PROTECTING THE LOOK & FEEL OF ARTWORKS, MAYBE

by Joshua Kaufman

Warning: Let me apologize at the outset for this article. It is going to be a very typical lawyerly article which comes to a… "well it depends on the facts" conclusion. But do not blame me, it's the state of the law. Our issue is: Can you protect the "look and feel" of an artwork or series of works? The situation comes about where someone sees another work, decides that they would like to license the work or market a work that is similar to the previous incarnation, but they know they cannot get permission, or choose not to get permission for whatever reason, and then attempt to "change it enough" so it is not infringing.

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There are many old wives' tales about how different a secondary work has to be in order for it not to be infringing. We have all heard about changing five percent, ten percent, six colors, eight measures of music, 250 words; they are all old wives' tales and meaningless. There are no specific guidelines in copyright law for what amount of changes are made to an underlying work that will provide a safe harbor to someone who is "inspired" by the work of another. (This is different from appropriation art which has gotten a great deal of press of late. Appropriation art tends to literally copy the whole or part of another artwork and transform the medium, or take an existing artwork and add something to it, but the original artwork appears in whole or in part in the new appropriated artwork.)

Courts have in certain circumstances found that the copying of the 'total concept and feel' of a work, or series of works, does violate the substantial similarity rule and results in an infringement.

Fundamentally, copyright law states that an idea cannot be protected; just the expression of the idea. So if one looked at someone else's artwork and simply took the underlying idea behind it, but not any expression, that would not be an infringement and in most instances gives no basis for a claim. For example, a number of years ago, Thomas Arvid first came on the scene and stunned everyone at Artexpo New York with his perspective of wine bottles and wine glasses. He presented the art world with a new idea. By the next Artexpo, there were dozens of imitators. Most of them simply took Arvid's interpretation of a wine bottle or a close-up of a filled wine glass, created their own imagery and were not violating Arvid's rights. Not all were diligent and some presented works which were similar to Arvid's works and thus were subject to an infringement claim by Arvid. We need to ask, "Where is the line?"

The fundamental test in copyright is "substantial similarity." There are no hard and fast rules or guidelines as to what that means. Often at the end of the day, two works are held up for a jury of lay people (not people from the art world, art collectors, or aficionados), 12 ordinary people and they are told by a judge that if they find that the works are "substantially similar," there is an infringement and, if only the idea is copied, then there is no infringement. But the protection afforded an artist under the law does not stop there. While there are statements found in cases that state that a "style" cannot be protected, there are cases which state that the "total concept and feel of a work" can be protected. This is sometimes called the "look and feel" test. The legal tenet of no protection for style certainly applies to the broad category of a general artistic style, such as one cannot be stopped from painting in the cubist style, the impressionist style, or the Pop Art style, or anything that broad. However, when one gets to a particular work or series of works which do convey a unique and original "look and feel" or "total concept and feel," courts have in certain circumstances, although it is not universal, found that the copying of the "total concept and feel" of a work, or series of works, does violate the substantial similarity rule and results in an infringement. That was the situation in cases even when no specific elements are the same.

This legal theory came out of the 9th Circuit, which is the Federal Courts which covers the West Coast, in the early 1970s, and it has

continued on page 46

LEGAL ISSUES

LEGAL ISSUES
continued from page 44

been adopted by a number of other courts. It started with a case dealing with the artist, Susan Branch, in which she was asked by an ad agency to prepare drawings for an advertising campaign for Pepperidge Farm. Branch submitted her comps to the ad agency and they were shown and approved by Pepperidge Farm, however, ultimately they hired another artist, not Ms. Branch, to illustrate the ads. The final ads were very similar in "look and feel" to Ms. Branch's comps that had been submitted. Branch sued and was successful. The ad agency and Pepperidge Farm moved to dismiss the suit saying all they did was take Branch's ideas, but not any actual expression that was subject to copyright protection. The court found in this case, on these facts, that "although plaintiff cannot protect neither her ideas nor her use or procedures and techniques to express these ideas, she can protect creative arrangement and interaction of the techniques composing the expression… it is the combination of many different elements which makes it of copyright protection because of its particular subjective quality." However, courts in other cases have found that there was no protection; that only ideas were copied. Therefore, one must look at the specific facts of a case to see what was copied. Was a protectable expression copied? Was it a public domain work copied? Was it based on items found in nature that were independently created?

