisely the correct method of analysis for a final copyright judgment."<sup>28</sup>

## **3. Computer Programs -- "RAM" Copies.-- MAI Systems Corp. v. Peak Computer, Inc.<sup>29</sup>**

In a controversial decision, the Ninth Circuit ruled that "copying" for purposes of copyright law occurs when a computer program is transferred from a permanent storage device to a computer's random access memory ("RAM").<sup>30</sup> Quoting the lower court decision, the Court stated that:

the loading of copyrighted computer software from a storage medium (hard disk, floppy disk, or read only memory) into the memory of a central processing unit causes a copy to be made. In the absence of ownership of the copyright or express permission by license, such acts constitute copyright infringement.<sup>31</sup>

The Court found that when a third-party maintenance firm that is not licensed to use a particular copy of a computer program loads that program into the RAM of a licensee's computer to perform system maintenance tasks, a copy is created that is "fixed" for copyright purposes, i.e., "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."<sup>32</sup> The Court also noted that the language of § 117<sup>33</sup> (authorizing an owner of a copy to create additional copies as an essential step in using the program) is inapplicable, because the defendants' customers were licensees who did not "own" their copies of the plaintiff's computer programs.<sup>34</sup> This ruling has drawn criticism in view of the Court's failure to address issues such as (a) whether loading a program into RAM for purposes of routine system maintenance should be deemed a fair use of the work, (b) how long a copy in RAM must endure to be considered "fixed," since the simple act of turning off the computer will eradicate that copy, (c) how merely labelling a transaction a "license" can serve to defeat the substantive purposes of § 117,<sup>35</sup> and (d) the antitrust implications of a ruling which effectively forces licensees to purchase maintenance services exclusively from the vendor of the program -- who in this case was also the vendor of the computer itself.

## **C. Judgments**

### **1. Finality.-- Goodman v. Lee<sup>36</sup>**

The 1956 hit song "Let the Good Times Roll" was written by Lee and Goodman. In an infringement proceeding brought by Goodman against Lee's estate, the jury found, however, that even though Goodman was a joint author of the song, Lee had registered the copyright in the song in his own name, kept all \*77 earnings generated by the song to himself and concealed those facts from Goodman.<sup>37</sup>

The district court entered judgment for Goodman. The judgment stated that Goodman "was entitled to one-half of the income from the song from 1956 to date, together with prejudgment interest thereon, and all costs."<sup>38</sup>

Upon appeal, the Fifth Circuit was confronted with the issue of whether the judgment, which did not specify the specific sum to be awarded Goodman, was a final, appealable judgment. Goodman argued that it was, citing a number of cases where judgments without specific determinations of amounts were deemed to be final judgments. The Court, however, distinguished those cases, concluding that they only involved accountings which were purely mechanical or ministerial.<sup>39</sup> Given Goodman's counsel's admission that a determination of the amounts owed Goodman would be a "nightmare" and that Goodman had not even been able to identify the parties who had paid Lee money, the Court found that the "accounting goes far beyond" a mechanical or ministerial one, hence, the judgment was not final.<sup>40</sup>

## **D. Ownership**

Three recent appellate cases addressed several recurring questions concerning ownership, including: (a) the scope of a license grant in view of new and unanticipated technological uses, (b) the application of the Supreme Court's interpretation of the work made for hire concept, and (c) the apportionment of ownership among parties in the absence of a writing enunciating their intent.

### **1. Scope of License Grant -- New Technological Uses.-- Rey v. Lafferty<sup>41</sup>**

Lafferty and his affiliated investment firm ("LHP") licensed from Rey, the creator of the classic "Curious George" series of children's books, the right to create and distribute Curious George films "for television viewing." LHP later released videocassettes of the films, arguing that the license was broad enough to permit such distribution. Rey sued and prevailed in the district court.<sup>42</sup>

On appeal, the First Circuit, in affirming the district court's decision, noted that the relevant video technology was a "new use" which did not exist at the time the license was drafted, thus complicating any effort to accurately ascertain the "intent" of the parties.<sup>43</sup> The license did not contain any broadly phrased or general grant of rights, or any explicit statement that LHP's grant included future or unforeseen uses, thus the Court found it necessary to construe the phrase "for television viewing." The Court noted that other courts have determined that "television viewing" and "videocassette viewing" are not coextensive terms, since "television viewing" generally encompasses dissemination of the work from a central source via broadcast or cable, not the distribution and sale of a tangible consumer product.<sup>44</sup> Moreover, the Court suggested that it would perhaps be more accurate to say that one views a videocassette on a television *monitor*, rather than on a television, as none of the reception capabilities of \*78 a television are used in viewing the videocassette.<sup>45</sup> Accordingly, the Court found that the license LHP had been granted was not broad enough to convey videocassette rights.<sup>46</sup>

