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Recent Development

RECENT DEVELOPMENTS IN COPYRIGHT LAW

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I. Introduction

The federal courts have developed and refined copyright jurisprudence in several areas of importance over the past few months and have applied the law to a number of interesting cases. Reported below, by topic, are selected copyright decisions appearing in volumes 34 and 35 of United States Patents Quarterly, Second Series.

*130 II. Case Reviews

A. Scope of Protection

1. Compilations

The *Feist* doctrine continues to reverberate in the district and circuit courts.¹ In recent cases, both the Seventh² and Eleventh³ Circuits addressed the issue of originality required for copyrightable compilations under *Feist*.⁴ In *Mid America Title Co. v. Kirk*,⁵ the Seventh Circuit found that the selection of facts presented in a title commitment was “a matter of convention and strict industry standards” and therefore was insufficiently original to be protected under copyright law.⁶ The court refused to extend the ruling to title commitments generally, instead expressly limiting its holding to the title commitment at issue in the case.⁷ By upholding the disposition of the issue on summary judgment, the court indicated interest in efficient resolution of the issue in future cases, despite its determination in an earlier remand of this case that dismissal on a Rule 12(b)(6) motion is usually inappropriate.⁸

The Eleventh Circuit decision in *Warren Publishing, Inc. v. Microdos Data Corp.*⁹ illustrates the present inability of the *Feist* doctrine to provide predictability in close cases. At issue in *Warren Publishing* was a “Television and Cable Factbook” in which publicly-available information concerning cable systems was compiled in order by the “principal community” served by each system. The majority found sufficient originality in the publisher’s selection and organization of the Factbook to warrant copyright protection.¹⁰ After reviewing strong evidence of copying—including the *131 presence of fictitious cable system entries placed in the Factbook as “decoys”¹¹--the court affirmed the injunction granted against the infringer.¹²

Without addressing the highly incriminating evidence of actual copying, Judge Kravitch dissented on the issue of originality.¹³ She found the facts indistinguishable from *BellSouth Advertising & Publishing Corp. v. Donnelley Information Publishing*,¹⁴ in which the en banc Eleventh Circuit held that a yellow pages publisher’s selection of business listings lacked originality and therefore was unprotectable under *Feist*. The majority’s decision in *BellSouth* was based in part on the fact that the publisher derived the listings from its subscribers’ own descriptions of their businesses,¹⁵ just as the publisher of the Factbook in *Warren Publishing* obtained the “principal community” designation for each multi-community cable system from the operators of the cable systems listed in the publication.¹⁶ Judge Kravitch felt bound by *BellSouth* to withhold copyright protection for the Factbook as well, although she described the issue as a “very close question,” and admitted that she found the majority opinion well-reasoned and forceful.¹⁷ Whether her colleagues on the Eleventh Circuit are persuaded by her analysis, or are otherwise interested in resolving this case en banc, remains to be seen.

2. Government Works

In *Pfeiffer v. Central Intelligence Agency*,¹⁸ a former Central Intelligence Agency (CIA) employee raised the section 105¹⁹ exclusion of U.S. Government works as a defense in a dispute over a classified report about the CIA's investigation of the Bay of Pigs Operation. Dr. Pfeiffer, a former CIA historian, sued the Agency after it rebuffed his numerous requests to declassify for publication a report he had written while at the *132 CIA.²⁰ The Agency counterclaimed, demanding that Dr. Pfeiffer return the report, which he had taken in violation of his agreements with the CIA and the CIA's regulations when he resigned from the Agency.²¹ The district court ordered Dr. Pfeiffer to return his copy of the report to the Agency.²²

On appeal, Dr. Pfeiffer argued that section 105 invalidated the Agency's claim of ownership rights in the report, but the D.C. Circuit quickly rejected that argument.²³ Holding in favor of the Agency, the court found the exclusion of federal government works from copyright protection entirely consistent with the Agency's right to the physical embodiment of the work, which had been wrongfully converted by Dr. Pfeiffer.²⁴ As Judge Ginsburg put it, "Pfeiffer has no more legal right to the copy of the report that he took from the Agency than he has to take a book from the bookstore of the Government Printing Office without paying for it."²⁵ The court acknowledged, however, that the Copyright Act was not a barrier to Dr. Pfeiffer's reproduction of the information in the report from memory,²⁶ and further, that the First Amendment would protect his publication of any unclassified information he could recall.²⁷

3. Works Incorporated into Laws and Regulations

The Central District of California wrestled with the status of a copyrighted work that was incorporated into federal statutes and regulations in *Practice Management Information Corp. v. American Medical Ass'n*.²⁸ Like the Second Circuit in *CCC Information Services v. Maclean Hunter Market Reports, Inc.*,²⁹ which was decided only three days earlier, the *Practice Management* court found a Takings Clause problem with the notion that a privately-created work falls into the public domain when *133 it is referenced in federal laws and regulations.³⁰ In both of these recent cases, the courts have had difficulty distinguishing the First Circuit's contrary decision in *Building Officials & Code Administrators International, Inc. v. Code Technology, Inc.*,³¹ however, the *Practice Management* court persuasively limited its reach to privately-created codes that are adopted wholesale into law--"self-executing ordinances" in the language of the *Practice Management* court.³² Thus, the fact that the AMA reference book at issue in *Practice Management* sets forth the exclusive method for coding claims for reimbursement from federal and state governments and private insurers was not a determinative fact for the court. Instead, the court believed that the AMA's coding system is not a "law" in the sense that, standing alone, it alters or affects health care providers' substantive rights, and therefore its adoption by state agencies does not authorize commercial publishers to copy the coding system and publish it with impunity.³³

B. Notice and Registration

1. Effect of Berne Convention Elimination of Notice Requirement

The Fifth Circuit addressed an important notice issue in dicta in *Norma Ribbon & Trimming, Inc. v. Little*.³⁴ As an alternative basis for invalidating the plaintiffs' copyright in that case, the court found that the plaintiffs' pre-Berne era work had entered the public domain when it was published in the pre-Berne era³⁵ without satisfying the statutory notice requirement.³⁶ Acknowledging that the notice requirement was eliminated by the 1988 passage of the Berne Convention Implementation Act, the court stated the notice requirement nevertheless "remains in effect for works that predated that Act."³⁷ Under this analysis, all pre-Berne era works are subject to the notice requirement in perpetuity.

