

**Copyright Society of the USA  
Mid-Winter Meeting**

**Feb 4-6, 2011  
Santa Fe, New Mexico**

**Friday, February 4**

9:10 am – 10:30 am

**“You’re an Original, Baby!”**

Creators and legal minds explore the changing face of originality. The presentations include crafting digital works, reworking public domain and protected works into new forms and variations (and whether attribution should matter), and the challenges involved in litigating cases and protecting online works where originality is an issue.

Moderator:

Kristen Green, *Microsoft Corporation*

Panelists:

Rose Auslander, *Writer & Lawyer*

Patrick Donehue, *Photographer, Blackburn-Donehue  
Creative Services, LLC*

Laurie Rhoades, *Replin Rhoades & Roper, LLC*

Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc. 528 F.3d 1258 C.A.10 (Utah) June 17, 2008  
(originality in digital models of cars)

- In Meshwerks, Inc. v. Toyota Motor Sales U.S.A., the Court found uncopyrightable and, hence, not protected against an alleged copyright infringement, the "unadorned, digital wire-frames of Toyota's vehicles" which had been commissioned by the car manufacturer's ad agency, Saatchi & Saatchi, which was also a defendant.
- The Court analogized this situation to the early cases dealing with photography. At one point, many thought that a photograph could not be copyrightable. A photograph, some said, "copies everything and explains nothing." Although many photographs may, in fact, be mere recordings of their subject matter, they have now been readily accepted as a medium for copyrightable works where the photographic image, "...reflects the photographer's decisions regarding pose, positioning, background, lighting, shading, and the like..." And this is where the Court's good news arrives. "(W)e do not turn a blind eye to the fact that digital imaging is a relatively new and evolving technology and that Congress extended copyright protection to 'original works of authorship fixed in any tangible medium of expression, now known or later developed.' 17 U.S.C. Section 102(a) (emphasis added)....Digital modeling can be, surely is being, and no doubt increasingly will be used to create copyrightable expressions. Yet, just as photographs can be, but are not per se copyrightable, the same holds true for digital models."

Bridgeman Art Library, Ltd. v. Corel Corp. 36 F.Supp.2d 191 S.D.N.Y. February 18, 1999  
(originality in pics of public domain art)

- A United-Kingdom (UK) based company was marketing color transparencies and CD-ROMs of paintings that were in the public domain. The plaintiff sued the company for copyright infringement. In response to the plaintiff's suit, the company filed a motion to dismiss the suit claiming that according to the copyright law of the UK, no infringement existed because the works were not copyrightable. The UK law says that non-original works are impermissible subjects of valid copyright and therefore the works were not infringed. The Court granted the motion and noted that it would have reached the same conclusion under U.S. law. Following the decision, the plaintiff moved for reargument and reconsideration. The court granted the motion.
- The court quotes a distinguished British judge as explaining the three ways photography can meet the originality threshold necessary for copyright. They are: "[(1)] originality which resides in such specialties as angle of shot, light and shade, exposure, effects achieved by means of filters, developing techniques etc....[(2)] creation of the scene or subject to be photographed [,such as a photomontage or arrangement of a group]...[(3)] capturing and recording a scene unlikely to recur, e.g. a battle between an elephant and a tiger..." In contrast the works that are in question do not meet any of the above criteria. Rather, they are mere reproductions to the best ability that technology permits.
- The court discusses the notion of "originality" as being fundamental to achieve copyright protection under either law. The court concludes that the works in question lack this pre-requisite and therefore cannot be insulated from duplications of this nature.

