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Cases of Note -- Copyright

Bruce Strauch

The Citadel, strauchb@citadel.edu

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LEGAL ISSUES

Section Editors: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>
Bryan M. Carson, J.D., M.I.L.S. (Western Kentucky University) <bryan.carson@wku.edu>
Jack Montgomery (Western Kentucky University) <jack.montgomery@wku.edu>

Cases of Note — Copyright

Striking Similarity

by **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

Orrin Monroe Corwin v. Walt Disney Company, United States Court of Appeals for the Eleventh Circuit, 469 F.3d 1329; 2006 U.S. App. LEXIS 27148 (2006).

Orrin Corwin was the heir of **Mark Waters**, an artist who painted a concept for an international theme park in miniature. This was done at the behest of **Robert Jaffray** who envisioned villages representing multiple nations and continents. **Jaffray** claimed he tried to peddle the project to **Disney** but got a rejection letter. **Disney** said there was no meeting.

Yes, you can see it coming. They stole my idea.

Corwin sued **Disney** for copyright violation, claiming **EPCOT** was a copy of **Waters'** drawing.

Of course you know EPCOT is not a miniature village, but still ...

Did Disney See the Painting?

Waters' former wife said **Waters** had told her he was doing work for **Jaffray** but gave no details, nor had she seen the painting.

Jaffray's widow (yes, **Jaffray** is deceased like **Waters**) said she believed **Jaffray** had met **Disney** reps but didn't know what he took to the meeting. She said he had gotten a rejection letter, but she couldn't produce it.

Jaffray's daughter said she remembered picking her dad up at a train station after the **Disney** meeting. She believed **Disney** had kept the painting for some months thereafter. She also remembered her father seeing a picture of **EPCOT** and blurting out, "Oh, my god, they built it ... I left everything with them. They must have photographed and copied everything. No wonder they kept it for a month." In the conversation, **Jaffray** mentioned blueprints and drawings.

Well, that's pretty flaky, but as you'll soon see, the law would permit Corwin to overcome this if he had the right expert testimony.

Corwin Brings in Expert Witnesses

Expert Number One said: "At every level, from the basic concept and basic organization, to the way nationally themed pavilions are arranged around a vast lake while being visually and functionally separated by landscaped, wooded areas with plantings indigenous to the nations under consideration to the way the artistic renderings are composed with landscaped access to parking on the lower left hand side and festive lake on the upper right hand side these two projects are the same."

Expert Number Two was an expert on **World's Fairs**, theme and amusement parks. He said: "The arrangement of individual elements at **EPCOT** was neither coincidental nor happenstance." **EPCOT** was strongly influenced by **Waters'** painting.

Expert Number Three was a former project manager for **Disney** during the **EPCOT** project.

Yes, the disgruntled former employee. He's always ready to turn on the old boss.

He found a "striking similarity" between the painting and **EPCOT** and that **Disney** could produce no transition or development documents that would show intermediate steps in the design development.

Looks like a fairly strong case, but — whups — **Corwin** got bounced on summary judgment. So let's get to the law.

The Access Issue

To sue for copyright infringement, you must show (1) ownership of copyright and (2) copying by the defendant. To prove copying, you must show the defendant had access to the protected work. **Ferguson v. NBC**, 584 F.2d 111, 113 (5th Cir. 1978).

It did not help **Corwin's** case that both **Waters** and **Jaffray** were dead. They were the only two people who could truly testify to a meeting with **Disney** and surrendering the painting to **Disney**.

The testimony of **Waters'** ex-wife was excluded based on the hearsay rule. She had no direct, personal knowledge of what went on between **Waters** and **Jaffray**. She was not at the meetings, and as you will note

above, she admitted she didn't know what if any drawings he took to meetings with **Jaffray**.

The issue of the daughter's testimony is the excited utterance exception to the hearsay rule. Federal Rule of Evidence 803(2) allows in a "statement relating to a startling event or condition made while the declarant was under stress of excitement caused by the event or condition."

