

Copyright: It's the law and facts

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Whether it's computer software, music, books, photos or some other work protected by copyright, please stop and think before copying, downloading or distributing these works. While it doesn't take much for a copyright to come into existence (however, there are some requirements, as we shall see), just because you found it on the Internet doesn't mean the work is free. Yes, even this article you're reading is protected by copyright.

But, wait, just because something is protected by the federal copyright law, with the full weight of the United States Code (Title 17), including potentially statutory damages and remedies and years of court decisions, you must nonetheless analyze the relevant facts and apply the applicable law.

Copyright law is fact-dependent. Trying to analyze a copyright issue without an understanding and appreciation of the facts is akin to trying to understand why a baby is crying when you can't see the baby. It is difficult to analyze copyright issues in a vacuum.

The U.S. Supreme Court, in analyzing a case that had to do with the publication of a fact-based work, stated with regard to copyright that, "The standard of originality is low, but it does exist." The work must be original to the author and possess a minimal degree of creativity. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.* 499 U.S. 340 (1991). It depends on the facts. As *Feist* shows, absent the originality and creativity elements, a copyright right may not exist. (In *Feist*, a publisher of a phone book was found not to have copyright rights in its telephone residential directory.)

As *Feist* reminds us, "Not all copying, however, is copyright infringement. To establish infringement, two elements must be proven: 1) ownership of a valid copyright and 2) copying of constituent elements of the work that are original." And, as the 7th U.S. Circuit Court of Appeals has stated: "Because direct evidence of copying often is unavailable, copying may be inferred where the defendant had access to the copyrighted work and the accused work is substantially similar to the copyrighted work." *Atari Inc. v. North American Philips Consumer Electronics Corp.* (7th Cir. 1982).

These cases teach that copyright infringement requires 1) ownership of a valid copyright and 2) copying of constituent elements of the work that are original. Also, copying requires access and substantial similarity.

Just because a plaintiff alleges that a defendant downloaded his or her work from the Internet does not *ipso facto* mean that the defendant is a copyright infringer. In addition to the above-mentioned, there are a number of other factors to consider before reaching that conclusion, all of which factors spin around the facts and the applicable law.

Consider, for example, the file sharing or "mass copyright" cases that have been filed in several different U.S. district courts around the country. In some of these cases, hundreds of Doe defendants are listed. The typical scenario in these types of cases is for the plaintiff to allege, among other things, in his or her complaint that he or she owns a valid copyright right in a work identified in the complaint and that the Doe defendants infringed his or her copyrights in the work. Initially, the Doe defendants are usually only identified by an alleged Internet protocol (IP) address and a date/time stamp purporting to indicate activity related to downloading of the work.

To associate the names of individuals with the IP addresses, the plaintiff persuades the court to issue subpoenas to the Internet service providers (ISP) associated with the respective IP addresses and ordering the ISP to reveal the customer's name associated with the IP address. The ISP usually then notifies the customer and allows the customer a period of time to respond to the court or plaintiff's counsel and seek an order to quash the subpoena or otherwise dispense with the lawsuit. Absent any action by the customer, the ISP will respond to the subpoena and deliver the customer information to the plaintiff's counsel, who must then prove the plaintiff's copyright infringement claims.

Within the background of a file sharing case, consider the element of access and copyright infringement in the context of an unsecured wireless router. How would you evaluate the element of a defendant's access in this copyright infringement analysis? A U.S. District Court in California observed: "... an IP address exposed by a wireless router might be used by the subscriber paying for the address, but it might not. Roommates, housemates, neighbors, visitors, employees or others less welcome might also use the same address." *Discount Video Center, Inc. v. Does 1 – 5041*. (U.S.D.C., N.D., CA, 2011). You will need to know what to ask your client to do the analysis.

When a client calls and asks whether something they have done or plan to do has infringed or will infringe someone's copyright rights, the immediate answer is those words that are, by the end of law school, ingrained into most every lawyer's DNA: It depends on the law and the facts.

INFO TECH LAW TIP: Make sure you and your clients properly secure the wireless routers used in your home and office, including selecting appropriate security settings and not broadcasting the service set identifier.