### **2. Works Made For Hire.-- Autoskill, Inc. v. National Education Support Systems, Inc.<sup>47</sup>**

The Tenth Circuit has held that the Supreme Court's interpretation of the work made for hire rules under the Copyright Act,<sup>48</sup> announced in *Community for Creative Non-Violence v. Reid* ("CCNV"),<sup>49</sup> is to be applied retroactively to resolve ownership disputes with respect to works created prior to the CCNV decision.<sup>50</sup> In making this determination, the Court stated that since the new work made for hire rules enunciated by the Supreme Court in CCNV had been retroactively applied to the litigants in that case, "selective non-retroactivity is barred in all other cases as to that new rule." Thus, all works created under the 1976 Copyright Act are subject to ownership analysis under CCNV.<sup>51</sup>

### **3. Works Made For Hire: Joint Authorship.-- Forward v. Thorogood<sup>52</sup>**

The First Circuit ruled that Forward, who suggested, organized and paid for a band's 1976 "demo" tape, is not the author or owner of the sound recordings since he made no meaningful creative contribution to the sound recordings and since there is no clear expression of the band's intent to transfer ownership to him.<sup>53</sup>

The Court found that the sound recordings were not works made for hire because Forward did not truly "commission" or employ the band to play, nor did he compensate or agree to compensate them.<sup>54</sup> Moreover, the sound recordings were not made for Forward's sake, but rather to promote the careers of his friends in the band.<sup>55</sup> The Court also rejected Forward's claim to joint authorship, finding that, while an artist may conceivably share authorship with a record producer or engineer (since such persons often artistically supervise or edit the performance), a person who merely offers encouragement, logistical support and song selection ideas has not made a contribution sufficient to qualify the person as a joint author.<sup>56</sup>

## **E. Preemption**

More than fifteen years after the effective date of the 1976 Copyright Act, courts continue to grapple with the boundaries of the preemption doctrine, as the following cases indicate.

### **\*79 I. State Contract Claims.--National Car Rental Systems, Inc. v. Computer Associates International, Inc.<sup>57</sup>**

CA licensed a computer program to National to be used solely for National's internal purposes. National permitted two other companies to use the program to process data. When CA sued for breach of contract, National argued that federal copyright law preempted CA's state contract law claim.<sup>58</sup> Reversing the trial court's decision to dismiss the contract claim, the Eighth Circuit held that the state law action was not preempted since the contractual restriction on National's use of the licensed program "constitutes an extra element in addition to the copyright rights making this cause of action qualitatively different from an action for copyright."<sup>59</sup>

The Court stated that the appropriate inquiry is whether the contract right in question is infringed by an act in contravention of one of the exclusive rights of a copyright owner, e.g., unauthorized reproduction.<sup>60</sup> A breach of contract claim alleging

nothing more than an act of infringement would be preempted, but a state law claim predicated upon an act incorporating elements beyond mere reproduction is not equivalent and is not preempted.<sup>61</sup>

The Court emphasized that in this case, no infringing “copies” of the program were made to process the data of other companies. Therefore, any limitations on the “use” of the work must be derived from promises contained in the license agreement, not from copyright law.<sup>62</sup>

## **2. Termination of Licenses.-- Rano v. Sipa Press<sup>63</sup>**

A photographer residing in California granted a distributor an oral, non-exclusive license of an unspecified duration to distribute the photographer’s copyrighted photographs. The photographer terminated the license based on California contract law that permits contracts for unspecified durations to be terminated at will.<sup>64</sup> Nonetheless, the distributor continued distributing copies of the photographs after receiving the termination notice. The photographer then sued the distributor for copyright infringement.

