



LOSS PREVENTION

AXIS PRO's
Media Law 101

Written by the Claims & Loss Control Counsel for AXIS PRO

INTRODUCTION

Should you publish, can you publish, and – most important – will you be sued? Defamation, privacy, copyright, and trademark law are complicated and dangerous areas for publishers, journalists, ISPs, and advertisers, particularly in an evolving media marketplace saturated by blogs and other web based publications. This booklet is meant to give a brief overview of these areas of the law for the layperson, and to identify specific claim examples as illustrations of the risks. Of course, there is no substitute for hands-on legal advice, as every situation is different, and each jurisdiction has its own set of rules. When in doubt, ask a lawyer. We hope this booklet will give you a better idea of the questions to ask.

DEFAMATION:

Defamation is the legal term for speech that tends to expose a person to public hatred, contempt or ridicule or to injure him in his business or occupation. Speech can consist of words, but it can also be art, cartoons, or other forms of expression. Some courts use the term “libel” for injurious speech that is printed or broadcast, and the term “slander” for injurious words that are spoken. This distinction, however, is becoming obscure, and we will refer to both libel and slander as “defamation.”

DEFAMATION: Elements

In general, to establish a cause of action for defamation, a plaintiff must plead and prove that the speech at issue: (1) was published, (2) identifies him, (3) is false, (4) damages his reputation; (5) is made with fault; (6) and without any applicable privilege.

The first element of a defamation claim is **publication**. Defamation can only occur when somebody besides the writer and the subject has read or heard the words at issue. A plaintiff can satisfy the element of publication as soon as the words are read or heard by a third party. Authors and publishers can obviously be held liable for the material they distribute. Publication may be harder to prove, however, if the insured is an Internet Service Provider. A federal statute – the Communications Decency Act – protects Internet Service Providers from liability for the publication of defamatory material posted on or sent through their technology. In addition courts normally will not find bookstores and newsstands liable for defamation unless they knew, or had reason to know, that the material they sold was defamatory.

Publication also includes the “republication” of a defamatory statement. For example, a newspaper is not immune from a defamation lawsuit if the newspaper publishes a letter to the editor that falsely accuses someone else of a crime. In other words, an insured can be liable for defamation if it publishes a defamatory statement made by others. Various exceptions apply to this general rule, however, and are discussed below.

The second element of a defamation claim is **identification**. To satisfy this element, a plaintiff must prove that the allegedly defamatory statement was “of and concerning” the plaintiff. In other words, the plaintiff must be able to prove that a third party would associate the allegedly defamatory statement with the plaintiff. In general, this is not difficult to do, and can be accomplished even where the plaintiff is not named or seen, as long as the information provided about the plaintiff is specific enough to identify him to some third party. A plaintiff cannot prove identification, however, if the statement in question identifies a large group or class of people. Thus, it is impossible to defame “all Royals fans” or “all Republicans.”

DEFAMATION: Elements - cont'd

The third element of a defamation claim is **falsity**. To determine whether the statement in question is false, courts will look at the words in their plain and ordinary meaning. Courts will also look at the article as a whole. A common misperception of the falsity requirement is that opinions cannot be false and therefore are not defamatory. While opinion is generally protected, the United States Supreme Court has held that an opinion can state an implied fact that could be libelous. For example, saying that "It is my opinion that Scott is a crook," is not protected opinion. The "opinion" implies a factual statement about Scott (i.e., that he is a crook) that could be false and therefore defamatory. Whether an "opinion" implies a factual statement is a question that can usually be resolved, in the first instance, by the court.

The fourth element of a libel claim is proof of **damages**. In general, the allegedly libelous statement must cause a provable actual injury. Actual injury could be in the form of out-of-pocket expenses, loss of reputation, mental suffering, etc. The key is that the plaintiff must be able to prove some sort of actual injury. However, many courts allow juries to "presume" that a plaintiff has been damaged if a statement is found to have injured a plaintiff's reputation, and to award damages that the jury believes will fairly compensate the plaintiff for that injury.

