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Recent Development

RECENT DEVELOPMENTS IN COPYRIGHT LAW

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I. Introduction

This recent developments paper discusses copyright cases reported in volume 33 of the United States Patents Quarterly, Second. Topics addressed include the following: cancellations of registrations, originality of compilations, idea-expression dichotomy in compilation cases, loss of a copyright due to government use of a work, joint ownership, the Visual Artists Rights Act, copyright preemption, the copyright statute of limitations, and statutory damages.

II. Cancellations of Registrations

Following in the footsteps of the Northern District of California,¹ the district court for the Central District of California recently held in *Leegin Creative Leather Products* that a federal *274 district court has no authority to cancel a copyright registration.² The *Leegin* court noted that judicial cancellation of a copyright registration was not provided for by title 17 of the United States Code (Copyright Act),³ nor was implying such a remedy consistent with the purposes of the Act.⁴ The court also noted that Copyright Office regulations regarding the cancellation of a registration do not authorize judicial

involvement.⁵

III. Elements of Copyright-Originality of Compilations

In *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*,⁶ the Second Circuit addressed the copyrightability of a compilation under the rules set forth by the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*⁷ While noting that the level of originality of a white pages telephone directory was insufficient for copyrightability in *Feist*, the Second Circuit noted that the Supreme Court held the required level of originality to be minimal. Therefore, the Second Circuit said, “most compilations, merely by exercising some independent choice in the coordination, selection, or arrangement of data, will pass the *Feist* test.”⁸ Thus, the court found that the selection and arrangement of data in the defendant’s work had sufficient originality to meet the low threshold for copyright protection.⁹ To justify its holding, the Second Circuit noted that compilations “contribute to public knowledge by providing cheaper, easier, and better organized access to information.”¹⁰

The compilation in question was a book that listed the resale value of used cars, commonly known as the “Red Book.” Here, the Second Circuit distinguished the valuations noted in the Red Book from the telephone numbers in *Feist*. The *Feist* numbers were pre-existing facts. In contrast, the Red Book values were not historical prices, nor “mechanical derivations” thereof, but rather, “they represented predictions by the Red Book editors of future prices estimated to cover specified geographic regions.” The values were based on a “multitude of data sources,” as well as the judgment and expertise of the compilers.¹¹

Regarding the selection in ordering of particular facts or elements, the Second Circuit held that the district court had applied the wrong standard in holding that the selection and arrangement was “a logical response to the needs of the vehicle valuation market.”¹² The court noted that “the fact that an arrangement of data responds *logically* to the needs of the market for which the *275 compilation was prepared does not negate originality. To the contrary, the use of logic to solve the problems of how best to present the information being compiled is independent creation.”¹³ The Second Circuit also held that the fact that information is expressed in numerical form is “immaterial to originality.”¹⁴

IV. Idea-Expression Dichotomy in Compilation Cases

CCC Information Services also addressed the issue of idea-expression dichotomy in compilation cases. Having decided that the compilation of facts regarding car resale values had sufficient originality under the copyright statute, the court then undertook a separate analysis regarding the idea-expression dichotomy.

The court considered the nature of compilations and noted that “it is almost inevitable that the original contributions of the compilers will consist of *ideas*.¹⁵ Originality in selection, the court said, “will involve the compiler’s idea of the utility to the consumer of a limited selection from the particular universe of available data.”¹⁶ Examples cited by the court included selection of businesses of interest to a particular ethnic community,¹⁷ statistics on racehorses or pitchers,¹⁸ and the quality and value of restaurants.¹⁹ Originality in coordination or arrangement, by comparison, relates to ideas “generally designed to serve the consumers’ needs, making the data more useful by increasing the ease of access to those data that answer the needs of the targeted customers, or dividing the data in ways that will efficiently serve the needs of more diverse groups of customers,” such as restaurant listings grouped by geographic area, specialty, and price range.²⁰

