



Entertainment Law COMMENT

KING & BALLOW LAW OFFICES

EDITOR, THOMAS J. MOTZNY

Vol. 25, Number 3

March 2011

© 2011 King & Ballow

COPYRIGHT

Water pipe diagram protected against copying

by Patrick Ogilvy
pogilvy@kingballow.com

A U.S. District Court in California has found a t-shirt designer liable to an author for copyright infringement for reproducing the author's diagram on a t-shirt.

Author designs original water pipes

An author wrote and illustrated a book containing instructions and diagrams for building forty different bongs, pipes, and hookahs. A bong is a device where the smoke of a burning substance is pulled through and cooled by a small amount of water and then inhaled by the user. The author's book featured mechanical-type illustrations depicting how to make bongs out of various objects such as honey bears, apples, cantaloupes, dryer hoses and crushed aluminum cans. A distributor of clothing admittedly obtained a copy of the author's book and instructed one of its designers to use the illustrations from the book to create a t-shirt. The distributor then began selling the t-shirt featuring the author's bong-making diagrams. In response, the author filed suit for copyright infringement.

Defenses go up in smoke

Although the distributor explicitly admitted to taking the illustrations from the author's book, it claimed the diagrams were not entitled to copyright protection. First, the distributor argued the diagrams did not add anything original to the construction of a bong, which it called a common smoking device. However, the court noted only the work need be original, not the subject of the work, and there was no dispute the depictions of the various bongs in the diagrams were original to the author. Further, the author presented evidence he had depicted the bongs in his own way, choosing the various lines, shapes and angles comprising the diagrams. Accordingly, the fact the illustrations presented the "basic, age-old design of a bong" did not matter.

The court similarly dismissed the distributor's argument that the diagrams are not entitled to copyright protection because they depict useful articles. The court explained the illustrations themselves were not useful articles, but simply portray-

see "diagram," page 2

LITERATURE

Author needs permission absent fair use

by Patricia Kryder
pkryder@kingballow.com

A licensed psychotherapist began writing a book about the use of dogs to treat psychiatric disabilities. As part of her research, she contacted a person who was experienced using and training psychiatric dogs ("PSDs") with the intention of featuring the trainer in her book. After being approached about her PSDs, the trainer agreed to provide information about her personal experiences using a PSD.

Then, the author requested the trainer's assistance in drafting those portions of the book relating to PSD training and interaction. As a specialist in training PSDs,

see "materials," page 4

INTERNET

Uploading photos to Twitter/Twitpic does not create express license to third

by Chase Brown
cbrown@kingballow.com

In the aftermath of the earthquake in Haiti, iconic images were captured and distributed worldwide. Some of these images first surfaced through various social networking sites, where subsequent distribution for payment by third parties would create a legal battle involving multiple defendants. This year, a district court in New York denied an agency's claim that uploading pictures to Twitter/TwitPic granted third parties abroad license to exploit the posted content.

Tweet me. Don't cheat me.

A renowned photojournalist took breathtaking pictures of the immediate earthquake aftermath in Haiti. He then uploaded these photographs to TwitPic, a

see "photos," page 4

Don't cry over unspillable milk



John Russell Nixon

Rarely, if ever, do copyright claims and millions of dollars fit into a glass of milk, but in January 2011 a Pennsylvania federal district court judge said they do. In 2007, a software company developed iMilk, a cell phone application (better known as an “app”) that allows users of iPhones to simulate the act of drinking a glass of milk. At \$2.99 per download the software company made millions off their idea.

A large American candy company famous for its chocolate syrup contacted the software company to ask if iMilk could be modified to include chocolate syrup and to replace iMilk’s ending “burp” with a “moo.” The parties entered into negotiations but were unable to reach agreeable terms for the development of the candy company’s app. In 2009, the candy company launched its own app. The app allows users to pour a glass of milk, add chocolate syrup, and to stir and drink with a straw. When the virtual glass is empty the phone makes a “slurping” sound. The software company sued, alleging the candy company’s app infringes on their existing copyright for beverage simulation apps.

Copyright law allows for the protection of the expression of ideas, not the ideas themselves. Thus the idea for drinking a virtual glass of milk is not at issue. Rather, the expression of that idea is the crux of the argument these companies now make. The parties here are arguing the significance of tipping a phone to pour out its contents versus drinking from a virtual straw.

from “diagram,” page 1

als of useful articles (and the court questioned whether a bong could even be considered a useful article). Along the same lines, the court rejected the distributor’s suggestion the diagrams were not protected because they show a method or procedure for assembling bongs. The court explained the author did not seek protection for the process of making a bong, but only his specific depiction of that process. While the concept and process of making a bong are outside the reach of copyright, an artistic expression of the concept and process are not. As such, the author was entitled to copyright protection for his diagrams, and the distributor’s t-shirt infringed those diagrams. ■

Feedback

If you have any questions on the cases or regulations mentioned in the articles, please feel free to contact the editor, Thomas Motzny, at tmotzny@kingballow.com.

