Part I

Copyright Update

Catch up on new copyright developments that impact you.

By Lawrence Savell

Editors of print and electronic publications need to be sensitive to and familiar with the wide range of legal claims that may be asserted against their offerings. One of the most critical and complex legal areas affecting publications is copyright ownership and infringement. This article is designed to provide editors with a brief overview of pertinent copyright law principles and issues and significant recent developments of particular interest involving them.

What Is Copyrightable?

It takes relatively little for a "work" to qualify for protection under the copyright law. All that is required is that the item be an "original work[] of authorship fixed [i.e., memorialized] in any tangible medium of expression . . . ." Generally, the slightest amount of originality confers protection under the law, with neither artistic merit nor great novelty being required. The key is that the author created it with his or her own skill, labor, and judgment. Thus, publishers should consider the possibility that every text and illustration encountered may meet this modest standard and may thus be subject to copyright protection.

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Nevertheless, some recent decisions have made it clear that there are limits to what is copyrightable. In the April 15, 1999 decision of the United States District Court for the Southern District of New York in *Polsby* v. *St. Martin's Press Inc.*, the court ruled that the life experiences of a doctor who compiled writings about her alleged sexual harassment at the National Institutes of Health were not copyrightable subject matter. In response to the plaintiff's admission that the details of her story were composed of historical facts of her life and experiences at NIH, the court emphasized that copyright protection extends only to an author's particular expression of facts or ideas, not to the facts or ideas themselves. It therefore granted summary judgment to St. Martin's.

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Similarly, the United States District Court for the Southern District of New York ruled on February 19, 1999 in *Dobson* v. *NBA Properties, Inc.*, that the slogan "Repeat Threepeat" was not copyrightable. The court noted that under federal copyright law, "words and short phrases such as names, titles, and slogans" are not subject to copyright. (An attempt to trademark the slogan might have been more successful.) Therefore, the plaintiff's claim that the National Basketball Association infringed his copyright by using his marketing/promotional project entitled "Chicago Bulls Repeat Threepeat" was dismissed by the court for failure to state a claim upon which relief could be granted.

On January 22, 1999, the United States District Court for the Central District of California ruled in *Hoffman* v. *Capital Cities/ABC, Inc.*, that movie actor Dustin Hoffman's right of publicity claims regarding Los Angeles Magazine's unauthorized use of his name and likeness to endorse and promote articles of designer clothing were not preempted (i.e., barred) by federal copyright law. The court ruled that the actor's name, likeness, and "persona" could not be seriously argued to constitute a requisite "writing" or "work of authorship" within the meaning of the Copyright Act.

Copyright Infringement

Copyright infringement generally requires proof of two factors: (1) access to the original work by the infringer; and (2) "substantial similarity" between the protectable aspects of the original work and the alleged infringing work.

In the Polsby case noted above, the court rejected the plaintiff's contention that the defendant author had access to the plaintiff's work. In particular, the court rejected the argument that access could be inferred through the similarity of the works, pointing out that proof of similarity is independent of proof of access. Even if access were established, the

court noted, summary judgment would still be warranted because there was no substantial similarity between the protectable elements of the two works. Here, it found that the similarities between the two works were limited to unprotectable elements. The court stressed that the plaintiff did not allege that even a single phrase of her work was copied verbatim or that the defendants had appropriated any aspect of the unique manner in which she expressed the facts and events of her experiences at NIH.

In a decision published on May 4, 1999, the United States District Court for the Southern District of New York ruled that there was no copyright infringement between two murder novels set in India. In *Mann* v. *Farrar, Straus & Giroux Inc.*, the author of a novel sued another author and the latter's publisher for copyright infringement, arguing that both works involved the similar mutilation and murder of transvestite prostitutes in India and that the principal character in each work was part Indian and part British. The defendants moved for summary judgment, arguing that a comparison of the two works established as a matter of law that the plaintiff could not prove the substantial similarity necessary for infringement. The court granted the motion, concluding that an average person (the "ordinary lay observer") would not recognize the alleging copy as having been appropriated from the copyrighted work, as the similarities were nothing more than mere generalized ideas or themes. The court found the two works to be vastly different in their treatment, details, scenes, events, and characterization.

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On January 22, 1999, the United States Court of Appeals for the Second Circuit ruled in *Nihon Keizai Shimbun, Inc.* v. *Comline Business Data, Inc.*, that the defendants' abstracts of the plaintiff's Japanese news articles infringed the plaintiff's U.S. copyrights in those articles since the abstracts tracked the articles and added virtually nothing new to the discussion. Although the court acknowledged that the facts related in the articles were not themselves copyrightable, the extent of the copying led the Court to affirm the lower court's holding of infringement. The court noted that the abstracts in many instances appeared to be direct translations, edited only for clarity; that the average abstract used about two-thirds of each article's protected expression; that the abstracts tracked the information in the articles sentence by sentence in sequence; that the abstracts only occasionally varied from the format of the articles; and that the abstracts basically followed the same structure and organization of the articles.

Note: Part II will contain a follow-up piece that explains what you need to know about the *Tasini* v. *New York Times Co.* decision.

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