February 1997

Cases of Note

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Recommended Citation

Jennings, Anne F. and Montgomery, Jack G. (1997) "Cases of Note," *Against the Grain*: Vol. 9: Iss. 1, Article 31.
DOI: <https://doi.org/10.7771/2380-176X.2004>

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LEGAL ISSUES

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Cases of Note

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Infringement of Copyright

Churchill Livingstone, Inc., v. Williams & Wilkins, a division of Waverly, Inc. and Thomas W. Sadler, 1996 WL 724737 (S.D.N.Y.) Dec. 16, 1996.

Plaintiff Churchill Livingstone, Inc., a book publisher, sued defendants Williams & Wilkins and Thomas W. Sadler, M.D. for copyright infringement, the issue being substantial similarity between the Churchill published medical textbook, *Human Embryology*, written by Dr. William J. Larsen and the Williams & Wilkins title, *Medical Embryology*, by Dr. Sadler. Both parties moved for summary judgment and the court ruled in favor of defendants for the reasons explained hereinbelow.

Dr. Larsen began writing *Human Embryology* in 1988. Each chapter in the textbook contains three sections: descriptive medical embryology; clinical applications; and experimental principles. The illustrations used by Larsen included three-dimensional, air-brushed drawings, scanning electron micrographs ("SEMS") and photographs. Larsen's book was published in 1993 and was "hailed as a major advancement in embryology textbooks." Reviewers praised the illustrations and the inclusion of clinical material. Larsen won the 1993 Award of Excellence of the Association of Medical Illustrators and, according to the plaintiff, Larsen's text was a great commercial success.

In 1995, Williams & Wilkins published the seventh edition of Langman's *Medical Embryology* ("Langman's 7th") which Dr. Sadler has edited since the fifth edition in 1985. According to Sadler, Langman's 7th is concise and confines the study of embryology to "what students need to know in terms of what is taught in the classroom and what is covered by the national exams." Sadler claimed that Langman's has always been well-illustrated and every edition has included ample drawings and photos. Sadler claims also that Langman's has always included three-dimensional drawings, and that in 1985 Sadler added SEMS to the fifth edition to complement drawings already in the book. Langman's 7th competes with Larsen's in the medical school textbook market.

Plaintiff claimed that in revising Langman's 7th, defendants copied plaintiff's selection and arrangement of illustrations, tables and topics as follows: 1) in the selection of which embryological topics to illustrate with 3-D drawings, SEMS and photographs; 2) in the selection of what topics to present in tabular form; and 3) in the choice of which new topics to add to Langman's 7th. Plaintiff does not claim that any particular illustration or text in Larsen's was copied directly in Langman's 7th.

To support its copyright infringement claim, plaintiff made six distinct factual claims relating to defendant's book. First, that 40 of the 46 new 3-D drawings added to Langman's 7th illustrate

the same subjects illustrated by 3-D drawings in Larsen's. Second, that 36 of the 65 new SEMS added to Langman's 7th illustrate topics illustrated with SEMS in Larsen's. Third, that 14 of the 39 new photographs added to Langman's 7th illustrate topics illustrated with photographs in Larsen's. Fourth, that the three new tables added to Langman's 7th are the subjects of similar tables in Larsen's. Fifth, that two-thirds of the new topics added to Langman's 7th were topics addressed in Larsen's. Sixth, that Langman's 7th was revised to resemble Larsen's in that clinical material was added to Langman's 7th and set apart in chapter sections called "Clinical Correlates" which copied Larsen's use of separate clinical applications sections. Finally, plaintiff claimed that the defendants copied not only plaintiff's method of illustrating specific fact, but also used its "strategy" for illustrating difficult concepts.

Defendants did not dispute that they had access to plaintiff's book and, in fact, admitted that they reviewed Larsen's prior to revising Langman's 7th, but they claimed that any medical textbook author, "out of concern for the professional and scientific integrity" of the book, must consider other medical textbooks. Further, they asserted that they copied nothing from Larsen's and that all editorial decisions were made independent of Larsen's. The sole issue on the motions were whether there was a substantial similarity between defendant's book and the protected elements of plaintiff's book.

According to the court, in a case such as this, simply examining the relevant parts of a copyrighted work allows a court to apply settled copyright principles and thereby filter out unprotected elements. Those elements deemed unprotected are:

1. Facts are not copyrightable.
2. Ideas are not copyrightable.
3. Stock elements are not copyrightable; i.e., incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.