*134 A district court in Pennsylvania concurred in the Fifth Circuit's limited interpretation of the elimination of the notice requirement under the Berne Convention Implementation Act in *Metzke v. May Department Stores Co.*³⁸ The Pennsylvania court softened the draconian effect of this interpretation somewhat, however, by refusing to find the apparently rather minuscule notice given in that case insufficient as a matter of law, stating that "[n]otice is sufficient even where it is legible only to 'someone with excellent vision,' or if finding it requires 'close examination.'"³⁹

2. Invalidation of Registration

After reciting facts far too racy to be repeated here in any detail,⁴⁰ the district court in *Martin v. Cuny* invalidated the plaintiff's copyright based on fraud on the Copyright Office in the registration process.⁴¹ The plaintiff had provided false and intentionally misleading information when he submitted his application to register the copyright in a photograph entitled "Loving Couple."⁴² In particular, the plaintiff failed to list the defendants (who are owners of a liquor store known as "Beaver Liquors" and a retail outlet called "Lips Too") as joint authors of the photograph, even though they had determined its subject matter and provided raw materials to be used as props in the photograph.⁴³ The plaintiff also failed to reveal that the photograph had previously been published on posters and T-shirts advertising the defendants' liquor store.⁴⁴

***135 C. Ownership and Term**

1. Works Made for Hire--Specially Commissioned Works

In a comprehensive opinion issued in *Playboy Enterprises Inc. v. Dumas*,⁴⁵ the Second Circuit analyzed whether 285 pieces of artwork that were created by Patrick Nagel and published in *Playboy* magazine between 1974 and 1984 were works made for hire. Because the time period implicates the work made for hire doctrines under both the 1909 and 1976 Copyright Acts, the court addressed several distinctions between the doctrines under the two acts. With respect to the writing required for "specially commissioned" works under the 1976 Act definition of "work made for hire," the court held that a written agreement executed after the work is created is sufficient, so long as the writing merely confirms an agreement made before the work was created that the work would be a work made for hire.⁴⁶ The court further refined the definition of "specially ordered or commissioned" works to address the issue of motivation and control over the subject matter of the works, which was at the heart of the dispute between Playboy and Nagel's widow, who now owns the copyrights in Nagel's artwork.

When Patrick Nagel first began creating artwork for Playboy in 1974, Playboy gave him specific instructions regarding the subject matter of the artwork it required. Playboy, realizing that "trying to funnel such a large talent so narrowly was like telling Irwin Shaw or Ray Bradbury what to write about," began giving Nagel greater rein in conceptualizing his work.⁴⁷ Between 1977 and 1978, Nagel had established a practice of submitting drawings that he had initiated himself, and Playboy generally published the artwork that Nagel submitted, although Playboy paid for the submitted artwork regardless of whether it was published.⁴⁸

Therefore, the issue with respect to the pre-1978 paintings was whether the works were created at Playboy's "instance and expense," and thus were works made for hire under the 1909 Act. The Second Circuit held that Nagel's receipt of payment for each of the published paintings satisfied the "expense" requirement under the 1909 Act, reversing the district court's holding to the contrary, and remanded for a determination of which paintings during the 1977-1978 transition period were motivated by Playboy, or "made at Playboy's instance."⁴⁹

***136** With respect to the paintings published after 1978, Playboy argued unsuccessfully that the 1909 Act instance and expense analysis did not apply to specially commissioned works under the 1976 Act. Playboy's claim was that under the section 101 definition for specially commissioned works, all that is required is that the parties execute a written agreement identifying the specially commissioned work as a work made for hire, and that the work falls within one of the nine categories contained in the section 101 definition.⁵⁰ The court disagreed, however, interpreting the phrase "specially ordered or commissioned" in the 1976 Act definition as having essentially the same meaning as "instance and expense" under 1909 Act doctrine.⁵¹ According to the court, the term specially ordered or commissioned does require *motivation*, but does not require artistic control over the work.⁵² The court remanded for application of this newly-developed standard to the evidence presented on both sides of the issue thus far, indicating that a decision either way was supported by the record.⁵³

2. Works Made for Hire--Determination of an Employee Relationship

The Sixth Circuit addressed the first prong of the 1976 Act work made for hire definition in *Hi-Tech Video Productions, Inc. v. Capital Cities/ABC Inc.*⁵⁴ After conducting a de novo review of the district court's assessment of the *Community for Creative Non-Violence v. Reid* factors,⁵⁵ the majority reversed the district court's finding that the plaintiff's videotape was appropriately registered as a work made for hire.⁵⁶ Because the videographer's relationship with his assistants in this case militated both for and against a finding of employee status, the judges on appeal were required to make a subjective determination of the relative weight to be given each of the factors. One judge on the Sixth Circuit panel agreed with the district judge's balancing of the factors;⁵⁷ unfortunately for the videographer, however, two did not. The majority focused on

the absence of employee benefits and the videographer's own description of the camera crew as "freelancers" and "subcontractors," and found the right to control the video's production, which weighed strongly in favor of the videographer, relatively less important. As a result of the reversal on the work made for hire issue, the *137 videographer lost his copyright, as well as the judgment entered by the district court for treble damages on his willful infringement claim against the defendant, ABC.⁵⁸

In another, long-standing work made for hire dispute, the district court in *Muller v. Walt Disney Productions*⁵⁹ held that Walt Disney will not have to share any of the \$190 million it made from the home video release of *Fantasia* with Leopold Stokowski, the former conductor of the Philadelphia Orchestra who wrote the music for the original movie version. The parties' 1939 contract established that Mr. Stokowski wrote the music on a work made for hire basis, and that his transfer of rights in the work to Walt Disney included the right to incorporate the music in the 1991 home video release.⁶⁰

3. Derivative Works--Originality

In a case involving character costumes for such cultural icons as "Cap'n Crunch," "Toucan Sam," and "Little Sprout," the Northern District of California synthesized disparate provisions of the Copyright Act to reach the conclusion that originality for a derivative work that is "sculptural" cannot be based on differences from the pre-existing work that were driven by functional or utilitarian purposes.⁶¹ Since the only differences between the character costumes at issue in the case and the underlying copyrighted characters were those necessary to fit the costume on a human body, the costumes lacked sufficient originality to qualify as copyrightable derivative works.⁶² The plaintiff costume designer was unable to enjoin a competitor's copying, but the district court noted that the holders of the copyrights in the characters were "poised to intervene."⁶³