The photographer claimed that California law permitted him to terminate the license at will. However, the Ninth Circuit rejected this argument, holding that § 203(a)<sup>65</sup> preempts California law.<sup>66</sup> According to the Ninth Circuit, licenses for unspecified duration may only be terminated during a 5 year period 35 years after their inception unless they are materially breached by one party prior to that time.<sup>67</sup>

## **\*80 F. Procedure**

### **1. Pleading.-- Mid America Title Co. v. Kirk<sup>68</sup>**

According to the Seventh Circuit, while the Supreme Court’s decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>69</sup> served to articulate limits on the protectability of compilations of facts, it did not thereby place any new pleading requirements on plaintiffs claiming infringement of their compilations.<sup>70</sup> The defendant in the case before the Court argued that since the complaint did not identify the specific elements of plaintiff’s compilation that were alleged to be original, it provided inadequate notice of the nature of the claim under Fed. R. Civ. P. 8(a)(2).<sup>71</sup> The Seventh Circuit, however, disagreed, stating that if the complaint alleges plaintiff’s ownership, proper registration of the work, and infringement by defendant it will generally be sufficient to withstand challenge. The Court indicated that further elaboration of the precise factual basis of the claim can come after the complaint if filed, as the defendant will have ample opportunity to inquire into elements of originality during the discovery process.<sup>72</sup>

## **G. Remedies**

### **1. Attorney Fees -- Prevailing Defendants.-- Fantasy, Inc. v. Fogerty<sup>73</sup>**

The Ninth Circuit reaffirmed its position that a prevailing copyright defendant cannot be awarded attorney fees pursuant to § 505<sup>74</sup> unless the defendant can demonstrate that the action for copyright infringement was either frivolous or was brought and prosecuted in bad faith.<sup>75</sup> The Court pointed out that this disjunctive test has also been adopted by the Second and Seventh Circuits,<sup>76</sup> and rejected the notion that the Ninth Circuit should adopt the Third and Eleventh Circuits’ “evenhanded” approach<sup>77</sup> (which requires no such showing of bad faith or frivolity as a prerequisite for collecting attorney fees).<sup>78</sup>

## **III. On the Horizon**

As noted above, the Supreme Court has granted certiorari in *Fantasy, Inc. v. Fogerty*,<sup>79</sup> to consider whether the standard for awarding attorney fees to prevailing parties pursuant to § 505<sup>80</sup> should be different for prevailing plaintiffs as opposed to prevailing defendants. No Fifth Circuit case has explicitly \*81 addressed the issue, although the Court in *Micromanipulator v. Bough*<sup>81</sup> in awarding attorney fees to a prevailing plaintiff, stated that “[a]lthough attorney’s fees are awarded in the trial court’s discretion, they are the rule rather than the exception and should be awarded routinely.”<sup>82</sup> In view of the general rule that the Supreme Court rarely grants certiorari to tell the appellate court what a good job it did, copyright plaintiffs in borderline cases may soon be more reticent to pursue litigation.

The Supreme Court is also expected to issue a ruling in the near future in *Acuff-Rose Music, Inc. v. Campbell*.<sup>83</sup> This case involves a parody recording of the song *Pretty Woman* by the rap group 2 Live Crew. The Sixth Circuit examined the four factor fair use test set forth in § 107<sup>84</sup> and reversed the lower court’s finding of non-infringement.<sup>85</sup> The Sixth Circuit emphasized the centrality of the fourth factor (the effect of the use on the market for the original work), noting that 2 Live Crew’s somewhat lascivious reading of the classic song could so taint the public’s impression of the original work that it could have a significant impact on the owner’s ability to reap future benefit from further re-recordings of the song.<sup>86</sup>

Observers anticipate that the Supreme Court will attempt to clarify the use of the four factor test in the difficult context of parodies.

#### Footnotes

<sup>a1</sup> Arnold, White & Durkee, Austin, Texas.

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<sup>1</sup> 991 F.2d 511, 26 U.S.P.Q.2d (BNA) 1458 (9th Cir. 1993).

<sup>2</sup> 490 U.S. 730, 10 U.S.P.Q.2d (BNA) 1985 (1989).

<sup>3</sup> Autoskill, Inc. v. National Educ. Support Sys., Inc., 994 F.2d 1476, 26 U.S.P.Q.2d (BNA) 1828 (10th Cir. 1993).

<sup>4</sup> Acuff-Rose Music, Inc. v. Campbell, 113 S.Ct. 1642 (1993).

<sup>5</sup> Fogerty v. Fantasy, Inc., 113 S.Ct. 2992 (1993).

<sup>6</sup> 996 F.2d 1366, 27 U.S.P.Q.2d (BNA) 1001 (2d Cir. 1993).

<sup>7</sup> *Twin Peaks*, 996 F.2d at 1366.

<sup>8</sup> 17 U.S.C. § 107 (1992).

<sup>9</sup> Please note that this case summary contains quotations set forth in a “late-breaking” synopsis of the Second Circuit’s amended *Twin Peaks* decision, *see* “Highlights” section of 27 U.S.P.Q.2d No. 7.

