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Recent Development

RECENT DEVELOPMENTS IN COPYRIGHT LAW

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I. Introduction

This article reports recent decisions of the state and federal courts pertaining to copyright law and related issues. Unfortunately, for the period examined, few cases of great legal importance were handed down.¹ Nevertheless, the subject matter and fact patterns of a number of these cases are interesting, if not amusing, and several of these decisions appear to represent adoption by circuit courts of appeals of the reasoning applied by other courts of appeals.

***460 II. Case Reviews**

A. Scope of Protection

1. Compilations

In *Lipton v. Nature Company*,² the Second Circuit affirmed the district court's grant of summary judgment of copyright infringement of a work comprising a compilation of "terms of venery."³ Plaintiff-author Lipton, through research of various medieval texts and manuscripts, compiled a book of these terms of venery, arranged based on their "lyrical and poetic potential" and interspersed with artwork.⁴

In the course of attempting to license his work for use on various products, Lipton became aware of defendant Nature Company, which had used a "virtually identical" compilation of animal terms on a series of posters, T-shirts, and other products.⁵ Nature Company claimed to have licensed its adaptations from one Michael Wein, who, in turn, claimed to have copied his terms of venery from a banner or scarf that he received in the late 1960's as an unsolicited promotional item.⁶

Lipton commenced an action for copyright infringement against both Nature Company and Wein.⁷ The district court granted summary judgment in favor of Lipton, awarding injunctive relief, costs, attorney's fees, and enhanced statutory damages of \$100,000.⁸

On appeal, defendants argued, citing *Feist*, that the terms of venery at issue were unprotectable facts.⁹ The Second Circuit disagreed, affirming the district court's finding that Lipton's arrangement was the product of his creative and aesthetic judgment and that the work met the standard for the amount of creativity required for copyright protection of a compilation.¹⁰

***461** In the infringement analysis, the district court rejected Wein's explanation that he copied the terms of venery from the scarf, despite corroboration of the explanation by his art director.¹¹ Although the Second Circuit found that the district court's determination was inappropriate in the context of a summary judgment motion, the Second Circuit nevertheless held that Wein's copying of the scarf was no defense to a claim of infringement because the scarf itself was a derivative work.¹² In so holding, the Second Circuit noted that the scarf included the same selection of animal-related terms as Lipton's book: seventy-two of the seventy-seven animal terms from Lipton's book appeared on the scarf.¹³ Also, the Second Circuit noted that six translation errors from Lipton's compilation also existed in the scarf.¹⁴ Finally, the court found the arrangement of terms on the scarf to be sufficiently strikingly similar to the arrangement in Lipton's compilation to preclude an inference of independent creation.¹⁵ On this basis, the Second Circuit upheld the grant of summary judgment of infringement in Lipton's favor.¹⁶

The Second Circuit reversed the district court's finding of willful infringement on the ground that summary judgment on an issue involving a mental state is inappropriate.¹⁷ Further, the Second Circuit recognized the limitations on the scope of protection available to compilations after *Feist* by remanding with instructions to amend the injunction, which prohibited defendant's use of any of plaintiff's terms, together or separately.¹⁸ The Second Circuit held that only the selection and arrangement of the terms were protectable, not the individual terms themselves.¹⁹

2. Visual Artists Rights Act—Works Made for Hire

The Second Circuit reversed a controversial decision of the Southern District of New York in *Carter v. Helmsley-Spear Inc.*²⁰ The district court held that the Visual Artist Rights Act of 1990 (VARA) prevented defendants below, the owner and managing agent of a commercial building in Queens, New York, from removing, ***462** modifying, or destroying a work of

visual art installed in the defendants' building by plaintiffs-artists who were commissioned by a former tenant to install the work.²¹

After discussing the history of the moral rights of authors and VARA,²² the court agreed with the district court's finding that the sculpture, although consisting of several arguably separable elements, was a thematically consistent, interrelated work that could be treated as a single work of visual art within the meaning of VARA.²³ The Second Circuit nevertheless reversed the district court's finding that the sculpture was not a work made for hire²⁴ within the meaning of 17 U.S.C. § 101 and *Community for Creative Non-Violence v. Reid*.²⁵ The Second Circuit found the sculpture to be a work made for hire and therefore outside the literal scope of VARA.²⁶ The district court had previously found that the plaintiffs-artists were hired as independent contractors.²⁷

Noting that the Reid test is a list of factors that may or may not come into play in a given case, and therefore, is easily misapplied, the Second Circuit engaged in a de novo review of the district court's finding.²⁸ The Second Circuit agreed with the finding that the plaintiffs-artists retained significant artistic freedom in executing the sculpture and that great skill was required in the execution of the sculpture.²⁹ Nevertheless, the court held that these factors alone were not dispositive.³⁰

The Second Circuit focused on the following Reid factors in finding the work at issue to be a work made for hire and thus outside the scope of VARA:

- 1) defendants assigned plaintiffs numerous other projects;
- 2) defendants paid payroll and social security taxes;
- 3) defendants provided employee benefits including life, health, paid vacations, and contributed to unemployment insurance and workers' compensation funds on behalf of plaintiffs;
- 4) defendants paid each plaintiff a weekly salary;
- *463 5) plaintiffs agreed that they worked principally for defendants for the duration of their agreement on a 40-hour-per-week basis;
- 6) plaintiffs were employed for over two years with no set date of termination; and
- 7) plaintiffs could not hire paid assistants without defendants' approval.³¹

Despite its holding that the work was a work made for hire, the Second Circuit cautioned that the Reid test is fact-dependent and noted that future cases "will not always fit neatly into an employee or independent contractor category."³²

3. Ornamental Designs—Silverware Patterns

The test to determine if a design has sufficient originality to support copyright protection is whether the variation of the design from that which is in the public domain, even though small or modest, is substantial or distinguishable, rather than trivial.³³ Plaintiff commenced a copyright infringement action against defendant for copying its "20th Century Baroque" silverware pattern.³⁴ Defendant countered that plaintiff's pattern was based on the public domain "Grand Baroque" pattern and was unprotectable as lacking originality.³⁵