4. Derivative Works--Architectural Plans

In two otherwise unrelated cases, the definition of "derivative work" was applied to sales brochures advertising architectural plans of homes so as to protect the architects' copyrights in the underlying plans.⁶⁴ The court in *Ronald Mayotte & Associates v. MGC Building Co.*⁶⁵ found that the plaintiff's architectural plans were not *138 derivative of the previously published sales brochures, and therefore that the copyright registration for the plans was not invalid for failure to disclose the pre-existing brochures.⁶⁶ Conversely, in *Harris Custom Builders, Inc. v. Hoffmeyer*,⁶⁷ the district court held that the sales brochures were derivatives of the copyrighted plans.⁶⁸ Applying the rule that the publication of a derivative work does not affect the copyright in the underlying work, the court found that the entry of the sales brochures into the public domain did not invalidate the copyright in the plans.⁶⁹

5. Works First Published Under the 1909 Copyright Act

Judge Pierre Leval, writing for the Second Circuit in *Sanga Music, Inc. v. EMI Blackwood Music, Inc.*,⁷⁰ found plaintiff's copyright notice defective under a 1909 Act era ruling which he acknowledged "caused harsh forfeiture with little or no justification."⁷¹ He further refused to apply an equitable doctrine to avoid the forfeiture of the copyright in the folk hymn that entered the public domain in 1957 under this rule because the equities did not favor that outcome. When plaintiff originally authorized the publication of the song, she wanted to make sure that the folk hymn, to which she had appended a verse she had written, was not forgotten, i.e. she purposefully placed the song in the public domain.⁷² Thus, the admittedly inequitable statutory formalities of the 1909 Act era, dogmatically applied to this case, did not yield an inequitable result.

D. Infringement

1. Non-Literal Elements of Computer Programs

Cases involving various facets of computer program interfaces continue to get considerable play in the district and appellate courts. The cases can be generally grouped into two types--those pertaining to menu command hierarchies and those pertaining to data input/data file formats.

***139 a) Menu Command Hierarchy**

In perhaps the most headline-grabbing computer software case since the *Altai* decision,⁷³ the First Circuit has contributed some fresh thought on Lotus Development Corporation's long-running (and heretofore successful) battle⁷⁴ to protect the menu command hierarchy⁷⁵ of its popular Lotus 1-2-3 program. The First Circuit, however, dashed Lotus' hopes of continuing its victories in challenging the use of its menu command hierarchy in competing spreadsheet programs sold by Paperback Software International and Borland International.⁷⁶

In the view of the First Circuit, it was "navigating in uncharted waters" as to the copyrightability of menu command hierarchies standing on their own.⁷⁷ It dismissed as largely unhelpful Borland's arguments that the *Baker v. Selden* doctrine⁷⁸ should control resolution of the case since the issue before the court was not the spreadsheets' grid-like layouts, but rather the identical menu command hierarchies used to operate them.⁷⁹ The court also found unhelpful the Second Circuit *Altai* infringement test.⁸⁰ The First Circuit opined that although the *Altai* test might prove helpful in analyzing non-literal infringement cases, it was in fact unhelpful in a case of literal infringement because the "abstractions" analysis of the *Altai* test "seems to encourage [courts] to find a base level that includes copyrightable subject matter that, if literally copied, would make the copier liable for copyright infringement."⁸¹

Rather, the court focused on whether the menu command hierarchy was a "method of operation" excluded from copyright protection under section 102(b) of the Copyright Act. While finding that the computer code used to implement the menu command ***140** hierarchy was copyrightable,⁸² the First Circuit held that the menu command hierarchy was an uncopyrightable method of operation.⁸³ In so finding, the court found unimportant that the Lotus developers chose one of many possible ways to have organized the menu hierarchy, stating that such expressive choices "do not magically change the uncopyrightable menu command hierarchy into copyrightable subject matter."⁸⁴

To the undoubted relief of many computer users, the court considered the practical implications to computer users if it were to adopt the position advanced by Lotus. The court opined:

That the Lotus menu command hierarchy is a "method of operation" becomes clearer when one considers program compatibility. Under Lotus's theory, if a user uses several different programs, he or she must learn how to perform the same operation in a different way for each program used. For example, if the user wanted the computer to print material, then the user would have to learn not just one method of operating the computer such that it prints, but many different methods. We find this absurd. The fact that there may be many different ways to operate a computer program, or even many different ways to operate a computer program using a set of hierarchically arranged command terms, does not make the actual method of operation chosen copyrightable; it still functions as a method for operating the computer and as such is uncopyrightable.⁸⁵

b) Data Input/Data File Format Cases

Exemplary of the data input/data file format cases is the ongoing saga of *Engineering Dynamics, Inc. v. Structural Software, Inc.*,⁸⁶ a dispute involving the copyrightability of data input formats. *Engineering Dynamics* actually has ties to one of the earliest reported computer software copyright cases, *Synercom Technology, Inc. v. University Computing Co.*⁸⁷

In the *Synercom* case, Judge Higginbotham was called upon to decide whether certain data input formats were copyrightable. At the time of the *Synercom* decision, data and the computer programs themselves, were inputted via "punch cards." The cards were eighty columns across. Using a key-punch machine, holes were punched into each column of the card in different arrangements to represent different alphanumeric or control characters. The cards were then processed through card readers which interpreted the holes and fed the input into the computer.

***141** The computer programs at issue in the *Synercom* case were competing structural analysis programs. Essentially, they were "number-crunching" programs used to perform large numbers of tedious calculations. The relevant data for a particular scientific equation would be inputted on punch cards, and the program would then solve the equation and output the result. Obviously, for the program to understand which numbers on the punch card corresponded to specific variables in the equation, the numbers on the card had to be sequenced in a particular format.⁸⁸

Although omitting some detail for simplicity, Synercom had essentially developed nine specific input formats for its program.⁸⁹ EDI, which had developed a competing program, copied the Synercom file formats for use in its program.⁹⁰ EDI apparently did so because it wanted to make it easy for users of the Synercom program to be able to use the EDI program.⁹¹ Copying the input file formats facilitated such use because the users did not have to learn a new input format and could, in fact, use punch cards containing data that had been created for input into the Synercom program to input the same data into the EDI program.

Judge Higginbotham, for a variety of rationales under the 1909 Copyright Act, held generally that the “input formats” were not copyrightable. Thus, EDI was free to use them in its competing program. EDI apparently flourished after the *Synercom* case. Some thirteen years later, it was still selling its structural analysis program. But EDI’s success begat a competitor, SSI. In the development of its competing program, SSI copied some fifty-six input formats from EDI’s program, including the nine input formats which EDI had copied or adapted from Synercom’s input formats. None too happy about this turn of events, EDI sued SSI for copyright infringement.