The fifth element of a libel claim is **fault**. This element is usually the most crucial element because the burden of proof will change based on the plaintiff's status – i.e., whether the plaintiff is a public figure, public official or a private individual. In general, "public" people need to show a higher standard of fault than "private" people. In *New York Times Co. v. Sullivan*, the United States Supreme Court held that a public official cannot prevail in a defamation claim unless the public official can prove that the libelous statement was published with "actual malice." To prove actual malice, a plaintiff must prove that the defamatory material was published with actual knowledge of its falsity or with reckless disregard for the truth. The court must look at the state of mind of the publisher at the time of publication. Whether the defendant might have done some further investigation, or later learned that the statement was false is irrelevant.

The actual malice requirement applies to both public officials (that is any person involved in the government who has, or appears to have, substantial responsibility or control over public affairs) and public figures (generally, a person who has put herself into the limelight either in general or in the context of a particular public dispute). A person can be an "involuntary" public figure if he is drawn into some controversy despite his desire to remain private (as long as it is not the defendant's action that draws him into the controversy by publishing, for example, defamatory material about him).

In contrast to public officials and public figures, the private figure plaintiff does not need to prove the publisher acted with actual malice. The United States Supreme Court has left it to the various states to define the burden of proof for private figure plaintiffs. Most have determined negligence is the standard that must be met. In other words, the plaintiff must prove the publisher should have known, using an ordinary standard of care, that the statement at issue was false or could create a false impression.

As one would expect, this fifth element is the true battleground in a majority of defamation (or libel) cases. If the plaintiff must prove actual malice, the plaintiff must overcome a substantial burden of proof. If a reporter is not purposefully avoiding the truth when she pursues a story – even if she misses a crucial fact – the reporter will likely not be acting with actual malice.

DEFAMATION: Defense

In a defamation action, truth is an absolute defense. In general, a defendant need not prove that the statement at issue is literally true in every respect – only that it is substantially true, or that the “gist” or “sting” of the statement is accurate. The burden of proving falsity, however, always rests with the plaintiff.

Certain privileges may also insulate an insured from liability. For example, most state laws allow a conditional privilege to report fairly and accurately on judicial or legislative proceedings. If defamatory statements are made during those proceedings (by the participants in the proceeding), the publisher will not be held liable for those statements; however, the publisher must have accurately reported on the proceedings. This privilege may also apply to quasi-judicial proceedings and public records. This is commonly referred to as the Fair Report Privilege.

While it may help mitigate damages, a retraction is not a defense to libel and not grounds for dismissal of a libel suit.

DEFAMATION: Claims Example

Radio Broadcaster

A Midwestern radio station was sued for libel over remarks made by a radio announcer, about an unusual hunting accident suffered by the plaintiff that was embarrassing to him. The alleged inference of the announcer's remarks was that the plaintiff was so stupid and careless while hunting that he had shot himself in the rear end. The radio station prevailed on summary judgment, but the plaintiff appealed. The case was eventually settled by payment of an average amount to plaintiff. Legal fees were slightly higher, thereby more than doubling the loss.

A Southeastern radio station was sued when the plaintiff claimed he was libeled by a radio talk show host who stated he had AIDS and was psychopathic. The case was eventually settled for an above average amount after a long, contentious litigation. Legal fees incurred to defend the insured were considerable.

Television Broadcaster

A television station in the South was sued over a story it broadcast stating that the plaintiff had not paid federal income taxes for a number of years and the federal government was seizing his property. Plaintiff alleged that the stories incorrectly reported that he had failed to file tax returns, when in fact, his property had been seized for his failure to pay the full amount of taxes due. The case was eventually settled by a payment of an average amount. However, legal fees to defend the case were five times the amount of the settlement.

A Northeastern television station was sued by certain individuals who alleged that they were defamed due to statements made about their musical group, which performed hits from the 1950's. The announcer of the program said that the group that had been scheduled to appear had been cancelled because group members did not have the right to use the name of the group. Because of a split of the group, there was a dispute as to which group members were entitled to use the name of the group. This dispute among the group members was very acrimonious. While the case was eventually dismissed by way of a motion for summary judgment, extensive discovery was required and legal fees incurred to defend the case were considerable.

A New England television station was sued for its investigative report and related interviews with members of a government agency who indicated that the plaintiff had many complaints filed against him and that he was the subject of many investigations. The reporter summarized the comments of the various public officials and identified the plaintiff as "notorious for operating questionable business and paying employees with rubber checks". The case was settled just prior to trial for an above average amount. Legal fees to defend the case were approximately twice the amount of the settlement amount.

