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FRIDAY, NOVEMBER 23, 2012

Chicago Daily Law Bulletin

Volume 158, No. 230

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 fregit ("trespass on another's land") or qui peccat ebrius luat sobrius ("he who sins when drunk shall be punished when sober"), they do occasionally have to deal with 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." *Fisher v. Dees.* (9th Cir. 1986).

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 quantitative 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. In *Ringgold v. Black Entertainment Television* (2d 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 is 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 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 "Seven," a neo-noir thriller starring Brad Pitt. Ten photographic transparencies 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 there 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.

INSIDE IP LAW

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A brief sampling of additional cases may help to provide copyright litigators with a sense of when this defense will succeed and when it will not. Quaeras de dubiis legem bene discere si vis ("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 525,000 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 information the defendant copied was qualitatively crucial and thus not de minimis.

> *"The de minimis doctrine keeps us from being scofflaws."*

Rursus ("on the other hand"), in many cases the defendant's copying has been so minor as to qualify for de minimis treatment. For example, in *Mitek Holdings v. Arce Engineering* (11th Cir. 1996), a case alleging infringement of a computer program, the copying of only a small part of the plaintiff's program did not constitute infringement. The plaintiff failed to demonstrate the qualitative significance of the copied features. Another computer software case involving de minimis copying is *Vault v. Quaid* (5th Cir. 1988) where the court held that copying 30 characters out of 50 pages of computer source code was de minimis.

In *Newton v. Diamond* (9th Cir. 2004), the Beastie Boys, a famous hip-hop group, used a three-note segment from a musical composition by avant-garde jazz composer James Newton. The court found that this copying was de minimis. The sequence, which the Beastie Boys digitally looped into the background of its recording "Pass the Mic," was a "simple, minimal and insignificant" part of Newton's musical composition and lacked any distinctive elements.

The de minimis doctrine keeps us from being scofflaws. "Most honest citizens in the modern world frequently engage, without hesitation, in trivial copying. ... When we do, it is not that we are breaking the law but it is unlikely that we will be sued. Because of the de minimis doctrine ... we are in fact not breaking the law." *Davis v. The Gap.* Smart copyright litigators understand this because: Quae contra rationem juris introducta sunt, non debent trahi in consequentiam ("things introduced contrary to the reason of the law ought not to be drawn into a precedent").