<sup>10</sup> *Id.*

<sup>11</sup> *Twin Peaks*, 996 F.2d at 1376.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1377.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

18 *Id.*

19 983 F.2d 824, 25 U.S.P.Q.2d (BNA) 1336 (8th Cir. 1993).

20 *Pinkham*, 983 F.2d at 826.

21 *Id.*

22 *Id.* at 828.

23 *Id.* at 829.

24 994 F.2d 1476, 26 U.S.P.Q.2d (BNA) 1828 (10th Cir. 1993).

25 3 MEL VILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 [[[F] (1993).

26 982 F.2d 693 (2d Cir. 1992).

27 *Autoskill*, 994 F.2d at 1491-98.

28 *Id.* at 1491.

29 991 F.2d 511, 26 U.S.P.Q.2d (BNA) 1458 (9th Cir. 1993).

30 *MAI Sys.*, 991 F.2d at 518.

31 *Id.*

32 *Id.*

33 17 U.S.C. § 117 (1992).

34 991 F.2d at 519, n. 5.

35 17 U.S.C. § 117 (1992).

36 988 F.2d 619, 26 U.S.P.Q.2d (BNA) 1693 (5th Cir. 1993).

37 *Goodman*, 988 F.2d at 622.

38 *Id.*

39 *Id.* at 626.

40 *Id.* at 627.

41 26 U.S.P.Q.2d (BNA) 1339 (1st Cir. 1993).

42 *Id.* at 1342.

43 *Id.* at 1345.

44 *Id.* at 1346-48.

45 *Id.* at 1348.

46 *Id.* at 1347.

47 994 F.2d 1476, 26 U.S.P.Q.2d (BNA) 1828 (10th Cir. 1993).

48 17 U.S.C. § 101 *et seq.* (1992).

49 490 U.S. 730 (1989).

50 *Autoskill*, 994 F.2d at 1488.

51 *Id.*

52 985 F.2d 604, 25 U.S.P.Q.2d (BNA) 1733 (1st Cir. 1993).

53 *Forward*, 985 F.2d at 605-06.

54 *Id.* at 606.

55 *Id.*

56 *Id.* at 606-07.

57 991 F.2d 426, 26 U.S.P.Q.2d (BNA) 1370 (8th Cir. 1993).

58 *National Car Rental*, 991 F.2d at 428.

59 *Id.* at 431.



60 *Id.* at 432.

61 *Id.* at 434.

62 *Id.* at 433.

63 987 F.2d 580, 26 U.S.P.Q.2d (BNA) 1051 (9th Cir. 1993).

64 *Rano*, 987 F.2d at 585.

65 17 U.S.C. § 203(a) (1992).

66 *Rano*, 987 F.2d at 585.

67 *Id.*

68 991 F.2d 417, 26 U.S.P.Q.2d (BNA) 1538 (7th Cir. 1993).

69 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991).

70 *Mid America Title*, 991 F.2d at 422.

71 *Id.* at 420.

72 *Id.* at 421.

73 984 F.2d 1524, 27 U.S.P.Q.2d (BNA) 1039 (9th Cir.), *cert. granted sub nom.* *Fogerty v. Fantasy Inc.*, 113 S. Ct. 2992 (1993).

74 17 U.S.C. § 505 (1992).

75 *Fantasy*, 984 F.2d at 1532.

76 *Id.* at 1533 (citing *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 17 U.S.P.Q.2d (BNA) 1753 (7th Cir. 1991), *cert denied*, 112 S.Ct. 181 (1991); *Roth v. Pritikin*, 787 F.2d 54, 229 U.S.P.Q. (BNA) 388 (2d Cir. 1986)).

77 *Fantasy*, 984 F.2d at 1533.

78 *Id.* at 1532.

79 *Fogerty v. Fantasy, Inc.*, 113 S. Ct. 2992 (1993).

80 17 U.S.C. § 505 (1992).

- 81 779 F.2d 255, 228 U.S.P.Q. (BNA) 443 (5th Cir. 1985).
- 82 *Micromanipulator*, 779 F.2d at 259 (citing *Engel v. Teleprompter Corp.*, 732 F.2d 1238, 1241 (5th Cir. 1984).
- 83 754 F. Supp. 1150, 18 U.S.P.Q.2d (BNA) 1144 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429, 23 U.S.P.Q.2d (BNA) 1817 (6th Cir. 1992), *cert. granted, in part*, 113 S. Ct. 1642 (1993).
- 84 17 U.S.C. § 107 (1992)
- 85 *Acuff-Rose*, 972 F.2d at 1432.
- 86 *Id.* at 1438-39.