The court concluded that “virtually any independent creation of the compiler … [would] represent an idea.”²¹ However, the court rejected CCC’s argument that the merger doctrine should allow wholesale takings of the expression of such ideas. To so conclude would make the Copyright Act’s explicit protection of compilations “illusory.”²²

The Second Circuit noted that there is a distinction between ideas that attempt to enhance the understanding of phenomena or the solution of problems, and those that do not explain *276 phenomena or furnish solutions, but are infused with the author’s taste or opinion.²³ The court noted the tension between an unbridled application of the merger doctrine and the complete failure to apply it. The court then opted for “a *selective* application of the merger doctrine, withholding its application as to soft ideas infused with taste and opinion....”²⁴ This, the court said, would “carry out the statutory policy to protect innovative compilations without impairing the policy that requires public access to ideas of a more important and useful kind.”²⁵

After making an analysis of the extent of the takings by the copyright infringement defendant, and after consideration of the “suggestion-opinion” type of ideas included in the car valuation booklet, the Second Circuit held that the district court should

not have applied the merger doctrine.²⁶

V. Loss of Copyright Due Government Use of a Work

Another affirmative defense advanced by the copyright defendant and rejected by the Second Circuit in *CCC Information Services* was that the copyrighted work had fallen into the public domain because the information in the work was required to be used under state insurance statutes and regulations.²⁷ The defendant argued and the district court agreed that the values in the published book had become an alternative standard because insurance payments for total losses on cars were required to be at least equal to one of the two major automobile value booklets.²⁸ Thus, according to the defendant, this standardization placed the work into the public domain.²⁹ The district court relied on *Building Officials & Code Administration v. Code Technology*,³⁰ which involved a copyrighted work that had been incorporated into the laws of Massachusetts.

The Second Circuit refused to hold that “a state’s reference to a copyrighted work as a legal standard for valuation results in loss of the copyright.” The court explained that such a rule would raise “very substantial problems under the Takings Clause....”³¹ The case was remanded to the district court for further proceedings.³²

***277 VI. Joint Ownership**

There are two recognized and competing tests for whether a person is a joint author of a copyrighted work: the “de minimis” test,³³ and the “copyrightable subject matter” test.³⁴ The Western District of Michigan followed the Seventh Circuit in applying the “copyrightable subject matter” test in *Balkin v. Wilson*.³⁵ The “de minimis” test requires that “more than a word or line must be added by one who claims to be a joint author.”³⁶ Under this test, a person who contributed only “uncopyrightable plot ideas” may be considered a co-author, where another has incorporated those “ideas into a completed literary expression.”³⁷ However, under the “copyrightable subject matter test,” each collaborator’s contribution must be an original expression that is a copyrightable “work of authorship” on its own.³⁸ In agreeing with most courts which have addressed the issue and have adopted the “copyrightable subject matter” test, Judge Enslen noted that “ b y requiring a contribution to be copyrightable, creative efforts will be encouraged....”³⁹ This is because “there is no risk that a copyright on a finished work will be later found to be co-owned by a second person who has contributed or collaborated in some manner regarding the work where such contribution was not itself so creative as to be individually copyrightable.”⁴⁰

VII. Visual Artists Rights Act

The Visual Artists Rights Act (VARA),⁴¹ gives the author of a work of visual art the right to prevent any distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and to prevent any destruction of a work of recognized stature, subject to a fair use claim and with certain exceptions.