The software company said it did not seek protection for the “idea” of its iMilk app, but rather for the software—the original expression of their idea. The candy company claims it developed their own code for the app and did not copy any of the software company’s code. Though the candy company admits both apps reflect the idea of using an iPhone screen to create a glass of virtual milk, they argued there were “substantial differences in the actual expression” of the idea that are sufficient to negate the allegation the candy company intentionally copied the copyrighted code. The court disagreed and refused to dismiss the software company’s suit.

This was not the first time the software company has filed suit to protect its copyright. It had previously sued a large American brewery for marketing of an app which allowed users to drink a virtual beer. The software company claimed the brewery’s app infringed on their iBeer app. The two companies settled out of court for an undisclosed amount of money and the brewery no longer offers their customers a virtual cold-one.

Copyright does not protect an idea, even if that idea is worth millions of dollars. As a result, it is extremely important to consult an attorney skilled in this area of law early in the development process. An attorney can assist product developers in deciding whether their new product violates someone’s copyright or if the new product should be protected by applying for a copyright. ■

John Russell Nixon is a student at Nashville School of Law

“I Didn’t Know That”™
(Why We Say The Things We Say)

by Karlen Evins



“Drumming Up Trade”- Once in town, the early traveling salesman had to play the role of PR man, advertising man, and musician all in one. In order to stir up business, he was often known to beat a drum or ring a bell. The former action gave us our catchphrase, “drumming up trade,” while the latter lent itself to “now, that rings a bell!”

Reprinted with permission of Scribner, an imprint of Simon & Schuster Adult Publishing Group from I DIDN’T KNOW THAT by Karlen Evins. Visit www.karlenevins.com. Copyright © 2011 by Karlen Evins

LITERATURE

Never judge a book by its cover



Elizabeth Holt

A self-help author of a book guiding readers on celiac disease sued a publishing company and fellow author for allegedly printing a substantially similar work. The United States District Court for the District of Massachusetts found the later work on celiac disease, although similar in facts, ideas and phrases, did not infringe the earlier one.

Expression is protected

After publishing her book *Living*, a self-help author forwarded a copy to a publishing company and a fellow author, who also happened to be the co-host of a popular, round-table talk show. One year later, to her surprise, the publishing company and fellow author published *G-Free*, a self-help book on celiac disease. Both works listed the symptoms of celiac disease, described particular experiences by the respective authors, listed foods and other products that likely contained gluten, offered advice on avoiding contact with gluten and addressed problems with children who were allergic to gluten. The self-help author alleged the works were substantially similar and sued the publishing company and fellow author for copyright infringement.

Ideas, phrases and facts not always protected

Substantial similarity is measured by the ordinary observer. Even a small portion of copied material that is important to the original may be found substantially similar. However, under the doctrine of *scenes a faire*, elements of a work that are crucial or usual to the subject matter are not protected. To determine copyright protection, the jury or judge must dissect the unprotected elements of the work.

Although similarities in the structure of the two works exist, the similarities were found to be minor in relation to the expression of each work. Passages in the works had similar ideas, but that alone was not enough for copyright protection. The authors' variations of the issues as they related to the similar ideas were not slight or trivial. Therefore, the court found many of the ideas were unprotected by copyright law because the expressions of the ideas were dissimilar. In addition, the court found just because the ideas in the works used similar words or short phrases, the passages were not copyright protected because they did not involve minimal creativity necessary to warrant protection.

Additionally, the court found the lists of facts could be freely copied because the arrangement of the works

had minimal creativity. When symptoms of celiac disease are arranged differently, such as random as opposed to alphabetical, there is no protection of similarity remaining and therefore the work does not justify protection. The court further concluded the self-help author's claim of compilation copyright was flawed because the facts or ideas copied in the fellow author's work was reshuffled and restated. As a result, the phrases and words were excluded from protection.

Avoiding copyright infringement

While copyright law protects original ideas, the law does not protect ideas themselves. Even if two works are very similar, those similarities may be the result of unprotectable facts and ideas. ■

Elizabeth A. Holt is an attorney in the Family Law Section of King & Ballow in Nashville, Tennessee. Ms. Holt received her law degree from the Nashville School of Law. She graduated magna cum laude from Middle Tennessee State University with a major in Criminal Justice Administration and a double minor in Psychology and Sociology. Before starting her career as an attorney, Ms. Holt began her legal career as a legal assistant at King & Ballow. Ms. Holt is admitted to practice law in Tennessee.