INVASION OF PRIVACY:

There are four general invasion of privacy torts. They are: (1) False Light; (2) Commercial Misappropriation; (3) Intrusion Upon Seclusion; and (4) Publication of Private Facts.

INVASION OF PRIVACY: False Light

To cast a person in a false light is to give publicity to a person in a manner that would be highly offensive to a reasonable person. False light is similar to defamation, and often pleaded in conjunction with a defamation claim. The primary difference between the two is that false light is designed to compensate for hurt feelings rather than reputation.

INVASION OF PRIVACY: False Light: Elements

The elements of a false light claim are similar to a defamation (or libel) claim. First, the statement at issue must be published. Because false light claims focus on the subjective privacy of the individual, and seeks damages for alleged mental and emotional suffering, false light requires more publicity than libel. At least a significant portion of the general public must have been exposed to the communication.

The second element of a false light claim is that the information must be made about the plaintiff. The third element of a false light claim is that the statements at issue must be false. The false statements must be reasonably understood to state or imply facts about the plaintiff. Lastly, most jurisdictions require that the matter communicated to the public be highly offensive to a reasonable person. The publication will be deemed offensive when the defendant knows that a reasonable man would feel seriously offended and aggrieved by the publicity. If the false information would not be seriously offensive, the plaintiff will not be able to establish a false light claim.

Finally, if the statements concern a matter of legitimate public interest, the information must have been published with actual malice before the plaintiff can recover for false light. In general, whether or not the plaintiff is a public official is immaterial for this analysis. Some states, however, will apply the actual malice test only when the plaintiff is a public figure.

INVASION OF PRIVACY:

False Light: Defenses

Despite the subtle differences between a false light claim and a libel claim, the defenses are primarily the same. Truth is an absolute defense. Most important is the “lack of actual malice” defense described above. Newsworthiness and the Fair Report privilege is also a defense to the false light tort.

INVASION OF PRIVACY:

False Light: Claim Examples

Radio Broadcaster

An East Coast radio station was sued for comments about the plaintiff’s business practices that allegedly cast her in a false light before the public. After extensive discovery and settlement discussions, the case was settled and dismissed. Legal fees to defend the case were of an average amount.

A radio station in the Midwest was sued due to comments made by a telephone caller who identified the claimant in a story that was broadcast over the air. The telephone caller was a former employee of the plaintiff. The subject of the radio program was “The Worst Boss You’ve Ever Had”. The caller indicated that the claimant had a habit of staying out late on Friday nights, and coming in late on Saturday mornings and making mistakes on orders, but then blaming others for the mistakes. The radio announcer then commented that the boss sounded like a “nerd”. The case was settled just before trial.

Television Broadcaster

A West Coast television station was sued for false light after it broadcast a story about the alleged fraudulent sale of cash register receipt coupons. The story used film footage of the plaintiff’s coupon books, implying that they were part of the scam when they were not. The case was eventually settled for an average amount. Defense costs were about twice the amount of the settlement.

A New England television station was sued by plaintiff who alleged that its business was wrongfully implicated in a television broadcast concerning sexually explicit video arcade games that were being used by minors in the area. The story used file tape footage of the business in question, which was of a video arcade, but which did not have any of the video games in question. The case was eventually settled for a large sum. Defense costs in the case were limited since this was a case of clear liability and was settled quickly.

INVASION OF PRIVACY:

Commercial Misappropriation

The tort of commercial misappropriation is in constant flux with different courts charting different courses in this area of law. Generally, however, when an insured uses the name or likeness of another for the insured’s own commercial benefit, the insured can be held liable for commercial misappropriation.

INVASION OF PRIVACY:

Commercial Misappropriation: Elements

There are two key state statutes that are particularly relevant to this area of the law. In New York, the use of plaintiff's name, portrait, picture, or voice is prohibited for advertising or trade purposes, unless there is written consent. In California, state law prohibits the use of a person's identity or persona for the defendant's advantage, commercial or otherwise, unless consent is obtained from the plaintiff. To show "use or benefit for the defendant," a plaintiff must show that the defendant knowingly used the likeness of the plaintiff for the purposes of advertising or solicitation. The plaintiff must also show a direct connection between the use and the defendant's commercial purpose.