Works are considered substantially similar if "the ordinary

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observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the] aesthetic appeal [of the two works] as the same." *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1072 (2d Cir.1992) (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir.1960)). This is the ordinary observer test. Plaintiff did not argue that defendants copied its over-all selection and arrangement of the entire book. Rather, it was argued that defendants copied the choice of topics to illustrate, a small part of plaintiff's work as a whole. However, the court found that even when giving plaintiff "the benefit of all of the arguendos and defining the protected element as plaintiff would, plaintiff has failed to show substantial similarity."

To determine the substantiality of any portion found arguably to have been copied, a court must determine the copied "portion's relative importance with respect to the plaintiff's" overall work. In *Arica*, 970 F.2d at 102, the court found that the presence of words or phrases similar to those in plaintiff's book on 70 pages in the defendant's book, was insufficient to produce substantial similarity between the two works in the large. Thus, if the similar material in defendant's work is not a substantial part of plaintiff's work, there is no substantial similarity and hence no infringement. The issue here was whether the material in defendants' book which is similar to the protected elements in plaintiffs' book, is substantial in relation to plaintiff's book as a whole. Unfortunately, there is no magic formula to determine how substantial a similarity must be to constitute infringement.

The problem, as one commentator has noted, is one of "line drawing." 3 *Nimmer on Copyright* §13.03[A], at 1329. Although the selection and arrangement of defendants' book "and the selection of topics to illustrate in particular ways or to discuss at all" was similar to the selection and arrangement of plaintiff's book, that similarity is not substantial in relation to plaintiff's book's overall selection and arrangement. First, defendant's choice of which processes to illustrate with 3-D drawings, SEMS, and photographs is not substantially similar to plaintiff's choice of which processes to so illustrate. Second, the addition of new topics to Langman's 7th did not render that book's topics substantially similar to the overall selection and arrangement of all of the topics in Larsen's. Third, defendants' choice of which topics to illustrate with tables is not substantially similar to plaintiff's overall choice of which topics to illustrate with tables. Finally, the arrangement of the clinical correlates section in Langman's 7th is not similar to the arrangement of the clinical applications section in Larsen's.

A review of the issues presented by the plaintiff and the findings of the court are as follows:

A. Choice of Embryological Processes to Illustrate with 3-D Drawings, SEMS and Photographs

As noted, plaintiff argued that defendants copied Larsen's choice of which embryological phenomena to illustrate with 3-D drawings, SEMS, and photographs. According to plaintiff, the "actual issue" is Dr. Larsen's overall selection. Here, plaintiff claimed that he used his judgment to decide which phenomena to illustrate with 3-D drawings, SEMS or photographs. Defendant offered no evidence that plaintiff did not use his aesthetic or scholarly judgment. Given the amount of material which could be illustrated in a medical embryology textbook, it is reasonable to conclude that plaintiff's selection and arrangement of illustrations is creative and, therefore, original. Thus, plaintiff's selection and arrangement of which processes to illustrate in a particular manner is entitled to copyright protection without a precise recitation of plaintiff's organizing principle.

However, the court found that even this view of the evidence was insufficient to resolve fully the key issue — which is whether defendants copied plaintiff's selection and arrangement of which topics or processes to illustrate with each particular technique.

Plaintiff has not argued literal copying; thus, the number of similar illustrations is not the measure of infringement. The focus of inquiry should not be simply the number of allegedly copied illustrations, but the degree of similarity between the books in the choice of phenomena to so illustrate. The selection and arrangement of plaintiff's textbook is protectable. But, in the case at hand, the court found that defendant's book did not include a substantial part of plaintiff's selection and arrangement of material as viewed in light of the current case law.

B. Topics

Topics are not copyrightable. Considering the vast number of topics discussed in Larsen's, which is a comprehensive medical textbook, it was found that no reasonable jury could conclude that the addition of 33 new topics to Langman's 7th generates a substantial similarity between the selection and arrangement of topics in that book and the selection and arrangement of the hundreds of topics in Larsen's.

C. Tables

Plaintiff argued next that defendants added three new tables to Langman's 7th, and that those tables covered topics illustrated with tables in Larsen's. The expression of the more general idea of using tables to depict information in a readily accessible way may be copyrightable. Plaintiff's overall selection and arrangement of which topics to present in tabular form — such as his selection and arrangement of 3-D drawings, SEMS and photographs — may be protectable. The question then becomes whether inclusion of the three tables makes the tabular roster of Langman's 7th substantially similar to plaintiff's overall selection and arrangement of tables. After examining Larsen's in detail and finding a total of 11 tables, the court ruled that no reasonable jury, properly instructed, could find that defendant's selection and arrangement of three tables is substantially similar to plaintiff's overall selection and arrangement of 11 tables.