Citing *L. Batlin* for precedent as to the test of originality, the Southern District of New York stated that the threshold of originality is low and is met when the author contributes something more than a "mere trivial" variation, something recognizable as his own.³⁶ The district court noted that copying works in the public domain will not satisfy the test of originality, but a distinguishable variation from works in the public domain will.³⁷ Finding that plaintiff's pattern was a distinguishable variation, the court preliminarily enjoined defendant from further marketing of its pattern.³⁸

***464 4. Preemption**

In *Griggs v. South Carolina Electric & Gas Co.*,³⁹ the South Carolina Supreme Court held a number of state law causes of action to be preempted by the Copyright Act.⁴⁰ Plaintiff submitted a recipe to a cook-off sponsored by defendant utility company.⁴¹ Plaintiff was not selected as a winner; nevertheless, her recipe was published with all other recipes entered into the contest in a commemorative cookbook.⁴² Plaintiff demanded the recipe be removed from the cookbook because such publication prevented her from entering it into other contests.⁴³ Thereafter, some copies of the cookbook including her recipe were distributed.⁴⁴

Plaintiff alleged that the recipe was her sole creation and that defendant's printing it without her authorization caused her injury.⁴⁵ Plaintiff filed suit, bringing causes of action including conversion, negligence, quasi-contract, and outrage.⁴⁶ Defendant moved to dismiss the action for lack of jurisdiction due to the preemption of these causes of action by the Copyright Act.⁴⁷

In its preemption analysis, the court first considered whether a single recipe was the proper subject matter of the Copyright Act.⁴⁸ The court held a recipe to be copyrightable and then proceeded to determine whether the rights plaintiffs sought to be protected were equivalent to those within the scope of the Copyright Act.⁴⁹ Finding that all of plaintiff's claims were based upon defendant's publication of her recipe without authorization, the court held these rights to be equivalent to those under the Copyright Act and therefore, preempted.⁵⁰ In reaching its conclusion of preemption the court performed no significant analysis of the causes of action and their elements under South Carolina law.⁵¹

***465** One justice dissented from the holding that the cause of action for outrage (intentional infliction of emotional distress) and corresponding cause of action for loss of consortium were preempted.⁵² The dissent noted that the elements of proof for the cause of action for outrage were significantly different from the elements of a cause of action for copyright infringement, that the cause of action did not seek a remedy granted by the Copyright Act nor require construction of the Act, and that there is no distinctive policy requiring that federal principles control the disposition of the claim.⁵³ The dissent specifically expressed no opinion on the merits of either claim.

B. Ownership and Term

1. Written Transfer Requirement

The Eleventh Circuit joined a growing trend in relaxing the written memorandum of transfer requirement of section 204 of the Copyright Act in *Imperial Residential Design Inc. v. Palms Development Group, Inc.*⁵⁴ In 1988, plaintiff-author, president of Imperial Residential Design, prepared a set of house plans for plaintiff-owner Regal Classic Homes. After the plans were finished, plaintiff-author orally transferred to plaintiff-owner all of plaintiff-author's rights in the plans.⁵⁵ Subsequently, plaintiff-author became aware of a floor design strikingly similar to his, which was being marketed by defendant.⁵⁶

In April 1990, plaintiff-author and plaintiff-owner signed a written agreement transferring all rights under the Copyright Act to plaintiff-owner and obtaining registration of the work.⁵⁷ In October 1990, plaintiff-owner commenced a copyright infringement suit against defendant. Defendant challenged plaintiff-owner's standing on the ground that the agreement executed in April conveyed no right to sue for past infringement.⁵⁸ In response, plaintiff-author and plaintiff-owner executed a second written agreement (May agreement) specifically transferring all causes of action for prior infringements to plaintiff-owner.⁵⁹

***466** After a bench trial, the district court concluded that defendant had infringed the copyright in the work, but that plaintiff-owner did not have standing to sue for infringement occurring prior to the execution of the April agreement.⁶⁰ The district court excluded the May agreement under the parol evidence rule and refused to consider it, finding that the April agreement contained a merger clause.⁶¹ Pending appeal, the district court vacated its ruling that the May agreement constituted parol evidence, but held that it was properly excluded because it was executed after suit was filed.⁶² The Eleventh Circuit affirmed this decision without opinion.⁶³

In 1992, both plaintiff-owner and plaintiff-author commenced a copyright infringement action against defendant.⁶⁴ Again, defendant challenged plaintiff-owner's standing to sue based on ownership.⁶⁵ Due to its earlier finding of infringement, the district court submitted to the jury only the issue of damages.⁶⁶ The jury returned a verdict of \$81,000.⁶⁷ On a second appeal, the Eleventh Circuit remanded the case to permit the district court to clarify its findings of fact and conclusions of law on the

issue of standing.⁶⁸ On remand, the district court found that plaintiff-owner lacked standing and that the issue of damages should have been submitted to the jury only for plaintiff-author.⁶⁹

On this, the third appeal, the issue before the Eleventh Circuit was plaintiff-owner's standing to sue in view of the oral assignment and subsequent written memorandum of transfer.⁷⁰ The court explicitly held that an oral assignment can be ratified later or confirmed by a written memorandum of the transfer.⁷¹

Further, the Eleventh Circuit went on to state, arguably in dictum, that, where there is no dispute between the copyright owner and transferee as to the status of the copyright, it is unusual and unwarranted to permit a third-party infringer to invoke *467 the writing requirement of section 204 of the Copyright Act to avoid liability for copyright infringement.⁷² One commentator is of the opinion that this form of equitable estoppel is inappropriate because the writing requirement of section 204 is a legal rule, not an equitable doctrine.⁷³

2. Proof of Ownership

In *Havens v. Time-Warner, Inc.*,⁷⁴ Woodstock icon Richie Havens brought suit against Time-Warner alleging that it had exceeded the scope of a license granted by Havens to reproduce and distribute his performance of the songs "Handsome Johnny" and "Freedom" at Woodstock.⁷⁵ Time-Warner moved to dismiss on the grounds that Havens offered no proof of ownership of the copyright in the two songs during the relevant period.⁷⁶