INVASION OF PRIVACY:

Commercial Misappropriation: Defenses

The most common defense to a commercial misappropriation claim is newsworthiness. Generally, the unauthorized use of a person's name or likeness in matters of public interest is permissible, provided that the person's likeness bears a real relationship to the subject matter of the publication, and is not an advertisement in disguise.

The boundary between newsgathering and commercial exploitation, however, can be a fine one. For example, if a newspaper were to advertise its Sunday sports edition with a full length photograph of a football player, the athlete might have a claim for commercial misappropriation depending on whether the advertisement was viewed by the court as more similar to a poster (a commercial use) or simply an announcement for a story about the football player's outstanding game (a protected use).

INVASION OF PRIVACY:

Commercial Misappropriation: Claims Example

Television Broadcaster

A television station in the South was sued regarding its broadcast concerning a dog that had been subjected to cruelty. The story also used a picture of a minor child who was described as the owner of the dog. The child was identified by name and address. The plaintiff claimed, through her parents, that it was unnecessary to identify her and that the television station had done so only to embellish the story. The case settled for a moderate amount, including defense costs.

INVASION OF PRIVACY: Intrusion Upon Seclusion

Intrusion Upon Seclusion is a cause of action designed to protect the plaintiff from the intentional, highly offensive intrusion into the plaintiff's solitude or seclusion or her private affairs or concerns. Unlike the other invasion of privacy torts, no publication is necessary to give rise to this claim.

INVASION OF PRIVACY: Intrusion Upon Seclusion: Elements

Any type of breaking and entering, hidden surveillance, or unauthorized presence in a private space constitutes an intrusion upon seclusion. To sustain a cause of action, the intrusion does not need to be a physical intrusion – it could be by electronic or photographic means. Moreover, publication is not necessary for the plaintiff to sustain his cause of action. The mere act of intrusion gives rise to the claim.

The intrusion, however, must be an intrusion into a matter the defendant has a right to keep private. Moreover, the intrusion must be by use of a method that is objectionable to a reasonable person.

INVASION OF PRIVACY: Intrusion Upon Seclusion: Defenses

A common defense to an Intrusion Upon Seclusion claim is the defense of consent. The right to privacy can be waived either expressly or through implied consent. For example, a court found a woman gave her implicit consent when she came home and did not complain about a cameraman on her property. In the intrusion context, acting in a manner inconsistent with a reasonable expectation of privacy may often be construed as giving implicit consent to having one's privacy invaded.

Another common defense is newsworthiness. Although courts will weigh the newsworthiness against the offensiveness of the intrusion, a legitimate public interest in a matter may often outweigh any claimed privacy interest a plaintiff may have. In that respect, public figures and officials such as celebrities and politicians may have a difficult time bringing an intrusion claim because of the public interest in their lives.

INVASION OF PRIVACY:

Intrusion Upon Seclusion: Claim Examples

Radio Broadcaster

A West Coast radio station was sued for invasion of privacy because of its transmission of a live broadcast that included a telephone call from a listener who did not identify himself and who made inflammatory comments before abruptly hanging up. The announcer characterized the call as a “bogus call” and broadcast the caller’s phone number (obtained from caller ID), encouraging his audience to call the number frequently so as to annoy the “bogus” caller. The case was settled after mediation for a moderate sum. The legal fees to defend were above average.

A Midwestern radio station was sued due to its broadcast of a telephone conversation that was taped by its radio announcers without the knowledge of the plaintiff and which was then broadcast at a subsequent time without the plaintiff’s permission. The case was eventually settled. Defense costs equaled the amount of the payment to the plaintiff.

Television Broadcaster

A Midwest television station was sued for intrusion arising from its broadcast of a drug bust at a home that the plaintiffs were visiting. The television crew allegedly took pictures of the plaintiffs without their permission. The pictures were used in a television newscast on a story about women who became prostitutes for drug money. The plaintiffs claim that their picture was taken without their consent and that their right to privacy was violated as a result. The case eventually settled for a moderate amount, but legal fees were many times higher.

INVASION OF PRIVACY: Publication of Private Facts

The publication of true, but private, facts about an individual can give rise to a cause of action for publication of private facts if the matter publicized is: (a) highly offensive to a reasonable person and (b) not of legitimate concern to the public.

