The de minimis doctrine plays an important role in copyright law

Every good lawyer needs to know a little Latin. While copyright litigators rarely need to think about quare clausum freget (“trespass on another’s property”), secut roboris (the obstructions), three occasional cases do require some thought about the maxim de minimis non curat lex (“the law does not take notice of trifles”). De minimis copying is an act of taking that “is so meager and fragmentary that the average audience would not recognize the appropriation.”

Application of the de minimis doctrine can arise in several different contexts in a copyright case. For example, it can refer to a technical violation so trivial that the law will not impose legal consequences. An example of this would be photocopying a cartoon from a magazine and posting it on the kitchen refrigerator. For obvious reasons, this situation does not garner much courtroom attention.

De minimis can also mean that commercial copying has occurred, but only to an extent that falls below the threshold of substantial similarity. Courts look at the copying from both a quantitative and qualitative viewpoint when addressing the de minimis issue. The de minimis doctrine is sometimes incorrectly equated with fair use, but courts have distinguished the two. The fair use defense involves a careful examination of many factors, the amount and substantiality of the copying being just one of those factors.

If the defendant’s argument is that the minimal copying involved does not reach the qualitative threshold for infringement, that analysis should be made in advance of the more complex question of fair use.

Two cases from the 2nd U.S. Circuit Court of Appeals provide an interesting contrast in assessing when a minor use qualifies as de minimis. Both involved background material in a television program or movie.

Ringgold v. Black Entertainment Television (3d Cir. 1997), noted artist Faith Ringgold owned the copyright for a painted story quilt titled “Church Picnic Story Quilt.” The defendant produced an episode of a television sitcom in which a poster of the quilt was used as part of the set decoration. The poster was visible in one scene during which it was shown nine times. The nine sequences ranged from two to four seconds. The duration of all nine sequences was 27 seconds.

The poster was plainly observable, even though not in perfect focus and had some thematic relevance. The court concluded that this was not a de minimis copying. The court suggested that it was “disingenuous” for the defendant, whose production staff considered the poster well-suited as a set decoration, to contend in the litigation that no visually significant aspect of the poster was discernable. The court found that the poster was recognizable and had sufficient observable detail for the average lay observer to discern the characters in the quilt.

Sandoval v. New Line Cinema (2d Cir. 1998) involved the use of a work of visual art in the film “Sev’n,” a neo-noir thriller starring Brad Pitt. Ten photographic transparency images created by photographer Jorge Sandoval appeared mounted on a light box in the background of one scene. The photographs were briefly visible in 11 different camera shots. The longest uninterrupted view lasted six seconds and the total was 35 seconds. The photographs were not in focus and are seen in the distant background.

The court ruled that the copying was de minimis. It distinguished the facts of Ringgold, noting that the artwork was “clearly visible” and “recognizable as a painting with sufficient observable detail.” In Sandoval, the photographs were not displayed with sufficient detail to allow identification even of the subject matter of the photographs, much less the style used in creating them. They were out of focus and displayed only briefly. In Ringgold, the repeated shots of the poster reinforced its prominence. No such cumulative effect was present in the Sandoval case.

A brief sampling of additional cases may help to provide copyright litigators a sense of when this defense will succeed and when it will not. Querues de dubis legem bene discere si ("inquire into doubtful points if you wish to understand the law well").

In Davis v. The Gap (2d Cir. 2001), the plaintiff’s copyrighted eyeglasses were worn by one of the models in a magazine advertisement for clothing retailer, Gap. The court held that the de minimis doctrine did not apply. The copyrighted eyeglasses served as the focal point of the ad. The viewer’s gaze is “powerfully drawn” to the plaintiff’s creation.

In the field of computer software, Dun & Bradstreet v. Grace Consulting (3d Cir. 2002) rejected a de minimis defense where the material copied was quantitatively small, but qualitatively significant. The defendant claimed that only 27 lines out of a computer program of 235,000 lines of code had been copied. Expert witnesses for both parties, however, agreed that the defendant’s program would not work without the copied lines of code. The defendant copied was qualitatively crucial and thus not de minimis.

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