Havens failed to allege registration of the copyrights in the two songs; the only evidence proffered was the affidavit of a private copyright searcher that indicated the composition "Handsome Johnny" was registered and numerous instruments were recorded against the registration, none of which purported to assign any right to Havens.⁷⁷ The search further indicated that the composition "Freedom" was registered in the name of Richard P. Havens, but also identified several instruments recorded against the registration, the precise nature of which the court was unable to ascertain.⁷⁸ In view of this lack of evidence, Havens' complaint was dismissed with prejudice as to the copyright claims concerning the song "Handsome Johnny."⁷⁹ Nevertheless, the claims concerning "Freedom" were dismissed without prejudice so that Havens could recover his fumble.⁸⁰

In *I.A.E. Inc. v. Shaver*, the Seventh Circuit held that a nonexclusive license to use a copyrighted work is an exception to the requirement of section 204 of the Copyright Act that copyright ownership be transferred by a written instrument.⁸¹ A *468 consent to use a work by unwritten permission or a lack of an objection to use may create a nonexclusive license that need not be in writing. A nonexclusive license may be implied to create an affirmative defense to a claim of infringement.⁸² An implied license arises where the licensee requests creation of a work, the licensor creates the work, delivers it to the licensee, and the licensor intends that the licensee copy and distribute the work.⁸³

In *Shaver*, a summary judgment of no copyright infringement resulted from plaintiff-architect providing schematic design drawings to defendant, an airport authority, for an air cargo building.⁸⁴ Plaintiff believed that he would receive further contracts to perform future design development.⁸⁵ When no further work for the airport was forthcoming, plaintiff commenced suit for copyright infringement of the schematic design drawings.⁸⁶ Prior to filing suit, plaintiff indicated that he "trust ed that our ideas and knowledge exhibited in our work will assist the Airport in realizing a credible and flexible use Cargo/Hangar facility."⁸⁷ The district court granted summary judgment in favor of defendant, finding no issue of material fact as to the existence of an implied license.⁸⁸

Citing a Ninth Circuit decision for the above principles governing the existence of an implied license, the Seventh Circuit affirmed, observing that the certificate of registration for the drawings states that the designs are to be used for "airport facility," and that the original contract limited the architect's role to preparation of schematic drawings only.⁸⁹ He delivered the drawings without any warning that their further use would constitute copyright infringement and later acknowledged that he was no longer a contributor to the airport project.⁹⁰ These facts did not support his contention that he expected to prepare final drawings as well.

***469 C. Infringement**

1. Non-Literal Elements of Computer Programs

In *Productivity Software International, Inc. v. Healthcare Technologies, Inc.*,⁹¹ the Southern District of New York applied the controversial “abstraction-filtration-comparison” test for infringement of non-literal elements of computer programs first articulated by the Second Circuit in *Computer Associates International, Inc. v. Altai, Inc.*⁹² In *Productivity Software*, the plaintiff owned the copyright in a computer program known as “Productivity Plus” (PRD+). The program was designed for use on personal computers to increase productivity of the word processing applications by expanding abbreviations (Short Forms) into proper phrases (Long Forms).⁹³ Although fully licensed to incorporate PRD+ into its medical transcription systems known as “Mediscribe,” defendants apparently developed their own text replacement program, “SHORTCUT,” which was allegedly similar to PRD+.⁹⁴

In granting summary judgment on the issue of noninfringement, the U.S. District Court for the Southern District of New York engaged in an abstraction-filtration-comparison analysis.⁹⁵ In its abstraction analysis, the district court noted that the Fifth Circuit’s abstraction test, when applied to non-literal elements of computer programs reveals a “‘spectrum’ of copyrightable material ranging from uncopyrightable simple forms to ‘high expression, like that found in some computerized video games.’”⁹⁶ The court, finding plaintiff’s program a utilitarian, simple form of expression, held that the program was entitled to a narrow range of copyright protection.⁹⁷

In the filtration step, the court found plaintiff’s abstraction of the program—as an expansion of Short Forms to Long Forms—to be an uncopyrightable idea.⁹⁸ However, the court went on to filter the other alleged similarities between the non-literal elements of the programs.

As to the main menu screen, plaintiff argued that the specific arrangement of the Short Form list on the left of the Long Form list was counterintuitive and not *470 dictated by efficiency concerns, and was therefore a protectable non-literal element.⁹⁹ The court disagreed, finding such an arrangement to be dictated by the necessity of placing both lists side by side, leaving only two choices. As a result, protectability of this element was barred by the doctrine of merger.¹⁰⁰ Similarly, the court declined to protect plaintiff’s menu bar, which plaintiff argued had merely moved from the bottom of the screen to the top of the screen by the defendants.¹⁰¹ The court also found that the other elements of the main menu screen alleged to be infringed by defendants were dictated by efficiency concerns and were common design elements. Therefore, these elements were not copyrightable.¹⁰²

Plaintiff also argued that several non-literal elements of its program’s edit screen were infringed, including the use of a separate edit screen.¹⁰³ The court again disagreed, holding that the use of a separate edit screen was a standard technique within a specific computing environment and was thus, unprotectable.¹⁰⁴ Plaintiff also argued that placement of Short Form terms in a long narrow box at the top of the screen and Long Form terms in a larger box at the bottom of the screen was infringed.¹⁰⁵ However, with the features of the main menu screen, the court found a limited number of arrangements to be available, thereby rendering this feature unprotectable.¹⁰⁶

Having found no protectable non-literal elements in plaintiff’s program, the court’s comparison step amounted to a reiteration of the foregoing filtration analysis. Therefore, the court concluded that no reasonable fact finder could find substantial similarity between the two programs.¹⁰⁷

The Eleventh Circuit, in a case of first impression, adopted the abstraction-filtration-comparison test of infringement for computer software promulgated by the Second Circuit in *Computer Associates*.¹⁰⁸ In *Bateman v. Mnemonics Inc.*,¹⁰⁹ plaintiff-engineers developed computer hardware and an operating system for a *471 single board computer used in automated parking systems.¹¹⁰ Defendant was a manufacturer engaged in the manufacture of equipment for parking system businesses.¹¹¹

Originally, plaintiffs and defendant operated under an agreement where plaintiffs supplied defendant with the necessary hardware and software.¹¹² For a variety of reasons, the business relationship deteriorated, causing defendant to reverse engineer plaintiff’s software and hardware to develop its own single board computer.¹¹³