Technology having progressed, the programs at issue no longer operated on mainframes, but rather on personal computers. Nonetheless, the eighty-column input format scheme was retained for entering data into the programs.⁹² Thus, apparently for the same reasons EDI copied Synercom’s input formats, SSI copied EDI’s input formats.

It is important to note, however, that EDI did not claim that any individual data file format was copyrightable. Instead, EDI asserted that SSI infringed its copyright by copying the compilation of the fifty-six input formats. EDI presumably adopted this *142 position in view of Judge Higginbotham’s holding that input formats are not copyrightable.⁹³

The district court in *Engineering Dynamics*, while not necessarily agreeing with *Synercom*, believed that it was bound by that decision. The court read a Fifth Circuit decision, *Plains Cotton Co-op v. Goodpasture Computer Service*,⁹⁴ as approving the holding in *Synercom* and hence making it binding on the court.⁹⁵ The court pointed out, however, that later courts⁹⁶ had reached what the court viewed as perhaps better reasoned results in concluding that “user interfaces (input and output reports) are copyrightable.”⁹⁷ Without apparently focusing on EDI’s claim that its compilation of input formats had been infringed, the court simply held that the form of input and output reports is not copyrightable.⁹⁸

On appeal, the Fifth Circuit disagreed with the summary treatment of the issue given by the district court. The Fifth Circuit stated that *Plains Cotton* did not expressly approve the holding in *Synercom* with respect to the copyrightability of input formats, and therefore, the district court was not bound by the *Synercom* ruling.⁹⁹ Further, the Fifth Circuit, in the context of evaluating EDI’s claim to a valid copyright in the compilation of the input formats and given the incomplete factual development before it in view of the district court’s summary disposition of the issue, held that a “thin” copyright possibly subsisted as to Synercom’s compilation.¹⁰⁰ It remanded the case to the district court for further determinations on whether various issues, e.g., the copyright doctrine of merger or the fact that EDI had copied some of the input formats from Synercom, might preclude copyright protection for the compilation of input formats.¹⁰¹

The Fifth Circuit’s opinion in *Engineering Dynamics* was met with somewhat of an outcry from hardware and software vendors who were concerned that they may not be *143 able to build interoperable systems without risking copyright infringement. SSI moved for rehearing and a variety of amicus curiae briefs were filed. The Fifth Circuit refused rehearing, both by the panel and en banc.¹⁰² However, in its opinion on the motion for rehearing, the panel, apparently to placate the arguments of the various amici, did state: “[Our first] opinion cannot properly be read to extend to the manufacturing of computer hardware so as to deter achieving compatibility with other models or to the practice employed by users of programs of analyzing application programs to ‘read’ the file formats of other programs.”¹⁰³

It is unclear whether the basis for this statement is founded in fair use principles or whether it has to do with the breadth of the copyright in data input formats. In either event, the Fifth Circuit’s analysis is being followed by other courts.¹⁰⁴

2. Synchronization Rights in Sound Recordings

In a tightly focused statutory analysis, the Second Circuit in *Agee v. Paramount Communications, Inc.*¹⁰⁵ determined that the limited reproduction right embodied in section 114¹⁰⁶ for sound recordings includes a synchronization (synch) right. As a result, Paramount Communications, Inc. was held liable for infringing a sound recording copyright by duplicating the copyrighted music at issue onto an audio track for a segment of its *Hard Copy* television program.¹⁰⁷

In arriving at this conclusion, the court analyzed both the statutory language and the legislative history of section 114. Acknowledging the fact that the copyright legislation granting rights in sound recordings was directed at curbing record piracy, rather than the exploitation of sound recordings by synchronization, the court nevertheless found that section 114 explicitly granted synchronization rights to sound recording copyright holders.¹⁰⁸ Paramount argued that, while the synchronization was technically a reproduction, it was no different than the “time-shifting” permitted to home television viewers under *Sony Corp. v. Universal City Studios*.¹⁰⁹ The court distinguished *Sony*, however, by pointing out that home viewers derive no commercial benefit from “time-shifted” reproductions. Paramount, on the other hand, obtained *144 commercial benefit by enhancing the visual *Hard Copy* program it distributed and, in addition, by using the synchronized portions in commercials and promotions for the program.¹¹⁰

After briefly analyzing the nature of the derivative right for sound recordings, the court found it unnecessary to determine whether Paramount had infringed the plaintiff’s right under section 114 to create derivative works.¹¹¹ The court did, however, reach the issue of Paramount’s infringement of the plaintiff’s distribution rights, holding that Paramount’s satellite transmission of the work with its *Hard Copy* segment was not an infringement of plaintiff’s right of distribution. Satellite transmissions are public performances under the Copyright Act, reasoned the court, and not “distributions,” which at least in the context of broadcast television require transmission of a material object.¹¹² Thus, although Paramount’s original duplication of the sound recording was wrongful, the transmission of the infringing audiovisual work was not; and finally, the television stations that aired the program were protected by the ephemeral recordings exception, despite the inclusion of the music wrongfully reproduced by Paramount on the program that they broadcast.¹¹³

3. Fair Use

The Second Circuit limited its groundbreaking fair use decision, *American Geophysical Union v. Texaco, Inc.*,¹¹⁴ in a July 17, 1995 amendment to the original opinion which was issued in October 1994.¹¹⁵ The amendments clarify that the court’s finding of no fair use was confined to systematic copying in institutional settings such as the Corporate Research Department of Texaco; the court expressly disclaimed any implication for individual researchers or academics photocopying scientific journal articles for their own research.¹¹⁶ Judge Jones, in dissent, opined that this limitation on the *Texaco* holding was not, as a practical matter, very meaningful since “[r]esearch is largely an institutional endeavor nowadays.”¹¹⁷ Furthermore, according to Judge Jones’ dissent, the institutional context does not alter the character of the copying by the *145 individual scientists who determine whether the articles may be useful to their research.¹¹⁸

Three district courts applied fair use factors to claims of plagiarism, arriving at varying results in *Belmore v. City Pages, Inc.*,¹¹⁹ *Robinson v. Random House, Inc.*,¹²⁰ and *Rotbart v. J.R. O’Dwyer Co. Inc.*¹²¹ *When unauthorized quotes were published for the purpose of commenting on or criticizing an author’s opinions, fair use was found.*¹²² *But when, in Robinson v. Random House, Inc., the defendant excerpted large portions of the commercially published biography at issue in the case in order to produce a market substitute for the work, the court refused to find fair use.*¹²³

