

## **The Basics of Copyright Infringement**

### **Copyright Protection**

Before a work can be infringed by another party, it must first have copyright protection. It is recommended that a work is first registered with the Copyright Office to memorialize copyright protection and gain other benefits of registration. (See "Why Should I Register My Work With the U. S. Copyright Office?"). However, the law actually provides copyright protection as soon as a creative work is set in a tangible, fixed medium - for example, as soon as it is written, recorded, photographed, drawn, etc. The key issue in these types of situations is proving who created the work, what was created and when it was created, all of which are evidenced by registering with the Copyright Office.

### **Rights Associated With Copyrighted Works**

In general, ideas, concepts, titles and any expression not fixed in some tangible form are not eligible for copyright protection and, therefore, cannot be infringed by another party. But works that are eligible for copyright protection have five rights: 1) the right to copy the work (reproduction right); 2) the right to create a derivative work based upon the original work (adaptation right); 3) the right to distribute the work to the public (distribution right); 4) the right to publicly perform the work (does not apply to graphic, sculptural and pictorial works, but does apply to sound recordings performed publicly by means of digital audio transmission); and 5) the right to publicly display the work.

### **Copyright Infringement**

Copyright infringement occurs when a party who doesn't own the copyright to a work exploits one of the rights without permission. Most often, it involves a claim of improper copying (violation of the reproduction right) or creation of a new work based upon the original (the adaptation right), but it can also include a violation of the other rights as well. For example, someone who owns a copyright could, and actually did, claim that the producers of the movie *E.T. - The Extra-Terrestrial* infringed the copyright of the musical play she wrote entitled *Lokey from Maldemar*. *Litchfield v. Spielberg*, et. al. , 736 F. 2d. 1352 (1984). The court ultimately dismissed the claim, but this case illustrates the basic issues in a copyright infringement case involving films and scripts.

In any case of copyright infringement, it's highly unlikely that actual copying could be proved - the defendant would have to confess or a witness would have to testify that the alleged infringer was viewed copying the work or similar type of evidence would have to be produced. Most likely, the fact that the defendant copied the work has to be indirectly proved. The California court in *Litchfield v. Spielberg* clearly stated the steps for indirectly proving copyright infringement. The person alleging the infringement must show that: 1) they own the copyrighted work; 2) the alleged infringer had "access"

to the copyrighted work; and, 3) there is "substantial similarity" between the copyrighted work and the alleged infringer's work.

First, how does the person alleging infringement, Mrs. Litchfield in this case, prove she owns the copyright? The best manner of proving this is to show that the work has been registered with the Copyright Office before the alleged infringement. This is what Mrs. Litchfield did with her play.

Second, how is "access" to the copyrighted work proved? "Access" is defined as the reasonable opportunity to review the copyrighted work. For example, Mrs. Litchfield submitted a copy of her musical play to one of the defendants, Universal City Studios, Inc., for the company to consider adapting her play into a movie. The company reviewed and rejected her play, but, incidentally, it was the company that later distributed the movie *E.T. - The Extra-Terrestrial*. On appeal, Universal conceded "access" to the work. However, in any case involving a claim of infringement, proving access depends upon the facts and circumstances of each particular case, and it ultimately must be proved that the alleged infringer actually reviewed the work in question or a chain of events occurred that proves the defendant had a reasonable opportunity to review the work.

The third issue the alleging party must prove is "substantial similarity" between the copyrighted work and the alleged infringing work. It is very difficult to generalize about what facts constitute "substantial similarity." At one end of the spectrum is no similarity, and at the other end is an exact copy. Most cases fall somewhere in between the two extremes and there is no bright line rule as to where "similarity" between two works becomes "substantial." However, in terms of films and scripts, it is illustrative to review the elements a court has explored when making a determination of substantial similarity in the context of a film.

To prove a case of infringement, a plaintiff must prove "substantial similarity" in the idea of the film and the expression of the idea. When comparing films and scripts for infringement, courts first look to determine what is the general idea of the film. For example, the court expressed the general idea of the movie *Jaws* as "the depiction of a terror fish attacking a coastal town on the Atlantic Seaboard." *Universal City Studios v. Film Ventures International*, 543 F. Supp. 1134 (1982). In another case, the court stated that movie *E.T. - The Extra-Terrestrial* "concentrates on the characters and the relationship between a boy and an extra-terrestrial." In any case involving copyright infringement of films, the court must first find that the general ideas of the two works are "substantially similar."

The court then examines whether the expression of the general idea is "substantially similar" in the two works. In a film, the court compares the basic story points, the major characters, the sequence of events that occur, the development and interplay of the characters and the story points, and any other aspect that shows the alleged infringing work is "substantially similar" to the original work. Ultimately, whether one work is "substantially similar" to another is a subjective decision by the court that is based upon

as many objective criteria as possible given the facts and circumstances of each particular case.