Plaintiffs initiated suit alleging copyright infringement and theft of trade secrets.¹¹⁴ At trial, the jury awarded plaintiffs \$225,000 in damages for infringement of plaintiffs’ copyright in its software and circuit design.¹¹⁵ At issue on appeal was the jury instruction pertaining to the abstraction-filtration-comparison test of infringement. Specifically at issue was the following language in the jury instructions:

[S]ubstantial similarity of the non-literal elements is determined by comparing with the defendants’ program, that protectable expression of the copyrighted work which remains after filtering out any

portion of the copyrighted work, which represents only ideas, elements ... dictated solely by logic and efficiency, elements dictated by hardware or software standards, computer industry programming and practices or elements which are taken from the public domain.¹¹⁶

Plaintiffs offered this instruction and the court accepted it over defendants' objection. Defendants objected to the instructions being limited to apply the filtration step only to non-literal elements of the computer programs.¹¹⁷ Plaintiffs apparently relied on a statement made by the First Circuit in *Lotus Development Corp. v. Borland International, Inc.*,¹¹⁸ which declared the *Altai* test to be of little help in assessing whether literal copying of a command hierarchy constitutes copyright infringement.¹¹⁹ Defendants apparently relied on the Tenth Circuit's decision in *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*,¹²⁰ which *472 suggested that filtration should eliminate all unprotectable elements, non-literal or otherwise.¹²¹

The Eleventh Circuit observed that the purported disagreement between *Lotus* and *Gates* was largely a matter of semantics, stating that challenges to copying of literal elements must be considered, whether as part of the filtration or in a separate, parallel analysis.¹²² Because the district court's jury instructions implied that the Computer Associates filtration step was limited to non-literal copying, the Eleventh Circuit held that the jury must have concluded that any instances of literal copying of plaintiff's work were acts of infringement.¹²³ The court concluded that the jury was misled and improperly guided in its deliberations and reversed and remanded the case for new trial.¹²⁴

The second error alleged by defendant was that the district court failed to instruct the jury on the legal consequences of a finding that certain instances of literal copying of the work by defendant were dictated by compatibility and interoperability requirements.¹²⁵ Although the portion of the jury instructions quoted above would seem to be adequate in this respect, defendant proposed the following jury instruction: " You are to filter out as unprotectable expression portions of the program that the evidence shows were dictated by the interface with the applications code which was an external constraint."¹²⁶

This instruction was refused over plaintiff's objection. The Eleventh Circuit agreed with defendant that the jury should have been more explicitly instructed with regard to compatibility issues and the protectability of elements dictated by compatibility.¹²⁷

Finally, defendant argued that the district court erred in verbally instructing the jury as follows: "[E]ven a qualitatively small amount of copied material which remains unfiltered may be sufficiently important to the operation of [plaintiffs] operating system program to justify a finding of substantial similarity."¹²⁸ Defendant objected to the misstatement by the trial judge of the term "qualitatively" instead of "quantitatively."¹²⁹ Because defendant failed to object to the instruction, *473 the Eleventh Circuit reviewed the instruction for plain error.¹³⁰ There was no dispute that the written charges given to the jury correctly read "quantitatively." Based on this fact, the court found no plain error.¹³¹

2. Fair Use—Intermediate Copying of Firmware

In *DSC Communications Corp. v. DGI Technologies Inc.*,¹³² the Northern District of Texas concluded that the disassembly of a computer program, which involved "intermediate copying" in order to develop a microprocessor card compatible with plaintiff's digital trunk frames and operating software, constituted fair use.¹³³ In this case of first impression within the Fifth Circuit, the court followed the precedent of the Ninth Circuit on the issue of intermediate copying in *Sega Entertainment Ltd. v. Accolade, Inc.*¹³⁴

Plaintiff, DSC, and defendant, DGI, manufacture digital switching systems, micro-processor cards, and other hardware for the telecommunications industry.¹³⁵ The product at issue was an upgrade in the micro-processors on circuit boards or cards, referred to as the "MP-8".¹³⁶

DGI purchased from DSC on the open market a number of MP-8 cards to study and develop a card compatible with DSC digital trunk frames and operating software.¹³⁷ DGI developed a disassembly program in order to disassemble, or translate, into human-readable form, the DSC firmware retrieved from the DSC MP-8 card.¹³⁸ DGI disassembled the program and firmware located on the PROM¹³⁹ chip on the DSC MP-8.¹⁴⁰ The disassembled code was used to draft a flowchart of the firmware to begin drafting the DGI firmware,¹⁴¹ which was stipulated not to be *474 substantially similar to DSC's.¹⁴² Additionally, DGI surreptitiously downloaded DSC's operating system software at one of DSC's customer's sites.¹⁴³

The parties stipulated that the DGI disassembled version of the DSC firmware was a copy.¹⁴⁴ The only question was whether or not the stipulated copying was a fair use under section 107 of the Copyright Act, which provides the following four factors for consideration:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted works;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁴⁵

The court observed that these statutory factors are not exclusive because the doctrine of fair use is an equitable rule of reason.¹⁴⁶ The court concluded that three of the four factors weighed in favor of DGI and that only the third factor weighed against DGI because its disassembly of the entire program to discover its functional aspects was necessitated by the nature of the computer program.¹⁴⁷ The court then stated:

Considering the factors as a group, the Court finds that DGI's disassembly was fair use. Allowing a computer programmer to hide his ideas, processes and concepts in copyrighted object code defeats the fundamental purpose of the Copyright Act—to encourage the creation of original works by protecting the creator's expression while leaving the ideas, facts and functional concepts in a free marketplace to be built upon by others.¹⁴⁸

Thus, DSC was not entitled to a preliminary injunction on the firmware intermediate copying issue.¹⁴⁹