4. Sovereign Immunity

Although not without equivocation, the Fifth Circuit held that the State of Texas is subject to suits brought under the Copyright Act for infringements committed in the course of conducting businesses for profit.¹²⁴ The equivocation arises from the splintered Supreme Court decisions that have interpreted the Eleventh Amendment over the years since its passage, which the court in *Chavez* discusses at length. At present, section 511(a) of the Copyright Act,¹²⁵ which expressly disallows sovereign immunity claims in copyright suits, remains intact, and playwright Denise Chavez may proceed in her copyright infringement suit against Arte Publico Press, a component of the University of Houston.¹²⁶

*146 5. The Home-Style Receiver Exemption

In *Cass County Music Co. v. Muedini*,¹²⁷ the Seventh Circuit reviewed a district court application of the section 110(5)¹²⁸ exception from copyright liability for performances transmitted over a receiving apparatus “of a kind commonly used in private homes,” also known as the home-style receiver exemption.¹²⁹ Disagreeing with the district court’s finding that the 9-speaker, 40-watt stereo system that provided music to the defendant’s restaurant patrons was similar to other “[s]ophisticated ‘home entertainment’ systems today,”¹³⁰ the court reversed, noting that the congressional committee that

drafted the exemption considered the small radio playing in the plaintiff's take-out restaurant in *Twentieth Century Music Corp. v. Aiken*¹³¹ the "outer limit" of the exception.¹³²

E. Remedies and Procedure

1. Ex Parte Seizures

Time Warner was unable to obtain the broad *ex parte* seizure order it requested in *Time Warner Entertainment Co. v. Doe*.¹³³ The district court's opinion in this case describes in some detail what not to ask for in an *ex parte* seizure order: First, private agents may not be authorized to conduct *ex parte* seizures, and second, no "roving searches" are permissible.¹³⁴ The failure to sufficiently tailor the request will not only delay the ultimate relief, but also may subject the requesting party to the ire of the district judge, as Time Warner can attest.¹³⁵

2. Attorneys' Fees

Another district judge in the Southern District of New York has signed on to the "objectively unreasonable litigation conduct" standard for awarding attorneys' fees *147 under section 505.¹³⁶ An Arkansas district judge further held that a substituted plaintiff may be liable for attorneys' fees incurred as a result of its predecessor's bad faith litigation conduct in *Consolidated Sawmill Machinery International, Inc. v. Hi-Tech Engineering, Inc.*¹³⁷ The defendant in that case demonstrated improper litigation motive with direct admissions by the plaintiff's predecessor-in-interest.¹³⁸

3. Forum Non Conveniens

In two recent forum non conveniens cases, courts have addressed the procedural ramifications of the national treatment principle under international copyright law.¹³⁹ In *Murray v. British Broadcasting Corp.*,¹⁴⁰ a district judge entered a forum non conveniens dismissal of an essentially British dispute, holding that the lesser deference that is generally accorded a foreign plaintiff's choice of forum under forum non conveniens analysis was in no way undercut by the United States' 1988 accession to the Berne Convention's national treatment principle.¹⁴¹ Noting that the Universal Copyright Convention, to which the United States has been a party since 1955, also embodied the national treatment principle, the court relied on pre-Berne era forum non conveniens case law in dismissing the case.¹⁴²

In *Creative Technology Ltd. v. Aztech Systems PTE Ltd.*,¹⁴³ the Ninth Circuit held that the national treatment principle means that foreign litigants in U.S. courts are entitled to the same procedural rights as U.S. litigants, "no more, no less."¹⁴⁴ The issue in that case, as framed by the majority and dissenting judges, was whether the national treatment principle excluded foreign litigants from forum non conveniens analysis altogether.¹⁴⁵ The majority found that it did not, and upheld a dismissal of a suit involving two Singapore computer equipment competitors.¹⁴⁶ The dissenting judge argued that, despite the majority's finding that Singapore courts could apply U.S. copyright law in the event it governed the claims between the two companies, the *148 courts in Singapore were not equipped to resolve issues concerning U.S. copyright law's developing jurisprudence regarding computer software.¹⁴⁷

Footnotes

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^{aa1} Conley, Rose & Tayon, Austin, Texas.

¹ Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991).

² Mid Am. Title Co. v. Kirk, 59 F.3d 719, 35 U.S.P.Q.2d (BNA) 1502 (7th Cir. 1995).

3 Warren Publishing, Inc. v. Microdos Data Corp., 52 F.3d 950, 34 U.S.P.Q.2d (BNA) 1766 (11th Cir. 1995).

4 *Feist*, 499 U.S. at 363, 18 U.S.P.Q.2d at 1285 (selection of white page telephone listings was not original because the compiler “did not truly select” the names and telephone numbers, but instead listed all subscribers in its governmentally-mandated service area).

5 59 F.3d 719, 35 U.S.P.Q.2d (BNA) 1502 (7th Cir. 1995).

6 *Id.* at 722, 35 U.S.P.Q.2d at 1504.

7 *Id.*

8 *See id.* at 720, 35 U.S.P.Q.2d at 1503 (citing *Mid Am. Title Co. v. Kirk*, 991 F.2d 417, 422, 26 U.S.P.Q.2d (BNA) 1538, 1542 (7th Cir.), *cert. denied*, 114 S. Ct. 346 (1993)).

9 52 F.3d 950, 34 U.S.P.Q.2d (BNA) 1766 (11th Cir. 1995).

10 *Id.* at 952, 34 U.S.P.Q.2d at 1768.

11 On the usefulness of “decoys,” also known as “fingerprints” or “seeds,” in proof of actual copying, see Alan Latman, “*Probative Similarity*” as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187 (1990). Of course, copying is not, in and of itself, actionable. Copying plus a finding of substantial similarity as to protectable elements is required. *See id.* at 1189; *Feist*, 499 U.S. at 361, 18 U.S.P.Q.2d at 1284.

12 *Warren Publishing*, 52 F.3d at 955-56, 34 U.S.P.Q.2d at 1771-72.

13 *Id.* at 956-57, 34 U.S.P.Q.2d at 1772-73 (Kravitch, J., dissenting). The majority, in finding originality, may have been swayed by the defendant’s bad conduct. In theory, of course, originality is a distinct issue from actual copying. If the compilation is not original, that is, not copyrightable, then from a copyright perspective, defendants should be permitted to copy freely.