Section 106A(c) of VARA lists certain situations that do not constitute destruction, distortion, mutilation, or other modification of a work of visual art which may give rise to the artist’s rights. These situations include the following: where modifications are a result of the passage of time; where modifications are due to the inherent nature of the materials; and where modifications are a result of conservation or of the public presentation of the work, including those due to lighting and placement.⁴² Further, section 113(d) of the Copyright Act removes from the protection of section 106 those works which have been incorporated into a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other *278 modification of the work, so long as the author consented to the installation (before the VARA effective date) or waived his rights under sections 106A(a)(2) or 106A(a)(3).⁴³

VARA was the subject of *Carter v. Helmsley-Spear, Inc.*,⁴⁴ a case of first impression in the Southern District of New York, where plaintiffs brought an action in order to prevent the “alteration or destruction” of their work of art. The court first evaluated whether the work of art that had been installed by the plaintiffs in the lobby of a commercial building owned and managed by the defendants was one work of art or several discrete works of art. The work in the lobby was described by the court as “ s culptural elements including art work attached to the ceiling and the floor, interactive art, a vast mosaic covering the majority of the floor of the Lobby and portions of walls and several sculptural elements, and the interior of three elevators that open into the Lobby.”⁴⁵

In finding that the work was a single work of art whose elements were interrelated, the court considered the nature of the piece, expert testimony, the method by which the plaintiff created the work, the fact that the several sculptural and other elements appear to form an “integrated whole,” the dependence upon the meaning of certain interactive pieces to neighboring

sculptural elements, and the thematically consistent nature of the work.⁴⁶

The next issue addressed by the court was whether the work was “applied art” and not entitled to protection, as the defendants argued, or a work of “visual art” as defined by VARA.⁴⁷ “Applied art” describes “two- and three-dimensional ornamentation or decoration that is affixed to otherwise utilitarian objects.”⁴⁸ According to the court:

Even examined individually ... the vast majority of the Work’s sculptural elements cannot reasonably be described as applied art. Sculptural elements affixed to the ceiling, for example, serve absolutely no utilitarian purpose. These elements do not automatically become applied art merely because the ceiling to which they are attached is a utilitarian object. Such a result would render VARA nonsensical in light of the fact that VARA protects works of visual art that are permanently installed in buildings. Presumably, any part of the building to which such visual art is affixed serves some utilitarian purpose.⁴⁹

The court drew a distinction between works of visual art that incorporate elements of applied art and works that constitute applied art, noting that VARA does not proscribe protection for the former.⁵⁰ The court found that although the plaintiffs may have incorporated sculptural elements *279 that in isolation could constitute applied art, the work “as a whole” was not applied art.⁵¹ Thus, protection of the work was not forbidden under VARA.⁵²

The next issue considered by the court was whether “intentional distortion, mutilation, or modification” of the Work would be “prejudicial to [plaintiffs’] honor or reputation.”⁵³ Following the concept that the plain meaning of the statutory language should control, the court construed the terms “prejudicial,” “honor,” and “reputation.” According to the court, “prejudice” is commonly understood to mean ‘injury or damage due to some judgment of another.’ ‘Honor’ is commonly understood to mean ‘good name or public esteem.’ ‘Reputation’ is commonly understood to mean ‘the condition of being regarded as worthy or meritorious.’⁵⁴ Rejecting the concept that an artist must have a pre-existing standing in the artist community,⁵⁵ the court found that the plaintiffs “possess ed honor and reputations worthy of protection” and held that their reputations indeed would be damaged by any “intentional distortion, mutilation, or modification” of the work at issue.⁵⁶

The court also considered whether the Work had the “recognized stature” that merited protection under section 106A(a)(3)(B).⁵⁷ The court noted that the term “recognized stature” is not defined by VARA, but that it represents VARA’s “preservative goal.”⁵⁸

[T]he recognized stature requirement is best viewed as a gate-keeping mechanism-protection is afforded only to those works of art that art experts, the art community, or society in general views as possessing stature. A plaintiff need not demonstrate that his or her art work is equal in stature to that created by artists such as Picasso, Chagall, or Giacometti. As one commentator has noted, “The advantages of the ‘of recognized stature’ qualification include barring nuisance law suits, such as [a law suit over] the destruction of a five-year-old’s fingerpainting by her class mate” [citation omitted] Nor must the trier of fact personally find the art to be aesthetically pleasing; indeed, courts have persistently shunned the role of art critic.⁵⁹ Ultimately, the court held that for a work of visual art to be protected under this section, the copyright owner must show first, that the work has “stature” in that it is viewed as “meritorious,” and second, that the stature is “recognized” by “art experts, other members of the artistic community, or by some cross-section of society.”⁶⁰ The court noted that expert testimony would probably be utilized in this two-part factual inquiry.⁶¹