There remained the issue of DGI's liability for copying the operating system software. The court noted that the same legal analysis applied to the software issue as to the firmware issue.¹⁵⁰ However, the software copying was outright and wholesale rather than "intermediate" and for the purpose of understanding the *475 operation of the software.¹⁵¹ The nature of both works was similar, as was the extent of the copying: both were computer programs and both were copied in their entirety.¹⁵² The commercial impact of DGI's version of the MP-8 on DSC's MP-8 was found to be negligible,¹⁵³ while DSC's software was valuable and was acquired by DGI in violation of a testing agreement between DSC and a third party, and DGI was aware of its violation.¹⁵⁴ Thus, the court found DGI's software copying not to constitute fair use¹⁵⁵ and entered a preliminary injunction against DGI.¹⁵⁶

3. Fair Use

The Eastern District of Virginia entered into the fray in a series of skirmishes between the Church of Scientology and disgruntled ex-members and journalists seeking to expose the practices of the church in *Religious Technology Center v. Lerma*.¹⁵⁷ In 1991, the Church of Scientology sued disgruntled former member Stephen Fishman in the Central District of California. In that litigation, Fishman filed in open court an affidavit to which were attached sixty-nine pages of what plaintiff described as "Advanced Technology works."¹⁵⁸ In the California litigation, the Church of Scientology moved to seal the Fishman affidavit, arguing that the attached documents were trade secrets. The motion was denied and the Ninth Circuit affirmed the district court's decision not to seal the file.¹⁵⁹

Defendant Arnaldo Lerma, another former Scientologist, published the Fishman affidavit and attached documents on the Internet and sent a hard copy of the affidavit and attachment to Richard Leiby, an investigative reporter for *The Washington Post*.¹⁶⁰ After discovery of the documents on the Internet, the Religious Technology Center obtained a temporary restraining order prohibiting Lerma from further publication of the documents as well as a seizure warrant authorizing marshals to seize Lerma's personal computer, disks, and copies of the copyrighted works of L. Ron Hubbard, founder of the Church of Scientology and author of the documents attached to the Fishman affidavit.¹⁶¹

*476 In the meantime, the Religious Technology Center contacted *The Washington Post* and obtained the return of the Fishman affidavit and its attachments.¹⁶² Nevertheless, *The Post* obtained a copy of the Fishman affidavit from the open court file in the Central District of California.¹⁶³

On August 19, 1995, The Post published an article that related the plight of Lerma and the history of litigation by the Church of Scientology against its critics. The article included three brief quotes totaling forty-six words from the documents attached to the Fishman affidavit.¹⁶⁴ Shortly thereafter, the Religious Technology Center amended its complaint in the Lerma action to add The Post and two of its reporters as defendants.¹⁶⁵ The Eastern District of Virginia granted The Post's motion for summary judgment on the grounds that any copying by The Post and its reporters constituted fair use and that there was no misappropriation of trade secrets.¹⁶⁶

Although expressing serious doubts as to the validity of the copyright registrations in the documents attached to the Fishman affidavit, the court assumed the validity of the registrations and delved into the fair use analysis.¹⁶⁷ After briefly discussing the four factors enumerated in section 107 of the Copyright Act, the court found that the purpose and character of the use favored a finding of fair use because there was no evidence that The Post copied the document for any purpose other than news gathering, news reporting, and responding to litigation.¹⁶⁸ As to the second factor, the court, although struggling with the character and classification of Hubbard's works, found that the documents were intended to be informational in character rather than creative and that the nature of the work indicated a broader fair use approach.¹⁶⁹ Next, the court found that the third fair use factor, the amount and substantiality of the portion used, was insignificant in relation to the copyrighted work as a whole.¹⁷⁰

The Religious Technology Center argued that simply because The Post reporter chose the quoted portion that the quotes were significant and must constitute *477 infringement.¹⁷¹ The court rejected this argument, stating that to accept it would essentially destroy the fair use doctrine and noting that, read in context of the entire article, the quotes were offered solely as illustrations of the reporter's claims about Scientology and did not offer a complete definition of or capture the essence of Scientology.¹⁷² Finally, the court found the record devoid of evidence that The Post's use of the material had a detrimental effect on the potential market value for the copyrighted work, thus resolving the final fair use factor in favor of The Post.¹⁷³

Because The Post was the prevailing party on the copyright claim, the court found that it qualified for a discretionary award of attorney's fees.¹⁷⁴ Finding the Religious Technology Center's motive in filing the lawsuit "reprehensible" and that no reasonable copyright holder could have brought such an action in good faith, the court granted an award of attorneys' fees, but did not specify the amount.¹⁷⁵

Finally, finding no abuse of confidence, impropriety, or improper act by The Post in gathering information from the court file or downloading information from the Internet, the court granted summary judgment in favor of The Post on the Religious Technology Center's misappropriation of trade secret claims.¹⁷⁶ Nevertheless, the court did note that while a person originally posting a trade secret on the Internet may be liable for trade secret misappropriation, there can no liability for downloading information because there is no misconduct involved in interacting with the Internet.¹⁷⁷

4. Derivative Works—Novels, Motion Pictures

Noninfringement may be determined as a matter of law in the context of summary judgment if the similarity between the copyrighted and the alleged infringing works involves noncopyrightable elements or if no reasonable trier of fact could find that the works are substantially similar.¹⁷⁸ In *Littel*, the U.S. District Court for the Southern District of New York held that neither the motion picture *Predator* nor the motion picture *Predator 2* infringed an earlier published book of plaintiff entitled *The Predator*.¹⁷⁹

*478 Plaintiff's novel is the story of an albino boy abandoned in Africa and raised by baboons. The boy is taken in by priests and taken to New York City, where he escapes custody and embarks on a murderous rampage. A police officer, reporter, and anthropologist pursue the boy throughout the city until the denouement.¹⁸⁰ In contrast, the *Predator* motion pictures deal with a futuristically armed space alien on a murderous rampage in the jungle in the first film, and in Los Angeles in the second. A military team pursues the alien through the jungle in the first film, while a team including a police officer and a professor pursue the alien in the second film.¹⁸¹

The district court, in a comprehensive analysis of the works, concluded that the *Predator* motion picture and screen play were not substantially similar to *The Predator* novel.¹⁸² These works bore no resemblance to one another in terms of setting, plot, sequence of events, or individual scenes, and emanate from different genres.¹⁸³ The characters in the respective works shared no similarities apart from certain generalized, noncopyrightable concepts.¹⁸⁴