14 999 F.2d 1436, 28 U.S.P.Q.2d (BNA) 1001 (11th Cir. 1993).

15 *Id.* at 1445-1446, 28 U.S.P.Q.2d at 1008-09.

16 *Warren Publishing*, 52 F.3d at 952, 34 U.S.P.Q.2d at 1768.

17 *Id.* at 956, 34 U.S.P.Q.2d at 1772.

18 60 F.3d 861, 35 U.S.P.Q.2d (BNA) 1627 (D.C. Cir. 1995).

19 17 U.S.C. § 105 (1994).

20 *Id.* at 862-863, 35 U.S.P.Q.2d at 1628-29.

21 *Id.* at 863, 35 U.S.P.Q.2d at 1628.

22 *Id.*

23 *Id.* at 865, 35 U.S.P.Q.2d at 1629-30.

24 *Id.* at 865, 35 U.S.P.Q.2d at 1630.

25 *Id.*

26 Presumably, the court was not suggesting, however, that Pfeiffer be permitted to reproduce from memory his copyrighted expression of the information. Copying from subconscious, of course, can be just as unlawful as copying by active physical reference. *See* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom.*, ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 221 U.S.P.Q. (BNA) 499 (2d Cir. 1983).

27 *Pfeiffer*, 60 F.3d at 866, 35 U.S.P.Q.2d at 1631.

28 877 F. Supp. 1386, 34 U.S.P.Q.2d (BNA) 1282 (C.D. Cal. 1994).

29 44 F.3d 61, 33 U.S.P.Q.2d (BNA) 1183 (2d Cir. 1994) (discussed in Gordon T. Arnold, *Recent Developments in Copyright Law*, 3 TEX. INTELL. PROP. L.J. 273, 276 (1995)).

30 *Practice Management*, 877 F. Supp. at 1393, 34 U.S.P.Q.2d at 1287. This situation is both acknowledged and encouraged in the federal system as a means to curb regulatory costs. *See id.* at 1391, 34 U.S.P.Q.2d at 1285; *see also* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.06[C], at 5-60 (1995).

31 628 F.2d 730, 207 U.S.P.Q. (BNA) 81 (1st Cir. 1980). *See Practice Management*, 877 F. Supp. at 1392, 34 U.S.P.Q.2d at 1286; *see also CCC Info. Servs.*, 44 F.3d at 73, 33 U.S.P.Q.2d at 73 (noting that the district judge had relied on *Building Officials* in the underlying district court decision and, further, that the magistrate judge had found it “virtually indistinguishable” from the present case).

32 *Practice Management*, 877 F. Supp. at 1391-92, 34 U.S.P.Q.2d at 1286.

33 *Id.* at 1392-93, 34 U.S.P.Q.2d at 1286-87.

34 51 F.3d 45, 34 U.S.P.Q.2d (BNA) 1603 (5th Cir. 1995).

35 That is, before March 1, 1989. *See* Pub. L. No. 100-568, 102 Stat. 2853, 2857.

36 *Norma Ribbon*, 51 F.3d at 48, 34 U.S.P.Q.2d at 1605.

37 *Id.* Presumably, the court is referring only to *published* works, since only published works were required to bear notice in the
decennial era. *See* M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 7.03, at 7-19.

38 878 F. Supp. 756, 34 U.S.P.Q.2d (BNA) 1844 (W.D. Pa. 1995).

39 *Id.* at 1846 (quoting *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 489 F. Supp. 732, 737, 206 U.S.P.Q. (BNA) 439, 444
(S.D.N.Y. 1980) and *Trifari, Krussman & Fishel, Inc. v. Charel Co.*, 134 F. Supp. 551, 554, 107 U.S.P.Q. (BNA) 48, 50 (S.D.N.Y.
1955)).

40 If this was not sufficient to pique your interest and pander to your prurient side, then the following footnote to the decision, with
citations intentionally omitted, should cause you to read the case:

Given its subject matter, this opinion may join certain cases with obscure citations found in well-thumbed volumes in law school
libraries. These cases are favorites of second year law students imprisoned in libraries and seeking diversion from the boredom of
yet another year of the highly touted and low-yielding case method of instruction. Having known a law professor, now thankfully
of emeritus status, who assigned students to locate these cases as an exercise in legal research, I list a few to bring them into the
age of computers and political correctness through the back door: *See* the stately *Lason v. State*; *Carter v. Ingalls*; *Doe et ux. v.*
Missouri-Kansas-Texas Railroad Co.; *People v. Nitti*; *Matter on Anonymous*; *Geiler v. Comm. on Jud. Qual*; *Fen v. Dixe*; *Spears*
v. U.S.; *Hall Moody Inst. v. CO-PASS*; *Wolf et al. v. Feldman*; *Gill v. Middleton*; *Stevens et al. v. Louisville*; *McGinley v. Cleary*;
U.S. v. Byrnes; *Norman v. Reagan*; *Miles et al. v. City Council of Augusta*; *Coverson v. Mississippi*.
Martin v. Cuny, 887 F. Supp. 1390, 1392 n.1, 35 U.S.P.Q.2d (BNA) 1430, 1431 n.1 (D. Colo. 1995).

41 *Id.* at 1390, 35 U.S.P.Q.2d at 1430.

42 *Id.* at 1391, 35 U.S.P.Q.2d at 1431.

43 *Id.* at 1392-93, 35 U.S.P.Q.2d at 1432-33.

44 *Id.*

45 53 F.3d 549, 34 U.S.P.Q.2d (BNA) 1737 (2d Cir. 1995).

46 *Id.* at 559, 34 U.S.P.Q.2d at 1744.

47 *Id.* at 563, 34 U.S.P.Q.2d at 1747 (quoting Hugh Hefner's trial testimony).

48 *Id.* at 563, 34 U.S.P.Q.2d at 1747-48 (the record reflects that every issue of *Playboy* from August 1975 to July 1984 contained at
least one Nagel painting).

49 *Id.* at 556, 34 U.S.P.Q.2d at 1742.

50 *Id.* at 562, 34 U.S.P.Q.2d at 1746.

51 *Id.* at 562, 34 U.S.P.Q.2d at 1747.

52 *Id.* at 562-63, 34 U.S.P.Q.2d at 1746-47.