INVASION OF PRIVACY: Publication of Private Facts: Elements

First, a plaintiff must prove disclosure to the public in general, or to a large number of people. There is no magic number for how many people constitute a large enough group. Disclosure of an item to small number of people, with reasonable certainty that they will spread it to others, has been held to be a “public” disclosure. Disclosure to a select group of people, such as employees, bosses, creditors, etc. may also be enough to satisfy the publicity element of the tort.

Second, the disclosure must identify the plaintiff. The question here is whether the plaintiff would reasonably be understood by recipients of the offending communication to be the person to whom it relates.

Third, the facts disclosed must be private, not public. A plaintiff cannot claim a right of privacy if the facts have already been made public. Anything that happens in a public place (e.g., a park or stadium) will usually not be considered private.

Finally, the matter made public must be one that would be offensive and objectionable to a reasonable person under ordinary circumstances. The mere fact that a person may not want certain things publicized is not enough – on its own – to satisfy this element of the tort. Typically, a court will find offensiveness in conduct that it finds unconscionable.

INVASION OF PRIVACY: Publication of Private Facts: Defenses

As one would expect, truth is not a defense for this claim. Consent, however, is a defense to claims for publication of private facts. A person can give either his express consent or his implied consent for the release of private facts. A 911 call to the police is a good example of implied consent. Newsworthiness is the other common defense to claims for publication of private facts. Even if the media discloses a private fact about a person that a reasonable person would find offensive, if the matter is newsworthy there can be no claim for publication of private facts. The line is drawn where the publication goes from newsworthiness to mere sensationalistic prying. Thus, as with the intrusion claim, public figures and public officials will have a difficult time pursuing a right to privacy claim.

INVASION OF PRIVACY:

Publication of Private Facts: Claim Examples

Radio Broadcaster

A Far West radio station was sued due to comments that its radio announcer made about the plaintiff's appearance and medical history. The plaintiff sued for invasion of privacy, libel, and other causes of action. The case was eventually settled in mediation for a moderate amount, but not before legal expenses of approximately twice the settlement amount were incurred.

A radio station in the Mountain States was sued for its newscast that indicated that the plaintiff, a police officer, apparently had a bad reputation as a police officer. The plaintiff had been involved in the shooting of a suspect. The report indicated that he had a poor record within the police department and was in the process of being fired. The report was based on internal records of the police department, which were not public records. After a long history in the courts, the case was eventually settled by a payment to the plaintiff of a fairly moderate amount. Defense costs were substantial.

Television Broadcaster

A Southeastern television station was sued over its broadcast concerning early detection of breast cancer. Volunteers agreed to demonstrate how a woman should conduct a breast self-examination. It was the plaintiff's understanding that she would be shown from the neck down, so she could not be identified. Her torso was shown in one segment and in separate footage her face was shown. Because the plaintiff was the only woman of color in the broadcast, viewers were able to link her chest and face. Plaintiff filed suit for invasion of privacy and emotional distress. The case was eventually settled, but not before significant legal expenses were incurred.

An East Coast television station was sued for its broadcast of a syndicated television program, which contained photographs of a patient before and after reconstructive and cosmetic surgery. The plaintiff had provided a release, but was not allowed input into the final program as broadcast as she had expected. The causes of action alleged were invasion of privacy, intentional infliction of emotional distress, and negligence. The case was eventually settled for a fairly large amount, with legal fees of an equal amount.

TRADEMARK INFRINGEMENT:

A trademark is a distinctive work, logo, design, or some combination by a manufacturer used to identify its goods and distinguish them from others. A trademark identifies the source of the goods and assures purchasers of a certain degree of uniformity and quality.

TRADEMARK INFRINGEMENT: Elements

Trademarks are protected under both state and federal law (by statute and by common law). Generally speaking, a successful trademark claimant must prove the defendant used or imitated its trademark on goods in such a manner that the purchasers of the goods were deceived or are liable to be deceived, and will be induced into believing that the infringing goods were manufactured and sold by the owner of the trademark.

Federal protection for a trademark is provided under the Lanham Act. This provides nationwide protection of trademarks. To bring a claim under the Lanham Act, the owner of the trademark must show: (a) a valid mark entitled to protection, and (b) actions by the infringer likely to cause customer confusion. The owner of the mark need only demonstrate a likelihood of confusion, not actual confusion. If the products are unrelated, there is less of a chance of a possibility of customer confusion, even if the trademarks look very similar.