The Predator 2 motion picture and screen play were not substantially similar to the copyrighted novel even though they shared a common urban setting. They differed in protectable expression as to plot, sequence of events, individual scenes, characters, and “feel” of the works as a whole.¹⁸⁵

The voluminous textual analysis of the works submitted by the plaintiffs was not successful in showing infringement.¹⁸⁶ A review of unified, artistic works by dissection neglects the requirement that works be considered as a whole where the similarities claimed by the plaintiffs either disappeared or were reduced to unprotectable ideas, scenes a faire, and stock figures when examined in their entirety.¹⁸⁷ Indeed, the court observed that but for the similarity between the titles, it was hard to believe that any claim of infringement could have been filed.¹⁸⁸

***479 D. Remedies and Procedures**

1. Disposition of Copies and Phonorecords

In *Central Point Software Inc. v. Nugent*,¹⁸⁹ the U.S. District Court for the Northern District of Texas concluded that delivery to plaintiff of all computer hardware and software employed by defendant’s bulletin board service (BBS) was a reasonable disposition of property under section 503(b) of the Copyright Act.¹⁹⁰ Plaintiffs, several software distributors, filed suit for copyright infringement against a BBS operator for downloading or copying a number of plaintiffs’ software programs. The district court granted summary judgment for infringement, entered an injunction against further infringement, and awarded \$30,000 (\$10,000 per work) in statutory damages.¹⁹¹ Further, the court ordered the defendant to deliver to the plaintiffs the computer hardware and software used to make and distribute unlicensed or unauthorized copies of the copyrighted works, including modems, disks, CPUs, and other articles by means of which unauthorized copies were made.¹⁹² The court found this to be a reasonable disposition of this equipment under section 503.¹⁹³ The court also awarded plaintiffs attorney’s fees in the amount of \$6,000.¹⁹⁴

2. Criminal Penalties for Wire Fraud

In *United States v. Wang*,¹⁹⁵ the U.S. District Court for the District of Colorado held that the federal wire and mail fraud statutes encompassed the conduct of defendants: transmitting by wire computer files containing copyrighted source code that also infringed valid copyrights.¹⁹⁶ Defendants relied on *Dowling v. United States*,¹⁹⁷ which held that The National Stolen Property Act¹⁹⁸ did not encompass sale of bootleg musical compositions that infringed valid copyrights because the rights conferred by copyright law are carefully delineated by Congress and are ***480** distinguishable from the property interests protected by this section of criminal code.¹⁹⁹

The court distinguished *Dowling* on the ground that violation of the National Stolen Property Act required assuming physical control over property, which could not occur with intangible property such as copyrights.²⁰⁰ The court noted that the wire and mail fraud statutes contained no such requirement for physical possession of tangible property and thus applied to copyrights, confidential information, and other intangible property.²⁰¹

The court also dismissed defendants’ argument that section 1346 of the wire and mail fraud statute applied only to the general citizenry’s right to honest services of public officials, and not to a private employer’s right to the honest services of an employee.²⁰² The court declined to dismiss the indictments on these grounds.²⁰³

Footnotes

^{a1} Felsman, Bradley, Gunter & Dillon, L.L.P., Fort Worth, Texas.

^{aa1} Felsman, Bradley, Gunter & Dillon, L.L.P., Fort Worth, Texas.

¹ The decisions reported appear in volume 37, United States Patent Quarterly, Second Series through issue number 8, February 19, 1996.

² 71 F.3d 464, 37 U.S.P.Q.2d (BNA) 1012 (2nd Cir.1995).

³ Id. at 467, 37 U.S.P.Q.2d at 1013. “Terms of venery” is the plaintiff-author’s phrase for fanciful names of groups of animals such as “a pride of lions,” “a rafter of turkeys,” “a gaggle of geese,” etc. The title of the work, interestingly enough, was the poetic and obscure An Exaltation of Larks.

⁴ Id.

⁵ Id.

⁶ Id. at 467-68, 37 U.S.P.Q.2d at 1013-14.

⁷ Id. at 468, 37 U.S.P.Q.2d at 1014.

⁸ Id. at 469, 37 U.S.P.Q.2d at 1015.

⁹ Id. at 470, 37 U.S.P.Q.2d at 1015 (citing Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991)).

¹⁰ Id., 37 U.S.P.Q.2d at 1016.

¹¹ Id. at 471-72, 37 U.S.P.Q.2d at 1016-17.

¹² Id.

¹³ Id. at 471, 37 U.S.P.Q.2d at 1017.

¹⁴ Id.

¹⁵ Id. at 472, 37 U.S.P.Q.2d at 1017. Several strings of terms appeared on the scarf in the same order as in Lipton’s compilation. Id.

¹⁶ Id.

¹⁷ Id. at 472-73, 37 U.S.P.Q.2d at 1018.

¹⁸ Id. at 474-75, 37 U.S.P.Q.2d at 1019-20.

¹⁹ Id. at 475, 37 U.S.P.Q.2d at 1020.

20 71 F.3d 77, 37 U.S.P.Q.2d (BNA) 1020 (2d Cir.1995).

21 Carter v. Helmsley-Spear, Inc., 861 F.Supp. 303, 337, 33 U.S.P.Q.2d (BNA) 1225, 1248 (S.D.N.Y. 1994) (using 17 U.S.C. § 106A (1994)), rev'd, 71 F.3d 77, 37 U.S.P.Q.2d (BNA) 1020 (2d Cir.1995).

22 Carter, 71 F.3d at 81-83, 37 U.S.P.Q.2d at 1022-24.

23 Id. at 83-85, 37 U.S.P.Q.2d at 1024-26.

24 Id. at 88, 37 U.S.P.Q.2d at 1028-29.

25 490 U.S. 730, 10 U.S.P.Q.2d (BNA) 1985 (1989).