53 *Id.* at 563-64, 34 U.S.P.Q.2d at 1747-48.

54 58 F.3d 1093, 35 U.S.P.Q.2d (BNA) 1419 (6th Cir. 1995).

55 *See* 490 U.S. 730, 10 U.S.P.Q.2d (BNA) 1985 (1989).

56 *Hi-Tech Video*, 58 F.3d at 1099, 35 U.S.P.Q.2d at 1424.

57 *Id.* at 1099, 35 U.S.P.Q.2d at 1424-25 (Jones, J., dissenting).

58 *Id.* at 1099, 35 U.S.P.Q.2d at 1420, 1424.

59 871 F. Supp. 678, 34 U.S.P.Q.2d (BNA) 1061 (S.D.N.Y. 1994).

60 *Id.* at 682, 34 U.S.P.Q.2d at 1065.

61 *Entertainment Research Group v. Genesis Creative Group*, 853 F. Supp. 319, 34 U.S.P.Q.2d (BNA) 1305 (N.D. Cal. 1994).

62 *Id.* at 323-24, 34 U.S.P.Q.2d at 1307-08.

63 *Id.* at 321, 34 U.S.P.Q.2d at 1306.

64 *See* *Ronald Mayotte & Assocs. v. MGC Bldg. Co.*, 885 F. Supp. 148, 34 U.S.P.Q.2d (BNA) 1073 (E.D. Mich. 1994) *and* *Harris Custom Builders, Inc. v. Hoffmeyer*, 874 F. Supp. 899, 34 U.S.P.Q.2d (BNA) 1250 (N.D. Ill. 1995).

65 885 F. Supp. 148, 34 U.S.P.Q.2d (BNA) 1073 (E.D. Mich. 1994).

66 *Id.* at 152, 34 U.S.P.Q.2d at 1075.

67 874 F. Supp. 899, 34 U.S.P.Q.2d (BNA) 1250 (N.D. Ill. 1995).

68 *Id.* at 902, 34 U.S.P.Q.2d at 1252.

69 *Id.*

70 55 F.3d 756, 34 U.S.P.Q.2d (BNA) 1848 (2d Cir. 1995).

71 *Id.* at 760, 34 U.S.P.Q.2d at 1851.

72 *Id.* at 758, 34 U.S.P.Q.2d at 1849.

73 Computer Assocs. Int'l, Inc. v. Altai, 982 F.2d 693 (2d Cir. 1992).

74 See Lotus Dev. Corp. v. Paperback Software Int'l, 740 F. Supp. 37, 15 U.S.P.Q.2d (BNA) 1577 (D. Mass. 1990); Lotus Dev. Corp. v. Borland Int'l, Inc., 788 F. Supp. 78, 22 U.S.P.Q.2d (BNA) 1641 (D. Mass. 1992); Lotus Dev. Corp. v. Borland Int'l, Inc., 799 F. Supp. 203 (D. Mass. 1992); Lotus Dev. Corp. v. Borland Int'l, Inc., 831 F. Supp. 202, 30 U.S.P.Q.2d (BNA) 1081 (D. Mass. 1993); Lotus Dev. Corp. v. Borland Int'l, Inc., 831 F. Supp. 223, 30 U.S.P.Q.2d (BNA) 1081 (D. Mass. 1993).

75 This hierarchy consists of some 469 commands, e.g., "copy" or "print," organized into some fifty menus and submenus.

76 On September 27, 1995, the Supreme Court granted Lotus' petition for certiorari. 116 S. Ct. 39 (1995). Therefore, the final disposition of the issue is undecided.

77 Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807, 813, 34 U.S.P.Q.2d (BNA) 1014, 1019 (1st Cir. 1995).

78 Baker v. Selden, 101 U.S. 99 (1879).

79 Lotus, 49 F.3d at 814, 34 U.S.P.Q.2d at 1019-20.

80 Id., 34 U.S.P.Q.2d at 1020-21. For a district court opinion which uses the *Altai* test to determine that "menu command systems" are uncopyrightable processes, see MiTek Holdings, Inc. v. Arce Eng'g Co., 864 F. Supp. 1568, 34 U.S.P.Q.2d (BNA) 1417 (S.D. Fla. 1994).

81 Lotus, 49 F.3d at 814, 34 U.S.P.Q.2d at 1020.

82 Lotus did not contend that Borland copied its computer code.

83 Lotus, 49 F.3d at 815, 34 U.S.P.Q.2d at 1021.

84 Id. at 816, 34 U.S.P.Q.2d at 1022.

85 Id. at 817-18, 34 U.S.P.Q.2d at 1023.

86 785 F. Supp. 576, 21 U.S.P.Q.2d (BNA) 1524 (E.D. La. 1991) (Beer, J.), *aff'd in part and rev'd in part*, 26 F.3d 1335, 31 U.S.P.Q.2d (BNA) 1641 (5th Cir. 1994), *reh'g denied*, 46 F.3d 408, 34 U.S.P.Q.2d (BNA) 1157 (5th Cir. 1995).

87 462 F. Supp. 1003, 199 U.S.P.Q. (BNA) 537 (N.D. Tex. 1978) (Higginbotham, J.).

88 For example, if the equation to be solved was the Pythagorean theorem ($a^2 = b^2 + c^2$), then the input format might require that the number corresponding to "a" appear in columns 1-5 of the card, the number corresponding to "b" in columns 6-10 of the card, etc. Data input formats are analogous to data file formats today.

89 Synercom, 462 F. Supp. at 1007, 199 U.S.P.Q. at 541.

90 *Id.* at 1008-09, 199 U.S.P.Q. at 541-42.

91 *Id.*

92 Although not completely clear from the *Engineering Dynamics* opinions, the data was not entered into these programs by punch cards. Instead, it was entered either real-time via keyboard or in batch mode from some storage device, e.g., a floppy-disk, onto which the data had been previously entered in the proper format.

93 It is possible to have a valid copyright in a compilation, even though the individual elements in the compilation are not copyrightable. *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991).

94 807 F.2d 1256, 1 U.S.P.Q.2d (BNA) 1635 (5th Cir.), *cert. denied*, 484 U.S. 821 (1987).

95 *Engineering Dynamics*, 785 F. Supp. at 582-83, 21 U.S.P.Q.2d at 1528.

