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PUBLISHED: APRIL 9, 2024

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Copyrights Wanted: No Creativity Required

PENDING LAWSUITS INVOLVING ARTIFICIAL INTELLIGENCE ARE POISED TO RESHAPE COPYRIGHT LAW, BUT A RECENT CASE CONCERNING FAR MORE MUNDANE MATERIAL COULD HAVE AS GREAT AN IMPACT.

The advent of generative artificial intelligence (AI) has brought renewed attention to copyright law, with much of the early generative AI-related litigation concerning claims of copyright infringement of the content being used to train AI models. These lawsuits will likely spin off some of the most consequential case law in connection with copyrights that we have seen in some time, particularly around the notion of what constitutes fair use; however, a recent appellate decision on far more mundane subject matter could have an equally significant impact on copyright law, including those cases dealing with cutting-edge technology like AI.

On February 26, 2024, the U.S. Court of Appeals for the Sixth Circuit issued a precedential opinion in *Premier Dealer Services Inc. v. Allegiance Administrators LLC* that restated and elaborated the “minimal degree of creativity” standard created by the U.S. Supreme Court in 1991 in *Feist Publications Inc. v. Rural Telephone Service Co.* In effect, the decision expands on *Feist*, holding that “the modest imperatives of creativity” is a low standard that “most works will satisfy...no matter how humdrum the subject matter.”

The “work” at the center of the Sixth Circuit case concerned a mundane form containing the terms and conditions used by administrators of an auto dealership loyalty program. Plaintiff alleged that the defendant had infringed its copyrighted material for its own use and profit, and indeed, the Sixth Circuit noted that “[t]his case presents ‘rare’ direct evidence of copying...as no

one in the case disputes.” The case, therefore, turned on whether the works in question were protectable by copyright, and the appellate court affirmed the lower court’s determination that they indeed were.

Lessons Learned

The circuit court provided some useful commentary on how the defendant could have made a stronger case for itself, particularly in how the legal concepts of merger and scenes a faire bear upon both the threshold originality of a copyright and the underlying affirmative defenses to infringement; however, there are far less complex takeaways from the case that all businesses would do well to consider. First, and perhaps most obvious, is don’t copy other businesses’ copyrighted material, no matter how dull, boring, or uninspired the work may be. After all, the low standard applied to copyrights cuts in both directions, such that it often does not take much of a change to avoid infringement. While it might not guarantee a win at trial, it is far more defensible than blatantly copying a work and then being left in the position to rebut a copyright’s presumption of validity.

Second and following close on the heels of the above observation is recognizing the latent value many companies have in their workaday forms and business documents. Many companies use forms to conduct business, but how many go to the trouble of obtaining copyright registrations for them? Most do not and assume that they either are probably not eligible for protection or are not worth the time and expense of engaging a lawyer to file the application, but as seen in the Sixth Circuit case, the damages associated with copyright infringement can be significant. The court ordered the defendant to pay out over \$400,000 in damages and nearly \$600,000 in attorneys’ fees. Companies could unlock substantial value by inventorying their forms and documents, both print and digital, and then putting a plan in place to protect their intellectual property rights in them against infringers.

Future Implications

It remains to be seen whether (and how) *Premier Dealer Services Inc. v. Allegiance Administrators LLC* will impact ongoing and future copyright lawsuits, particularly the closely followed cases involving AI developers and media outlets. Some of those cases feature complaints that allege mere copying and purport to provide direct evidence of it, but digital technologies have a way of mediating things we used to take for granted in new and unpredictable ways (think ride-hailing services and vacation rentals). Once courts look at copyright law through the lens of AI, there is no telling to what degree technological novelty might alter the relatively settled nature of copyright law. But one thing *Premier Dealer Services Inc. v. Allegiance Administrators LLC* has made clear: satisfying copyright law’s low standard of protectability doesn’t require much creativity at all.