*280 Next, the court considered and rejected the defendants’ constitutional argument that application of VARA would violate “the Fifth Amendment by giving a third party the right to control the use of [the defendants’] property.”⁶² The court noted that application of VARA would be constitutional for the following reasons:

- (1) VARA applies only to protected works installed after the effective date of the statute;
- (2) the impact of VARA on the defendant’s property would be temporary, as VARA protection lasts only for the life of the last surviving author of the work;
- (3) VARA furthers the public interest in that it creates a comprehensive scheme designed to protect and ensure the preservation of certain types of art work in order to advance the public interest and protect moral rights of artists;
- (4) VARA does not disproportionately or unfairly target or burden particular classes because VARA applies only to works

installed after the effective date and allows for contractual waivers of VARA protection;

(5) VARA does not diminish property value but provides that, after the decision to permit installation of a work covered by VARA, the work must remain for the life of the last surviving artist, unless there is a waiver; and

(6) there is a reciprocal benefit to VARA in that the public benefits through the preservation of cultural resources and building owners benefit as members of the society and by the societal interest in the art.⁶³

Finally, the court decided the appropriate scope of protection under VARA and the relief to be allowed. The court granted an injunction prohibiting the defendants from distorting, mutilating, or modifying the plaintiffs' work, a prohibition from removing the work from the defendants' building, and a prohibition from destroying the work.⁶⁴ However, the plaintiffs would not be allowed to continue modifying or increasing the size of the work themselves, as they had desired. The court held that VARA does not give the artist "the right to complete, or engage in further work on, the Work," noting that the building owners' "refusal to permit plaintiffs to 'finish' the Work does not constitute 'distortion, mutilation, or other modification' under 17 U.S.C. § 106A(a)(3)(A)."⁶⁵

As to damages, the court noted that to bring an action for recovery for violation of the rights under section 106A(a), prior registration of the work was not required.⁶⁶ Actual and statutory damages were available upon proof, but in this case, there was a lack of proof.⁶⁷ In *281 addition, the court held that since this was a case of first impression, it would be inappropriate to award either side costs and attorney fees.⁶⁸

VIII. Copyright Preemption

The Gibbons of ZZ Top fame recently appeared before the Fifth Circuit to contest plaintiff Daboub's appeal from a grant of summary judgment that the federal Copyright Act preempted Daboub's long list of state and federal law claims in *Daboub v. Gibbons*.⁶⁹ In *Daboub*, the Nightcaps, a band, alleged that ZZ Top copied their song "Thunderbird." The district court adopted a magistrate's finding that Nightcaps' state and federal claims were either preempted by the federal Copyright Act or barred by the applicable statutes of limitation and granted summary judgment for ZZ Top.⁷⁰ The claims included conversion, misappropriation, plagiarism, violation of the Texas Free Enterprise and Antitrust Act of 1983, disparagement, and defamation. The heart of each claim in the case was the same: that the wrongful copying, distribution, and performance of the lyrics of a sound recording were covered under the Texas statutes,⁷¹ as per the statutory exception of section 301(c) of the Copyright Act.⁷² The court rejected this argument, indicating that ZZ Top did not present the plaintiff's recorded version as their own, and thus, their actions did not fall under the sound recording exception of section 301(c). The court also rejected the state claims on the ground that they were equivalent to those interests protected under the federal Copyright Act.⁷³

The plaintiff was barred under various statutes of limitations from bringing the action because the alleged misappropriation occurred in the 1970's, and the case was not brought until many years later. The court rejected plaintiff's argument that each time the allegedly misappropriated song was played constituted a part of a continuing tort.⁷⁴ The court indicated that a continuing tort theory would frustrate the policies behind the Copyright Act to provide closure for possible defendants with a definite statute of limitations.⁷⁵