26 Carter, 71 F.3d at 88, 37 U.S.P.Q.2d at 1028.

27 Carter, 861 F.Supp. at 319, 33 U.S.P.Q.2d at 1235.

28 Carter, 71 F.3d at 85, 37 U.S.P.Q.2d at 1026.

29 Id. at 88, 37 U.S.P.Q.2d at 1027.

30 Id. at 86-87, 37 U.S.P.Q.2d at 1027.

31 Id., 37 U.S.P.Q.2d at 1027-28.

32 Id. at 87, 37 U.S.P.Q.2d at 1028.

33 Godinger Silver Art Co. v. International Silver Co., 37 U.S.P.Q.2d (BNA) 1454, 1455 (S.D.N.Y. 1996) (citing L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490, 189 U.S.P.Q. (BNA) 753, 756 (2d Cir.), cert. denied, 429 U.S. 857, 191 U.S.P.Q. (BNA) 588 (1976)).

34 Id. at 1454.

35 Id. at 1454-55.

36 Id. at 1455 (citing L. Batlin, 536 F.2d at 490, 189 U.S.P.Q. at 756).

37 Id. (citing L. Batlin, 536 F.2d at 490, 189 U.S.P.Q. at 756).

38 Id. at 1456-58.

39 463 S.E.2d 608, 37 U.S.P.Q.2d (BNA) 1060 (S.C. 1995).

40 Id. at 609-10, 37 U.S.P.Q.2d at 1061-62.

41 Id. at 609, 37 U.S.P.Q.2d at 1061.

42 Id.

43 Id.

44 Id.

45 Id.

46 Id.

47 Id. (basing their argument on 17 U.S.C. § 301 (1994)).

48 Id. at 609, 37 U.S.P.Q.2d at 1061.

49 Id. at 609-10, 37 U.S.P.Q.2d at 1061-62 (citing *Fargo Mercantile Co. v. Brechet & Richter Co.*, 295 F. 823 (8th Cir.1924)).

50 Id., 37 U.S.P.Q.2d at 1061.

51 Id. at 610, 37 U.S.P.Q.2d at 1061.

52 Id., 37 U.S.P.Q.2d at 1062.

53 Id. at 611, 37 U.S.P.Q.2d at 1062.

54 70 F.3d 96, 37 U.S.P.Q.2d (BNA) 1157 (11th Cir.1995). See 17 U.S.C. § 204 (1994).

55 Id. at 97, 37 U.S.P.Q.2d at 1158.

56 Id.

57 Id.

58 Id.

59 Id.

60 Id. at 97-98, 37 U.S.P.Q.2d at 1158.

61 Id. at 98, 37 U.S.P.Q.2d at 1158-59.

62 Id., 37 U.S.P.Q.2d at 1159.

63 Regal Classic Homes, Inc. v. Palms Dev. Group, Inc., 979 F.2d 213 (11th Cir.1992).

64 Imperial Residential, 70 F.3d at 98, 37 U.S.P.Q.2d at 1159.

65 Id.

66 Id.

67 Id.

68 Id. (citing prior opinion remanding for clarification of findings of fact and conclusions of law with respect to standing, Imperial Residential Design v. Palms Dev. Co., 29 F.3d 581 (11th Cir.1994)).

69 Id. at 98-99, 37 U.S.P.Q.2d at 1159.

70 Id. at 99, 37 U.S.P.Q.2d at 1159.

71 Id., 37 U.S.P.Q.2d at 1160 (citing Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc., 29 F.3d 1529, 31 U.S.P.Q.2d (BNA) 1940 (11th Cir.1994) and Great Southern Homes v. Johnson & Thompson, 797 F.Supp. 609, 24 U.S.P.Q.2d (BNA) 1876 (M.D. Tenn. 1992)).

72 70 F.3d at 99, 37 U.S.P.Q.2d. at 1160 (citing Eden Toys, Inc. v. Florelee Undergarment Co., 697 F.2d 27, 217 U.S.P.Q. (BNA) 201 (2d Cir.1982)).

73 W. PATRY, COPYRIGHT LAW AND PRACTICE, 389 (1st ed. 1994).

74 896 F.Supp. 141, 37 U.S.P.Q.2d (BNA) 1218 (S.D.N.Y. 1995).

75 Id. at 142, 37 U.S.P.Q.2d at 1219.

76 Id.

77 Id. at 143, 37 U.S.P.Q.2d at 1220.

78 Id.

79 Id.

80 Id. at 143-44, 37 U.S.P.Q.2d at 1220. This startling evidentiary lapse evokes Judge Posner's caution that general practitioners undertake copyright litigation at their peril in *Hays v. Sony Corp.*, 847 F.2d 412, 7 U.S.P.Q.2d (BNA) 1043 (7th Cir.1988).

81 74 F.3d 768, 37 U.S.P.Q.2d (BNA) 1436 (7th Cir.1996). See 17 U.S.C. § 204 (1994).

82 Id. at 775-76, 37 U.S.P.Q.2d 1442.

83 Id. at 776, 37 U.S.P.Q.2d 1442.

84 Id. at 772-73, 37 U.S.P.Q.2d at 1439.

85 Id. at 770-71, 37 U.S.P.Q.2d at 1437-38.

86 Id., 37 U.S.P.Q.2d at 1438.

87 Id. at 774, 37 U.S.P.Q.2d at 1440.

88 Id. at 772, 37 U.S.P.Q.2d at 1439.

89 Id. at 776-77, 37 U.S.P.Q.2d at 1442-43. See *Effects Assocs. v. Cohen*, 908 F.2d 555, 15 U.S.P.Q.2d (BNA) 1559 (9th Cir.1990), cert. denied, 498 U.S. 1103 (1991).

90 Id. at 777, 37 U.S.P.Q.2d at 1443.

91 37 U.S.P.Q.2d (BNA) 1036 (2d Cir.1995).

92 982 F.2d 693, 706, 23 U.S.P.Q.2d (BNA) 1241, 1252-53 (2d Cir.1992).

93 *Productivity Software Int'l*, 37 U.S.P.Q.2d at 1037.

94 Id. at 1038.

95 Id. at 1039.

96 Id. (quoting *Engineering Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1344, 31 U.S.P.Q.2d (BNA) 1641, 1647 (5th Cir.1994), modified on other grounds, 46 F.3d 408, 34 U.S.P.Q.2d (BNA) 1157 (5th Cir.1995)).