The basis for this is the belief that a spontaneous blurring out of something is likely to be true and not the product of a premeditated lie. "I didn't know the gun was loaded!"

The Eleventh Circuit said they didn't need to address this issue because the statement didn't provide specific evidence that Disney had access to the painting.

"I left everything with them. They must have photographed and copied everything."???

Striking Similarity and Idea v. Expression

In the absence of proof of access, you must establish infringement by demonstrating that the two works are strikingly similar. **Calhoun v. Lillenas Publ'g**, 298 F.3d 1228, 1232 n.6 (11th Cir. 2002).

The experts were qualified to testify on the issues, but they were caught by the idea v. expression distinction. Ideas are not protected by copyright; expression is. **Herzog v. Castle Rock Entm't**, 193 F.3d 1241, 1248 (11th Cir. 1999). If the experts relied on uncopyrightable ideas rather than the expression of those ideas, then the evidence is properly excluded. See **Rice v. Fox Broad. Co.**, 330 F.3d 1170, 1180 (9th Cir. 2003).

Scenes a faire are not protected by copyright. These are "[i]ncidents, characters, or settings that are indispensable or standard in the treatment of a given topic ..." **Herzog**, 193 F.3d at 1248; see also, e.g., **Walker v. Time Life Films, Inc.**, 784 F.2d 44, 50 (2d Cir.) (observing that there is no protection for common elements in police fiction, such as "drunks, prostitutes, vermin and derelict cars" and "foot chases and the morale problems of policemen, not to mention the familiar figure of the Irish cop").

continued on page 63

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Cases of Note from page 62

An expert report relying on stock elements is excludable. Lists of similarities are “inherently subjective and unreliable, particularly where the lists contain random similarities, and many such similarities could be found in very dissimilar works.” *Herzog*, 193 F.3d at 1257.

A work could, however, be protected if its unprotectable elements are arranged in a unique way. See *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) (observing that the arrangement of puppies in a photograph may constitute a protectable element).

The expert reports focused on concepts and ideas behind the painting and *EPCOT*, but not the expressive aspects of those concepts and ideas. The arrangement of a variety of world cities in a village is a stock idea that’s been around for many **World’s Fairs**. Neither the idea of a Moroccan casbah or a French provincial village nor their placement beside each other is protectable by copyright. 🐼

Questions & Answers — Copyright Column

Column Editor: **Laura N. Gasaway** (Associate Dean for Academic Affairs, University of North Carolina-Chapel Hill School of Law, Chapel Hill, NC 27599; Phone: 919-962-2295; Fax: 919-962-1193) <laura_gasaway@unc.edu>
www.unc.edu/~unc1ng/gasaway.htm

QUESTION: *A music library is evaluating the feasibility of a CD preservation program and is considering the following to preserve its existing collection of CDs proactively but is concerned about whether these actions infringe copyright. (1) Create a single duplicate copy of CD holdings and store these copies in a secure dark archive. (2) Continue to circulate the originals as normal, but if an original becomes lost or damaged beyond usability, first conduct a search to see if a replacement copy can be found in-print or otherwise available on the market at fair market value. (3) If no such replacement can be found, create a new copy from the duplicate in the dark archive and use that for future circulation.*

ANSWER: While the plan makes sense as a preservation matter, some of

the actions do infringe the copyright. (1) The only backup copies for libraries that are permitted are under section 108(b), and that is for unpublished works only. CDs, and music CDs in particular, typically are published. Reproducing these CDs to create backup copies without permission is infringement. What the library can do is to purchase two copies of each CD and place one in a dark archive. (2) Number two follows the requirements of section 108(c) for replacement copies. (3) If no replacement copy can be found at a fair price, then the library is permitted to make a replacement copy which could be made from the purchased CD in the dark archives.

Even if the **Copyright Act** were amended to further library preservation, it likely would permit copying for preservation only if the work were at immediate risk of loss or destruction. CDs are not considered to be so fragile.

QUESTION: *A library is considering downloading audio books as a less expensive alternative*

continued on page 64