An analysis has to be undertaken as to the materials copied in addition to their overall "look and feel" and their arrangements. One commentator, William Patry, summed up the inherent contradictions in the law as follows: "The Total Concept and Feel approach, i.e. comparing the overall appearance of the parties' works, may sweep into that consideration of the unprotectable elements, thereby skewing the analysis against the defendant and, in the process, impermissibly expanding the scope of plaintiff's copyright. Yet the dissection of a work into constituent elements, which are then either separately compared or left entirely out of the consideration of the works' overall similarities, runs the risk of ignoring a party's creativity in the whole."

One famous judge, Learned Hand, said "The ordinary observer, unless he sets out to detect the dissimilarities, would be disposed to overlook them, and regard their aesthetic appeal as the same" and in such circumstances, you would have a copyright infringement. Another court stated the defendant may legitimately avoid infringement by intentionally making sufficient changes in a work which would otherwise be regarded as substantially similar to that of the plaintiffs. Yet, another court stated, "…where substantial similarities are found, small changes here and there made by the copier are unavailing. It is only where the points of dissimilarity exceed those that are similar and those similarities are, when compared to the original work, of small import, quantitatively or qualitatively that a finding of no infringement is appropriate."

The law is hardly clear in the area of copyright infringement for one who does not copy specific and exact elements but does attempt to copy the overall 'look and feel.' Therefore, when someone does copy the overall look and feel of another's work they do so with the possibility that a court could find a copyright violation.

As the reader can see, the law is hardly clear in the area of copyright infringement for one who does not copy specific and exact elements, but does attempt to copy the overall "look and feel." Therefore, when someone does copy the overall look and feel of another's work, they do so with the possibility that a court could in fact find a copyright violation even though no specific elements were in fact copied.

Another area where this same issue comes onto the legal stage is in trademark law under the concept of "trade dress." Trade dress is a broad concept where a consumer is likely to believe that the source of goods is based on a certain set of characteristics. For instance, when you look at the shape of a Coke bottle you would know it is from Coca-Cola without even looking at the actual name on the bottle. Trade dress has expanded into all sorts of areas from product configuration, packaging, color, and even to the design and layout of restaurants. There have been a number of trade dress cases which overlap into this art arena. They have dealt generally with greeting card companies where one greeting card company attempted to copy the overall appearance and look of a different company's cards. Under trade-

continued on page 47

LEGAL ISSUES
continued from page 46

mark law, functional elements cannot be protected, but in these cases the courts found that these elements were not functional and were protected under the trademark law, specifically the Lanham Act section of the law, as protectable trade dress.

There was also a case with Harlequin Books in which the court found that the overall features of a book's cover design were likely to cause confusion with the cover of a competitor, found in favor of Harlequin Press. There was even a specific art law case many years ago in which the artist Tarkay sued another artist, Patricia Govezensky, for copying his trade dress in his art works. At the time, Tarkay was fairly unique in the way he portrayed his "café women" and Patricia came out with her own very similar version of them, but different enough to not infringe Tarkay's copyright in any specific print. They did have a very similar effect on the viewer and the court in that case found that Miss Govezensky violated Tarkay's trade dress. That case never came to an ultimate conclusion and there was not an appellate decision. Whether it is still good law is a question, particularly in light of the supreme court case called Dastar, in which the court ruled that the Lanham Act does not cover the mis-designation of authorship of the work; just the source of the actual goods (i.e., the publisher). This all makes for a very confusing area of law.

However, a week does not go by when one of my artist or publisher clients does not call with righteous indignation on how another artist, or publisher, or licensee imitated their "highly original" line of prints or products—all wanting to know if we could stop the other party from going forward.

As you can see, based on the above, sometimes you can and sometimes you cannot as it is a very complicated area of law. Any attorney who would tell you up front that a "look and feel" type of case is a slam dunk, does not understand the nuances of the law. However, the closer someone copies the overall "concept and feel" of a work, where the ordinary observer is likely to be deceived as to the origin of the goods or come away with a very similar aesthetic feel, the more likely they are to be found infringing.

In today's world where buyers are demanding the style and color concept of the week, every publisher, agent, and artist is highly tempted to imitate the success of their competitors, but they do so with some risk.

Joshua J. Kaufman, Esq. is a partner in the law firm of Venable, LLP, and Chair of their Copyright & Licensing Group. He is one of the country's foremost attorneys in art, copyright, and licensing law. He has published more than 200 articles, co-authored several books, and is a regular lecturer on various topics in the Art Law and Licensing fields. Mr. Kaufman is also an adjunct law professor at American University Law School where he teaches Art Law, and is counsel to the Art Copyright Coalition. E-mail Mr. Kaufman at: jjkaufman@venable.com or call (202) 344-8538.