King & Ballow's Breakfast Briefing™ Seminars

We are hosting our Breakfast Briefing seminars twice each month. Our seminars will be held on the 2nd and 4th Fridays of each month. Our next Breakfast Briefing is:

FMLA Breakfast Briefing on
Friday, March 11, 2011 and
Friday, March 25, 2011

Our seminars are held at King & Ballow, located at 315 Union Street, Nashville, Tennessee, in the Seminar Room on the fourth floor. The cost to attend each seminar is \$25 per attendee. This price includes a continental breakfast, parking, and a DVD of the seminar you attend. If you want to attend the above seminar or for more information, please contact Natasha Walker at nwalker@kingballow.com or (615) 726-5526.

from “materials,” page 1

the trainer expected to be compensated for these additional efforts in the form of attribution for the trainer’s work, financial compensation from sales of the book, and inclusion in future speaking engagements in connection with the book.

The author and trainer communicated via e-mail and telephone. Shortly before the book was completed, the trainer sought to formalize their agreement in writing, which the author refused to do. The author communicated to the trainer that all references to the trainer, her experiences and writings would be removed from the book. The book, entitled *Healing Companions*, was published in 2010.

The trainer maintained that she owned the copyright registration for her “work” and that portions of the “work” were published in *Healing Companions*. She filed a case in federal court in the eastern district of California alleging claims for fraud, copyright infringement, common law misappropriation and violation of California’s Unfair Competition Law (“UCL”). The author sought to dismiss the state law claims and for a judgment on the pleadings as filed.

from “photos,” page 1

third-party application to the social networking website Twitter. A resident in the Dominican Republic apparently copied the images to his own TwitPic account and then purported to license them. While the facts moving forward are unclear, no dispute exists that a French news agency subsequently downloaded the photographs from the Dominican resident’s account, marketed and distributed them, and initially credited the Dominican with taking them. When the photographer observed what was happening, he sent several “cease and desist” letters, and the news agency responded with a declaratory judgment action saying it did not infringe the photographer’s rights.

A picture is worth a thousand legal documents

The news agency’s primary arguments were that (1) it had an express license to use the photographer’s images based on a license contained in the Twitter or TwitPic terms of service, or (2) that it was nonetheless a third party beneficiary of the photographer’s membership agreement with Twitter. The court rejected the agency’s first argument by looking at the terms of both Twitter and TwitPic. Twitter’s terms grant a license to use content only to Twitter and its partners. Similarly, TwitPic’s terms grant a license to use photographs only to Twitpic.com or affiliated sites. The court held the agency’s position that a separate provision of Twitter “encourage[s] and permit[s] broad re-use of Content” does not clearly confer a right on others to re-use copyrighted postings. The court also rejected the agency’s

The federal court determined that federal copyright law governed the state law claim for misappropriation, because copyright infringement contained the same elements. As such, the state law claims were preempted by the Copyright Act, and the state law claims were dismissed.

However, the court ruled that the trainer had established sufficient evidence of copyright infringement for the case to proceed because the author was unable to demonstrate that their use of the material was protected fair use. Although the section of the book in which the trainer’s work was found is a small portion of the book as a whole, and the commercial value of the book is not based entirely on the trainer’s work, the new work was not transformative. A work is transformative when the new work does not merely supersede the objects of the original creation but rather adds something new, with a further purpose or different character, altering the first with new expression, meaning or message. The more transformative the new work, the less the significance of other factors that weigh against fair use, such as use of a commercial nature. ■

second argument that it was a third party beneficiary to the Twitter license agreement, since the agency was not a “partner or sublicensee” of Twitter. The agency acknowledged that it was only a “user.”

How do we tweet from here?

The result of this case is not surprising from a legal standpoint, but should allow photographers and other Twitter participants to breathe a sigh of relief. As a general reminder, content creators should beware that uploading content to social networking websites can create implications on your legal rights. As for the news agency in this case, it learned the harder lesson of performing due diligence in verifying the source of the photographs it markets and distributes. ■

Entertainment Comment is published monthly by the law firm of King & Ballow, Nashville, Tennessee, and San Diego, California. The materials contained herein have been abridged from laws, court decisions and administrative rulings and should not be construed as legal advice on specific subjects.

Additions and/or deletions to King & Ballow’s e-mailing list should be e-mailed to brooks@kingballow.com. Professional educational courses for CLE credit are also available online at www.kingballowlearning.com.

Follow King & Ballow on Twitter at
www.twitter.com/kingballow