Courts use the following factors that help to determine whether there exists a likelihood of confusion: (a) The degree of similarity between the marks; (b) the intent of the alleged infringer in adopting its mark; (c) evidence of actual confusion; (d) the degree of care likely to be exercised by purchasers; (e) the strength or weakness of the marks; and (f) the quality of the defendant's product.

TRADEMARK INFRINGEMENT: Defenses

There are four general defenses to a trademark claim. The first is fair use. The fair use defense is available, however, only in actions involving descriptive terms. One party's exclusive right to use a trademark will not prevent others from using that word in good faith and its descriptive sense. A common example of this is comparative advertising ("Pepsi drinkers prefer Coke!").

A second general defense is the good faith or innocent infringement defense. If the trademark was adopted without knowledge of the registrant's prior use and has been

continuously used, the defendant's good faith can be a defense. To prevail on this defense, the defendant should have performed a trademark search before using the mark, relied on advice of counsel, or have a trademark that reflects the product's characteristics.

Third, the defendant can assert that the plaintiff has acquiesced to other uses of the mark. The defendant must prove that the trademark holder actively represented that it would not pursue a claim against the defendant, that the delay between this representation and its subsequent assertion of rights was not excusable, and that the delay by the plaintiff caused the defendant undue prejudice. This defense, if successful, deprives the trademark users of a remedy for infringing uses by others.

Finally, the defendant can assert the defense of laches. This defense requires a delay in asserting trademark rights, a lack of excuse for the delay, and undue prejudice caused by the delay. The laches defense applies only when the original user knowingly allows the trademark to be used for an extended period of time. The length of time begins when the plaintiff knew or should have known about the infringement.

TRADEMARK INFRINGEMENT: Claim Examples

Radio Broadcaster

A Southern radio station was sued by a competitor, who claimed that the defendant had infringed upon its trade name and trademark by copying its slogan. The case was eventually settled at no cost, when the defendant changed its advertising, but not before legal fees had become significant.

Television Broadcaster

A television station in the West was sued for its public service announcements concerning education about prenatal health and pediatrics medicine. The television station used a slogan for the program that allegedly was trademarked by another company from a different part of the country. The case was eventually settled for an amount in the mid-six figures. Legal fees were an additional one-half of the amount of the settlement.

An East Coast television station was sued on the basis that it improperly used the plaintiff's registered trademark, which was the name of a musical group. The television station alleged it had purchased the right to use the trademark. The case eventually settled for an average amount of the eve of trial. Defense costs were two times the settlement amount.

COPYRIGHT INFRINGEMENT:

A copyright is the protection of an original creative work. Under copyright law, the creator has the exclusive right to display the work, reproduce the work, distribute the reproductions of the work, perform the work publicly, make derivative works, and authorize others to do any of the above. A copyright is obtained as soon as the original work of authorship is fixed in any tangible medium of expression. It does not need to be “registered” or “licensed” in any way. “Original” means that the work was created by the author and contains some minimal degree of creativity. The work is “fixed” when its embodiment is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration.

It is important to note that facts cannot be copyrighted. For example, the listing of names in a phone book is not copyrightable. Ideas can also not be copyrighted. While the particular means of expression of an idea may be copyrightable, the idea itself cannot.

A copyright infringement is the violation of any one of the copyright holder’s exclusive rights.

COPYRIGHT INFRINGEMENT:

Elements

To sustain a cause of action for copyright infringement, a plaintiff must first prove ownership of a valid copyright. Ownership is shown by proof of originality, copyrightability, and compliance with the relevant statutes. While “ownership” may seem simplistic, numerous legal issues arise in this context. For example, if there is one or more author, they are considered co-owners in a joint work. Both authors must make an original contribution that could stand alone as copyrightable. When material is made within an employment relationship, the person for whom the work was prepared is considered the author – not the person who “created” the work.

If a work is derived from another work, only the derivative work will qualify for copyright protection and the author must have made a substantial contribution to the original work such that the derivative work represents an original work of authorship in and of itself. A compilation is a work formed by the collection of preexisting materials. This differs from a derivative work in that a compilation does not involve any change to the underlying works, while a derivative work requires the underlying work to be adapted in some way.