IX. Statute of Limitations

The Copyright Act provides that "[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued."⁷⁶ The Seventh *282 Circuit has held that a course of wrongful conduct begun before the three year period and finalized during the three year period resulted in a "continuing tort theory" for copyright infringement.⁷⁷ The Sixth and Second Circuits have holdings contrary to that of the Seventh Circuit and permit recovery only for those torts occurring during the statutory period.⁷⁸ In *Stone v. Williams*,⁷⁹ the Second Circuit held that "each act of infringement is a distinct harm giving rise to an independent claim for relief.... Recovery is allowed only for those acts occurring within three years of suit, and is disallowed for earlier infringing acts."⁸⁰ The Ninth Circuit followed the *Stone* court in *Roley v. New World Pictures*,⁸¹ indicating concurrence with the prevailing view that section 507(b) of the Copyright Act bars recovery on any claim for damages that accrued more than three years before commencement of suit.

The Fifth Circuit was persuaded by and agreed with the Sixth, Second, and Ninth Circuits' interpretation of section 507(b) of the Copyright Act in *Makedwde Publishing Co. v. Johnson*.⁸² Here, the defendant was held liable only for his own acts of infringement committed within the three years prior to plaintiff's lawsuit.⁸³ The defendant's last involvement with the

infringer or with the recording and distribution of the work at issue was on January 2, 1985.⁸⁴ After January 2, 1985, the court held that the defendant was not responsible “directly or vicariously, individually or jointly” in the operations of the infringer.⁸⁵ The court noted that to hold the defendant liable in this situation “would be a socially preposterous and commercially disastrous doctrine.”⁸⁶

X. Statutory Damages

In *Video Views, Inc. v. Studio 21, Ltd.*,⁸⁷ the Seventh Circuit stated that, while a district court was to have almost exclusive discretion in determining the size of statutory damage awards for infringement of copyright, the court must “provide some explanation of the factual findings that underlie this exercise of discretion to award greater than minimum statutory damages.”⁸⁸ More recently, in *Broadcast Music Inc. v. Star Amusements, Inc.*,⁸⁹ the Seventh Circuit gave an example of what type of explanation was appropriate. In *Star Amusements*, the defendants operated more than two hundred jukeboxes, most of which were not registered with the U.S. Copyright Office, as *283 required by law. The defendants, had not paid registration fees over a period of at least six years, and as a result, an act of copyright infringement had occurred every time one of the unregistered jukeboxes played a copyrighted song in public.⁹⁰ Relying on *Broadcast Music Inc. v. Triple L Vending*⁹¹ and *International Korwin Corp. v. Kowalczyk*,⁹² the district court awarded the plaintiff the statutory maximum, which was less than twice the defendants’ unpaid fees for registration of its jukeboxes, an amount that the court considered a reasonable and nonexcessive award for damages.⁹³ In reviewing the district court’s award of statutory damages for infringement, the Seventh Circuit observed that:

In a sense, unpaid registration fees actually provide a superior yardstick than total infringements for measuring appropriate damages. When the infringer is a jukebox operator, the transgression really occurs when the operator places an unregistered jukebox into operation in a public establishment. The number of technical infringements that result depends on the number of coins that are fed into the box. Though this number may in some abstract sense be a measure of the harm done to the copyright holders, it has little relation to their actual monetary harm which occurs when they do not receive their shares of the unpaid registration fee. This number has even less to do with the jukebox operator’s culpability, which is better measured by the number of unregistered jukeboxes he has placed in operation. Because jukeboxes do not keep a count of songs played, the number of provable infringements, which depends on how long BMI [Broadcast Music Inc.] is willing to pay someone to sit in a bar and listen to other people play the jukebox, bears even less relation to either the culpability of the operator or the harm done to the copyright holders.⁹⁴