D. Clinical Correlates

Plaintiff's final claim was that Langman's 7th was revised to resemble Larsen's in that clinical material was added and set apart in chapter sections called "Clinical Correlates" which copied Larsen's use of a separate clinical applications section for each chapter. The inclusion of clinical topics in an embryology textbook is not new. Plaintiff's original idea was to set clinical information apart from the rest of the chapter but, as noted, ideas are not copyrightable. Also as noted, the topics and facts included within plaintiff's clinical applications sections are not copyrightable. Plaintiff did not allege any direct copying of the clinical applications sections in Larsen's, and offered no evidence that defendants copied any part of the original expression in its clinical applications sections. After examining the sections it was found that no reasonable jury could conclude that defendants copied anything from plaintiff's clinical sections — other than the idea of setting clinical information apart, which is not copyrightable.

Continuing the theme of substantial similarity, we have a summary of an opinion of a case involving the author John Grisham and the serial killer Ted Bundy ...

Infringement of Copyright

Nelson v. John Grisham & Bantam Doubleday Dell, Inc., 1996 WL 635200 (D.D.C., September 26, 1996)

The works in question are *The Chamber*, which plaintiff, Polly Nelson, alleges Mr. Grisham copied from her book, *Defending the Devil: My Story as Ted Bundy's Last Lawyer*, in which plaintiff details her three-year representation of Mr. Bundy, a case which she accepted as a diversion from her normal securities regulations practice. (One asks "why"?). Ms. Nelson's book outlines the appeals process involved in the Bundy case and in particular, describes in great detail the habeas corpus issue of Bundy's competency to stand trial. Mr. Grisham's book, more

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widely read and subsequently made into a feature film, tells the fictional story of attorney Adam Hall's last minute representation of his grandfather, Sam Cayhall, a white supremacist who participated in the bombing of a Jewish attorney's office which resulted in the deaths of two small children. While the story includes descriptions of the appellate process, it more closely examines the family background and Adam's relationship with Sam during the last month of his life.

Defendants filed a motion for dismissal alleging that under no set of facts can plaintiff prove that Grisham had access to Nelson's writings, or, in the alternative, for summary judgment on the issue of substantial similarity.

Two elements must be shown to establish copyright infringement: 1. ownership of a valid copyright, and 2. that protectable elements in a copyrighted work were copied, *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). Because it is so difficult to provide direct evidence of copying, plaintiff's often raise the inference of copying by demonstrating access and substantial similarity.

As to the issue of access, the court found that *Defending the Devil* was published after *The Chamber*. However, plaintiff claims that in 1989 a proposal describing her book was sent to sixteen publishing houses. But, there was no evidence presented that one of those was Doubleday. Although it is undisputed that in 1990 a 68-page proposal and draft was submitted by the plaintiff to Doubleday, there is no evidence that Doubleday ever had possession of the draft. It was Ms. Nelson's intention that the court infer that the proposal was then passed around at Doubleday, eventually landing in the hands of Mr. Grisham. Further, Nelson alleges that Mr. Grisham was exposed to a final draft in 1993. Mr. Grisham and others at Doubleday produced affidavits to

refute this inference and denying ever having read the proposal.

Although Plaintiff's argument on the issue of access appeared weak at best, it would normally be inappropriate for the Court to grant summary judgment before the completion of the discovery process. However, the court concluded that plaintiff's case failed for another reason, that of substantial similarity. When substantial similarity is an issue, summary judgment is appropriate in such instances "where the works are so dissimilar that a claim of infringement is without merit." *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327 (9th Cir. 1983). To prove substantial similarity, the plaintiff introduced over 100 charts and relied on the testimony of an expert witness for a critical analysis of the two texts. The court questioned the usefulness of the charts as they were found to have taken many of the textual examples out of context, and, "in fact allege similarity when there is none to be found." As to the expert witness, such testimony was deemed to be irrelevant in a copyright case where the question of substantial similarity "depends on the observations of the ordinary, reasonable person." Upon a close examination, the court found that the passages pointed out by the plaintiff were not only not similar, but served an entirely different purpose relative to the plot of each book. Also, it was noted that the "concept and feel" of each book was different as *Defending the Devil* is a non-fiction account of actual events where there is no surprise or suspense leading up to the conclusion. *The Chamber* is a much more personal story which delves into a family's history during turbulent times in the deep South. Finally, contrary to the plaintiff's assertions, the character Sam Cayhall and the real Ted Bundy were entirely different individuals who committed dissimilar crimes, Cayhall being the lookout for a white extremist group that targeted Jewish Southerners. Bundy was a serial killer who attacked, raped and murdered women. Therefore, the court was able to grant the defendant's motion after finding no merit to the plaintiff's claim.

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