Once ownership is established, the owner has five rights in the work: (1) the right of reproduction; (2) the right to produce derivative works; (3) public distribution; (4) public performance; and (5) public display.

A copyright infringement claim will be sustained if the defendant copied elements that were original. While there is rarely evidence of direct copying, the plaintiff can prove copying by showing the infringer had access to the copyrighted work. In this case, wide publication of a work could be enough to show access. The plaintiff can also prove copying by demonstrating substantial similarity to the copyrighted work. In determining whether works are “substantially similar,” courts will not look at those elements that are not original to the work, such as scenes a faire, which one court has described as “those elements that follow naturally from the work’s theme, rather than from the author’s creativity.” Ideas are not copyrightable; however, one can copyright the expression of those ideas. Thus, as Judge Learned Hand famously noted, at some level of abstraction anything could be copyrightable, which is not the intent of the law. In making its determination, a court will consider whether the ordinary observer would recognize the copy as having been appropriated from the copyrighted work, and whether the infringement can be found even if only a small part of the work is copied.

COPYRIGHT INFRINGEMENT: Defenses

The most common defense in a copyright infringement claim is the defense of fair use. The fair use defense applies only to criticism, comment, news reporting, teaching, scholarship, or research. The fair use defense balances the need to provide an individual sufficient incentive to create public works with the public’s interest in the dissemination of information. For this defense a court will look at, first, the purpose and character of the use. In general, a nonprofit use will weigh more in favor of finding fair use by a defendant than a commercial use. Second, a court will look at the nature of the copyrighted work used. Here, the court will look at the type of the work used and how this work is traditionally treated. Third, a court will look at the amount of the work used in relation to the copyright as a whole. However, a small portion of extreme importance may be enough to satisfy this requirement. Finally, the court will consider the effect of the use upon the potential value of the work – does the use, for example, reduce the market for purchasers of the original work? Courts often consider the last factor the most significant.

A second common defense is the invalidity of the underlying copyright. A defendant can prove the invalidity of the underlying copyright with evidence of abandonment, lack of originality or false information in application for copyright.

A third common defense is the affirmative defense of independent creation. Here, defendant must prove that the original work was not copied, rebutting the plaintiff’s case. Independent creation can be proved by a showing of lack of access to the plaintiff’s work, lack of knowledge of the plaintiff’s work, or by showing a common source for both products.

COPYRIGHT INFRINGEMENT:

Defenses - cont'd

Much like a trademark claim, laches is another common defense to a copyright claim. An unreasonable or inexcusable delay in enforcing the copyright may result in the claim being thrown out as long as the delay resulted in prejudice to the defendant for relying upon it. The defendant may also show that the plaintiff knew of the defendant's infringing acts, consented through inaction or (express or implied) acquiescence, and the defendant relied on the inaction or acquiescence.

Finally, the statute of limitations is also a common defense. Copyright infringement has a statute of limitations of three years. No action can be maintained if it commences three years after the claim accrued. Only the last infringing act, however, need be within the three years to permit recovery for all infringing acts. The statute of limitations begins to run only when the plaintiff knew or should have known of the infringement.

COPYRIGHT INFRINGEMENT:

Claim Examples

Radio Broadcaster

A radio station in the Southwest was sued for copyright infringement on the basis that music it had prepared as background music for an advertisement promoting a special event at a local hotel was an existing composition, the rights to which were owned by the plaintiff. The plaintiff sued the radio station and the advertiser/hotel. The case was eventually settled for an average loss payment.

A radio station in the Midwest was sued for copyright infringement for a commercial that was created by its announcer. The commercial used the copyrighted music of the plaintiff without permission. The case was eventually settled. The total loss including legal fees was of a moderate amount.

Television Broadcaster

The plaintiff alleged that a midwestern television station had copied the plaintiff's commercial that was produced for another television station. The plaintiff alleged that the commercial for the insured was a direct imitation of the plaintiff's commercial, which was protected by copyright registration. The claim was settled for a significant amount, including legal fees.

A television station in the upper Midwest, broadcasting a sports and wildlife show, was sued by a publisher, which published books on the same subjects. The plaintiff alleged the defendant's show was adopted from plaintiff's books. The case involved a number of claims and counterclaims between the parties and was eventually settled. The amount of the settlement was above average. Defense costs were approximately three times the amount of the settlement.

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