97 Id. at 1039.

98 Id. at 1040.

99 Id.

100 Id.

101 Id.

102 Id. at 1041.

103 Id.

104 Id.

105 Id.

106 Id.

107 Id. at 1041-42.

108 *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 23 U.S.P.Q.2d (BNA) 1241 (2d Cir.1992).

109 38 U.S.P.Q.2d (BNA) 1225 (11th Cir.1995).

110 Id. at 1226.

111 Id.

112 Id.

113 Id. at 1226-29.

114 Id. at 1229.

115 Id. at 1226.

116 Id. at 1233.

117 38 U.S.P.Q.2d at 1232-33.

118 49 F.3d 807, 34 U.S.P.Q.2d (BNA) 1014 (1st Cir.1995), *aff'd per curiam*, 116 S.Ct. 804 (1996).

119 *Id.*

120 9 F.3d 823, 28 U.S.P.Q.2d (BNA) 1503 (10th Cir.1993).

121 *Bateman*, 37 U.S.P.Q.2d at 1234.

122 *Id.*

123 *Id.*

124 *Id.* at 1234, 1237.

125 *Id.* at 1235.

126 *Id.*

127 *Id.* at 1236.

128 *Id.*

129 *Id.*

130 *Id.* at 1236-37.

131 *Id.* at 1237.

132 898 F.Supp. 1183, 37 U.S.P.Q.2d (BNA) 1496 (N.D. Tex. 1995).

133 *Id.* at 1191, 37 U.S.P.Q.2d at 1502.

134 977 F.2d 1510, 24 U.S.P.Q.2d (BNA) 1561 (9th Cir.1992).

135 *DSC*, 898 F.Supp. at 1186, 37 U.S.P.Q.2d at 1497-98.

136 *Id.*, 37 U.S.P.Q.2d at 1497.

137 Id., 37 U.S.P.Q.2d at 1498.

138 Id.

139 Programmable Read Only Memory

140 Id.

141 Id. at 1186-87, 37 U.S.P.Q.2d at 1497-98. Disassembling a program consists of translating the firmware code, or instructions, from machine-readable object code to human readable form.

142 Id. at 1187, 37 U.S.P.Q.2d at 1498.

143 Id. at 1186, 37 U.S.P.Q.2d at 1497.

144 Id. at 1188, 37 U.S.P.Q.2d at 1499.

145 17 U.S.C. § 107 (1994).

146 DSC, 898 F.Supp. at 1188, 37 U.S.P.Q.2d at 1500.

147 Id. at 1187-92, 37 U.S.P.Q.2d at 1498-1502.

148 Id. at 1191, 37 U.S.P.Q.2d at 1502.

149 Id. at 1192, 37 U.S.P.Q.2d at 1502.

150 Id. at 1190, 37 U.S.P.Q.2d at 1500.

151 Id. at 1189-90, 37 U.S.P.Q.2d at 1500-01.

152 Id. at 1190, 37 U.S.P.Q.2d at 1501.

153 Id. at 1191, 37 U.S.P.Q.2d at 1502.

154 Id. at 1194, 37 U.S.P.Q.2d at 1504-05.

155 Id.

156 Id. at 1196, 37 U.S.P.Q.2d at 1506.

157 908 F.Supp. 1362, 37 U.S.P.Q.2d (BNA) 1258 (E.D. Va. 1995).

158 Id. at 1364, 37 U.S.P.Q.2d at 1259.

159 Id.

160 Id.

161 Id.

162 Id.

163 Id. at 1364-65, 37 U.S.P.Q.2d at 1259. Interestingly, the opinion states that the Post successfully foiled the Religious Technology Center's efforts to check the file out and hold it all day in order to prevent the public from viewing the file. Id. at 1365, 37 U.S.P.Q.2d at 1259.

164 Id. at 1265, 37 U.S.P.Q.2d at 1260.

165 Id.

166 Id. at 1367, 1369, 37 U.S.P.Q.2d at 1262, 1263.

167 Id. at 1365, 37 U.S.P.Q.2d at 1260.

168 Id. at 1366, 37 U.S.P.Q.2d at 1261. See 17 U.S.C. § 107 (1994). See also factors described supra.

169 Id. at 1366-67, 36 U.S.P.Q.2d at 1261.

170 Id. at 1367, 37 U.S.P.Q.2d at 1261.

171 Id.

172 Id. at 1367, 37 U.S.P.Q.2d at 1261-62.

173 Id., 37 U.S.P.Q.2d at 1262.

174 Id.

175 Id. at 1368, 37 U.S.P.Q.2d at 1262.

176 Id. at 1369, 37 U.S.P.Q.2d at 1263.

177 Id.

178 *Littel v. Twentieth Century Fox Film Corp.*, 37 U.S.P.Q.2d (BNA) 1353 (S.D.N.Y. 1995).

179 Id.

180 Id. at 1356-57.

181 Id. at 1358-61.

182 Id. at 1362.

183 Id.

184 Id.

185 Id. at 1363-65.

186 Id. at 1361-65.

187 Id. at 1365.

188 Id. at 1361.

189 903 F.Supp. 1057, 37 U.S.P.Q.2d (BNA) 1051 (1995).

190 Id. at 1061, 37 U.S.P.Q.2d at 1054. See 17 U.S.C. § 503 (1994).

191 Id. at 1060-61, 37 U.S.P.Q.2d at 1053-54.

192 Id. at 1061, 37 U.S.P.Q.2d at 1054.

193 Id.

194 Id.

195 898 F.Supp 758, 37 U.S.P.Q.2d (BNA) 1409 (D.Col. 1995).

¹⁹⁶ Id. at 761, 37 U.S.P.Q.2d at 1411. See 18 U.S.C. §§ 1343, 1346 (1994).

¹⁹⁷ 473 U.S. 207, 226 U.S.P.Q. (BNA) 529 (1985).

¹⁹⁸ 18 U.S.C. § 2314 (1994).

¹⁹⁹ Wang, 898 F.Supp. at 759, 37 U.S.P.Q.2d at 1409.

²⁰⁰ Id. at 760, 37 U.S.P.Q.2d at 1410.

²⁰¹ Id.

²⁰² Id. at 761, 37 U.S.P.Q.2d at 1410-11.

²⁰³ Id., 37 U.S.P.Q.2d at 1411.