The Seventh Circuit then affirmed the district court’s damages award, noting that the court had “properly considered a multiple of defendants’ unpaid jukebox registration fees” in its determination of a proper award which achieved the goals of deterrence of the infringers and compensation of the copyright holders.⁹⁵

XI. Conclusion

In recent copyright cases, courts of the various circuits have addressed issues involving compilations, the government use defense to infringement, the power of a district court to cancel a federal copyright registration, joint authorship requirements, and the Visual Artists Rights Act. Other recently addressed issues include the preemption of state law by the federal Copyright Act, statute of limitations issues, and the discretion of a district court to award statutory damages. Although not always in agreement, the various circuits all strive to preserve the policy goals of the Copyright Act.

Footnotes

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¹ See *Xerox Corp. v. Apple Computer, Inc.*, 734 F. Supp. 1542, 14 U.S.P.Q.2d (BNA) 1512 (N.D. Cal. 1990).

² *Leegin Creative Leather Prods., Inc. v. M.M. Rogers and Co.*, 33 U.S.P.Q.2d (BNA) 1158 (C.D. Cal. 1994).

³ See generally 17 U.S.C. § 101 *et seq.* (1988).

⁴ *Leegin*, 33 U.S.P.Q.2d at 1159.

⁵ *Id.* See also 37 C.F.R. § 201.7(c) (1993).

⁶ 44 F.3d 61, 33 U.S.P.Q.2d (BNA) 1183 (2d Cir. 1994).

⁷ 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991).

⁸ *CCC Info. Servs.*, 44 F.3d at 65, 33 U.S.P.Q.2d at 1186 (quoting *Feist*, 499 U.S. at 345, 18 U.S.P.Q.2d at 1278).

⁹ *Id.* at 67, 33 U.S.P.Q.2d at 1188.

¹⁰ *Id.* at 66, 33 U.S.P.Q.2d at 1186.

¹¹ *Id.* at 67, 33 U.S.P.Q.2d at 1187 (Deposition testimony indicated that the plaintiff's experts weighed fifteen considerations in determining a price. One example was the plaintiff's estimate of how "traditional competitor vehicles," a class of vehicles defined by the plaintiff, would compare in the marketplace.).

¹² *Id.* at 67, 33 U.S.P.Q.2d at 1187.

¹³ *Id.* at 67, 33 U.S.P.Q.2d at 1187-88 (citing *Feist*, 499 U.S. at 359, 18 U.S.P.Q.2d at 1283) (emphasis in original).

¹⁴ *Id.* at 67 n.6, 33 U.S.P.Q.2d at 1187 n.6.

¹⁵ *CCC Info. Servs.*, 44 F.3d at 70, 33 U.S.P.Q.2d at 1190 (emphasis in original).

¹⁶ *Id.*

¹⁷ *Id.* (citing *Key Publications, Inc. v. Chinatown Today Publishing Enter., Inc.*, 945 F.2d 509, 514, 20 U.S.P.Q.2d (BNA) 1122, 1125 (2d Cir. 1991)).

¹⁸ *Id.* (citing *Kregos v. Associated Press*, 937 F.2d 700, 706-07, 19 U.S.P.Q.2d (BNA) 1161, 1165-66 (2d Cir. 1991); *Wabash Publishing Co. v. Flanagan*, 10 U.S.P.Q.2d (BNA) 1714 (N.D. Ill. 1989)) (holding selection and arrangement of information pertinent to horse races copyrightable).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 72, 33 U.S.P.Q.2d at 1192 (emphasis in original).

²⁵ *Id.*

²⁶ *Id.* at 73, 33 U.S.P.Q.2d at 1193.

²⁷ *CCC Info. Servs.*, 44 F.3d at 74, 33 U.S.P.Q.2d at 1193.

²⁸ *Id.*

²⁹ *Id.*

³⁰ 628 F.2d 730, 207 U.S.P.Q. (BNA) 81 (1st Cir. 1980) (remanding for hearing on whether a previously protected construction code had lost its copyrightability by reason of its adoption as part of the laws of Massachusetts).

