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Cases of Note -- Copyright

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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 “[t]he incidents, 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”).

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 blurt 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.”

continued on page 63
Questions & Answers — Copyright Column

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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, are typically 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