96 The court cited the district court opinion in *Lotus Dev. Corp. v. Paperback Software, Int'l*, 740 F. Supp. 37, 15 U.S.P.Q.2d (BNA) 1577 (D. Mass. 1990). As noted *supra*, the decision by the district court in the *Lotus* case has been put in doubt by the First Circuit's decision in *Lotus Development Corp. v. Borland Int'l, Inc.*, 47 F.3d 807, 34 U.S.P.Q.2d (BNA) 1014 (1st Cir. 1995).

97 *Engineering Dynamics*, 785 F. Supp. at 582, 21 U.S.P.Q.2d at 1528 (citing *Lotus Dev. Corp. v. Paperback Software, Int'l*, 740 F. Supp. 37, 15 U.S.P.Q.2d (BNA) 1577 (D. Mass. 1990)).

98 *Engineering Dynamics*, 785 F. Supp. at 583, 21 U.S.P.Q.2d at 1528.

99 *Engineering Dynamics Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1342, 31 U.S.P.Q.2d (BNA) 1641, 1645 (5th Cir. 1994).

100 *Id.* at 1348, 31 U.S.P.Q.2d at 1653.

101 *Id.* at 1351, 31 U.S.P.Q.2d at 1655.

102 *Engineering Dynamics, Inc. v. Structural Software, Inc.*, 46 F.3d 408, 34 U.S.P.Q.2d (BNA) 1157 (5th Cir. 1995).

103 *Id.*, at 410, 34 U.S.P.Q.2d at 1158.

104 *See, e.g.*, *Interactive Network, Inc. v. NTN Communications, Inc.*, 875 F. Supp. 1398, 1403, 34 U.S.P.Q.2d (BNA) 1381, 1385 (N.D. Cal. 1995) (the format of "real-time data feed" from a computer game is protectable subject matter).

105 59 F.3d 317, 35 U.S.P.Q.2d (BNA) 1169 (2d Cir. 1995).

106 17 U.S.C. § 114 (1994).

107 *Id.* at 327, 35 U.S.P.Q.2d at 1178.

108 *Id.* at 321-323, 35 U.S.P.Q.2d at 1172-75.

109 464 U.S. 417, 220 U.S.P.Q. (BNA) 665 (1984).

110 *Agee*, 59 F.3d at 323, 35 U.S.P.Q.2d at 1174.

111 *Id.* at 324, 35 U.S.P.Q.2d at 1175.

112 *Id.* at 324-25, 35 U.S.P.Q.2d at 1176.

113 *Id.* at 326, 35 U.S.P.Q.2d at 1177.

114 60 F.3d 913, 35 U.S.P.Q.2d (BNA) 1513 (2d Cir. 1995).

115 The original opinion is published at 37 F.3d 881, 32 U.S.P.Q.2d (BNA) 1545 (2d Cir. 1994). The first amendment to that opinion is at 60 F.3d 913, 35 U.S.P.Q.2d (BNA) 1513 (2d Cir. 1995).

116 *American Geophysical*, 60 F.3d at 916, 931, 34 U.S.P.Q.2d at 1515, 1528.

117 *Id.* at 935, 35 U.S.P.Q.2d at 1532 (Jones, J., dissenting).

118 *Id.*

119 880 F. Supp. 673, 34 U.S.P.Q.2d (BNA) 1295 (D. Minn. 1995).

120 877 F. Supp. 830, 34 U.S.P.Q.2d (BNA) 1257 (S.D.N.Y. 1995).

121 34 U.S.P.Q.2d (BNA) 1085 (S.D.N.Y. 1995).

122 *Belmore*, 880 F. Supp. at 680, 34 U.S.P.Q.2d at 1300; *Rotbart*, 34 U.S.P.Q.2d at 1088.

123 *Robinson*, 877 F. Supp. at 843, 34 U.S.P.Q.2d at 1265.

124 *Chavez v. Arte Publico Press*, 59 F.3d 539, 35 U.S.P.Q.2d (BNA) 1609 (5th Cir. 1995).

125 17 U.S.C. § 511(a) (1994).

126 *Id.* at 546-48, 35 U.S.P.Q.2d at 1615-17.

127 55 F.3d 263, 34 U.S.P.Q.2d (BNA) 1773 (7th Cir. 1995).

128 17 U.S.C. § 110(5) (1994).

129 *Id.* at 266, 34 U.S.P.Q.2d at 1776 (quoting *Broadcast Music, Inc. v. Claire's Boutique*, 949 F.2d 1482, 1489, 21 U.S.P.Q.2d (BNA) 1181, 1186-87 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1942 (1992)).

130 *Id.* at 268, 34 U.S.P.Q.2d at 1777. Interestingly, that finding was made by the district court, sua sponte, after plaintiffs moved for default judgment.

131 422 U.S. 151, 186 U.S.P.Q. (BNA) 65 (1975).

132 *Cass County*, 55 F.3d at 268-69, 34 U.S.P.Q.2d at 1778.

133 876 F. Supp. 407, 408, 34 U.S.P.Q.2d (BNA) 1395, 1396 (E.D.N.Y. 1994).

134 *Id.* at 412-14, 34 U.S.P.Q.2d at 1399-1401.

135 *Id.* at 415, 34 U.S.P.Q.2d at 1401.

136 *CK Co. v. Burger King Corp.*, 34 U.S.P.Q.2d (BNA) 1319, 1320 (S.D.N.Y. 1995) (Haight, J.).

137 879 F. Supp. 945, 947, 34 U.S.P.Q.2d (BNA) 1733, 1734-35 (E.D. Ark. 1995).

138 *Id.* at 947, 34 U.S.P.Q.2d at 1734.

139 *Murray v. British Broadcasting Corp.*, 879 F. Supp. 945, 34 U.S.P.Q.2d (BNA) 1733 (E.D. Ark. 1995); *Creative Technology, Ltd. v. Aztech Sys. PTE, Ltd.*, 61 F.3d 696, 35 U.S.P.Q.2d (BNA) 1590 (9th Cir. 1995).

140 34 U.S.P.Q.2d (BNA) 1834 (S.D.N.Y. 1995).

141 *Id.* at 1836-37.

142 *Id.* at 1836 n.2.

143 61 F.3d 696, 35 U.S.P.Q.2d (BNA) 1590 (9th Cir. 1995).

144 *Id.* at 701, 35 U.S.P.Q.2d at 1593.

145 *Id.* at 696, 35 U.S.P.Q.2d at 1590.

146 *Id.* at 700-01, 35 U.S.P.Q.2d at 1592-93.

¹⁴⁷ *Id.* at 707-08, 35 U.S.P.Q.2d at 1598.

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