³¹ *CCC Info. Servs.*, 44 F.3d at 74, 33 U.S.P.Q.2d at 1193 (The court noted that for many years, state education systems have assigned books that are under copyright in order to comply with mandatory school curriculums, and that a holding such as the one advanced by the defendant would require that these types of assigned books lose their copyright protection. The court cited Nimmer's treatise on copyright to support its proposition that such a result would be contrary to the policy interests that the Copyright Act seeks to protect.).

³² *Id.*, 33 U.S.P.Q.2d at 1194.

³³ See MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 6.02 (1994).

³⁴ See PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 4.2.1.2 (1989).

³⁵ *Balkin v. Wilson*, 863 F. Supp. 523, 526-28, 33 U.S.P.Q.2d (BNA) 1217, 1218-20 (W.D. Mich. 1994) (citing *Erickson v. Trinity Theatre, Inc.* 13 F.3d 1061, 29 U.S.P.Q.2d (BNA) 1347 (7th Cir. 1994)).

³⁶ *Id.* at 526, 33 U.S.P.Q.2d at 1219 (quoting NIMMER, *supra* note 33, § 6.07 at 6-21).

³⁷ *Id.* at 526-27, 33 U.S.P.Q.2d at 1219 (citing *Erickson*, 13 F.3d at 1070, 29 U.S.P.Q.2d at 1353).

³⁸ *Erickson*, 13 F.3d at 1070, 29 U.S.P.Q.2d at 1354.

³⁹ *Balkin*, 863 F. Supp. at 528, 33 U.S.P.Q.2d at 1220 (citing *Erickson*, 13 F.3d at 1070, 29 U.S.P.Q.2d at 1353).

⁴⁰ *Id.*

⁴¹ 17 U.S.C. § 106A (1988).

⁴² *Id.*

⁴³ See 17 U.S.C. § 113(d) (1988).

⁴⁴ Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 33 U.S.P.Q.2d (BNA) 1225 (S.D.N.Y. 1994).

⁴⁵ *Id.* at 314, 33 U.S.P.Q.2d at 1229.

⁴⁶ *Id.* at 314-15, 33 U.S.P.Q.2d at 1229-30.

⁴⁷ *Id.* at 315, 33 U.S.P.Q.2d at 1230 (“Works of applied art are not ‘works of visual art’ as defined by VARA ... and therefore are not protected thereunder.”).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 315-16, 33 U.S.P.Q.2d at 1230.

⁵¹ *Id.* at 316, 33 U.S.P.Q.2d at 1230.

⁵² *Id.*

⁵³ *Id.* at 323, 33 U.S.P.Q.2d at 1236.

⁵⁴ *Id.* (citations omitted).

⁵⁵ *Id.*, 33 U.S.P.Q.2d at 1236 (The defendant’s expert testified that alteration of the Work would not adversely impact the plaintiffs’ reputation because the plaintiffs had no reputation. *Id.* at 324, 33 U.S.P.Q.2d at 1237.).

⁵⁶ *Id.*, 33 U.S.P.Q.2d at 1237.

⁵⁷ *Id.* (Under 17 U.S.C. § 106A(a)(3)(B), the author of a work of visual art shall have the right “to prevent any destruction of a work of recognized stature.”)

⁵⁸ *Id.* at 324-25, 33 U.S.P.Q.2d at 1237.

⁵⁹ *Id.* at 325, 33 U.S.P.Q.2d at 1237-38.

⁶⁰ *Id.*, 33 U.S.P.Q.2d at 1238.

⁶¹ *Id.*

⁶² *Id.* at 326-29, 33 U.S.P.Q.2d at 1239-41.

⁶³ *Id.* at 327-28, 33 U.S.P.Q.2d at 1240.

⁶⁴ *Id.* at 329-30, 33 U.S.P.Q.2d at 1241.

⁶⁵ *Id.* at 329, 33 U.S.P.Q.2d at 1241.

⁶⁶ *Id.*, 33 U.S.P.Q.2d at 1242 (citing 17 U.S.C. §§ 411, 412 (1984)).

⁶⁷ *Id.* at 329-30, 33 U.S.P.Q.2d at 1242.

⁶⁸ *Id.* at 330, 33 U.S.P.Q.2d at 1242.

⁶⁹ *Daboub v. Gibbons*, 42 F.3d 285, 287, 33 U.S.P.Q.2d (BNA) 1441, 1442 (5th Cir. 1995).

⁷⁰ *Id.* at 287, 33 U.S.P.Q.2d at 1442.

⁷¹ *Id.* at 289, 33 U.S.P.Q.2d at 1443.

⁷² See 17 U.S.C. § 301(c) (1988) (“With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047”).

⁷³ *Daboub*, 42 F.3d at 290, 33 U.S.P.Q.2d at 1444 (“Finding no disharmony between the elements of state law claims and the federal law in this case, we have no hesitancy in pronouncing enough equivalency to satisfy section 301(a.”).

⁷⁴ *Id.* at 291, 33 U.S.P.Q.2d at 1444-45.

⁷⁵ *Id.*, 33 U.S.P.Q.2d at 1445.

⁷⁶ 17 U.S.C. § 507(b) (1988).

⁷⁷ *Taylor v. Meirick*, 712 F.2d 1112, 1119, 219 U.S.P.Q. (BNA) 420, 423-24 (7th Cir. 1983).

78 *See Hoste v. Radio Corp. of America*, 654 F.2d 11, 212 U.S.P.Q. (BNA) 153 (6th Cir. 1981).

79 970 F.2d 1043, 23 U.S.P.Q.2d (BNA) 1492 (2d Cir. 1992), *cert. denied*, 113 U.S. 2331 (1993).

80 *Id.* at 1049-50, 23 U.S.P.Q.2d at 1496. *See also Kregos v. Associated Press*, 3 F.3d 656, 662, 27 U.S.P.Q.2d (BNA) 1881, 1884, *cert. denied*, 114 S. Ct. 1056 (1994) (specifically rejecting the continuous tort doctrine of *Taylor*).

81 *See Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 30 U.S.P.Q.2d (BNA) 1654 (9th Cir. 1994).

82 *Makedwde Publishing Co. v. Johnson*, 37 F.3d 180, 182, 32 U.S.P.Q.2d (BNA) 1635, 1637 (5th Cir. 1994).

83 *Id.*, 32 U.S.P.Q.2d at 1637.

84 *Id.*

85 *Id.*, 32 U.S.P.Q.2d at 1637 (quoting *Maloney v. Stone*, 171 F. Supp. 29, 32, 121 U.S.P.Q. (BNA) 257 (D. Mass. 1959)).

86 *Id.*

87 925 F.2d 1010, 17 U.S.P.Q.2d (BNA) 1753 (7th Cir. 1991).

88 *Id.* at 1017, 17 U.S.P.Q.2d at 1758.

89 44 F.3d 485, 33 U.S.P.Q.2d (BNA) 1378 (7th Cir. 1995).

90 *Id.* at 486-87, 33 U.S.P.Q.2d at 1379.

91 5 U.S.P.Q.2d (BNA) 1346 (W.D. Tex. 1987).

92 855 F.2d 375, 383, 8 U.S.P.Q.2d (BNA) 1050, 1056-57 (7th Cir. 1988).

93 *Star Amusements*, 44 F.3d at 488, 33 U.S.P.Q.2d at 1380 (The district court had originally concluded that it was appropriate to award three times unpaid fees because it would “ensure that violation of the copyright laws [was] a more expensive option than compliance.”).

94 *Id.* at 488-89, 33 U.S.P.Q.2d at 1381.

95 *Id.* at 489, 33 U.S.P.Q.2d at 1381.