Goldman v. Healthcare Management Systems, Inc. 628 F.Supp.2d 748, W.D.Mich. June 20, 2008 (originality in selection of data and expression)

- In litigation involving software programs and claims of copyright infringement and DMCA violations, the district court made several rulings in response to motions to exclude evidence.
- Despite plaintiff's claim that the complaint had been filed within three years of the discovery of the alleged infringement, the court held that the plaintiff can recover damages only for infringements that occurred within the three-year statute of limitations from the date the complaint was filed.
- The court noted that the majority of circuits that have examined the question of whether a court may award prejudgment interest under the Copyright Act have found that such an award is permissible.
- The court also addressed the issue of whether repeated violations of the DMCA constitute a single violation or multiple violations. Section 1203(c)(3) of the Copyright Act authorizes statutory damages "for each violation" of §§ 1201 and 1202, without defining what constitutes a violation. The court held that the DMCA authorizes statutory damages for each instance in which a copy of an infringed program was provided to a third party. "Unlike a television signal or an AP wire story sent simultaneously to all subscribers, the alleged 'violation' here [i.e., sale of software] is not a singular, isolated event. Instead, Defendants allegedly provided computer programs at different times, under different circumstances, to multiple hospitals. The computer program in the case at bar might be the same, but the conduct of distributing the software is variable."

Osment Models, Inc. v. Mike's Train House, Inc., 2:09-CV-04189-NKL, 2010 WL 5423740 (W.D. Mo. Dec. 27, 2010) (originality in scale models)

- Osment claims that Mike's gas station and train depot infringed, and that Mike's use of photographs of Osment's models in its sales catalog also infringed and constituted false advertising and unfair competition.
- Motion for summary judgment was denied

SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301 (S.D.N.Y. 2000) (originality in photos of objects)

- Munn hired Lindner to photograph mirrored picture frames manufactured and offered for sale by defendants. Lindner photographed approximately 130 different frames with the understanding that the photographs would be used as color slides by defendants' sales force. Thereafter, Munn used the photographs in a catalogue, reproduced them in 5,000 brochures, and offered them as magazine "comps" or publicity releases.
- Although the Ninth Circuit concluded that a photograph of a vodka bottle was not a derivative work of the bottle, it reached that holding only after determining that the bottle was not independently copyrightable. Thus, the Ninth Circuit reasoned that the bottle was not a preexisting work. This Court respectfully believes that the Ets-Hokin court

misconstrued the nature of derivative works. While the *Ets-Hokin* court correctly noted that a derivative work must be based on a "preexisting work," and that the term "work" refers to a "work of authorship" as set forth in 17 U.S.C. § 102(a), it failed to appreciate that any derivative work must recast, transform or adopt the authorship contained in the preexisting work. A photograph of Jeff Koons' "Puppy" sculpture in Manhattan's Rockefeller Center, merely depicts that sculpture; it does not recast, transform, or adapt Koons' sculptural authorship. In short, the authorship of the photographic work is entirely different and separate from the authorship of the sculpture.

- Two general principles emerge from *Burrow-Giles*. First, an author is some-one who creates the work himself, i.e., does not copy it from someone else. Second, an author must imbue the work with a visible form that results from creative choices.
- The standards to be applied in determining whether the creative spark is present can be elusive. Although photography is a species of pictorial work, it is not defined in the Copyright Act. Thus, unlike computer programs and audiovisual works, which are defined in the Act, courts are left without congressional guidance as to what attributes of photographic works are necessary to satisfy the originality requirement.
- While plaintiff's photographs meet the minimal originality requirements in *Feist*, they are not entitled to broad copyright protection. Plaintiff cannot prevent others from photographing the same frames, or using the same lighting techniques and blue sky reflection in the mirrors. What makes plaintiff's photographs original is the totality of the precise lighting selection, angle of the camera, lens and filter selection. In sum, plaintiff is granted copyright protection only for its "incremental contribution." Practically, the plaintiff's works are only protected from verbatim copying. However, that is precisely what defendants did.
- Case contains great summaries of the history of copyrightability of photographs, requirements of a work for hire, and factors in joint authorship

*Newton v. Diamond*, 204 F. Supp. 2d 1244 (C.D. Cal. 2002) aff'd, 349 F.3d 591 (9th Cir. 2003) opinion amended and superseded on denial of reh'g, 388 F.3d 1189 (9th Cir. 2004) and aff'd, 388 F.3d 1189 (9th Cir. 2004) (originality of 3 notes of music in Hip Hop sample case)

- Cases finding that sequences of less than six notes could be qualitatively distinctive have involved: 1) sequences with accompanying lyrics; 2) sequences at the heart of the musical compositions; 3) sequences and lyrics that were repetitive; and/or 4) sequences that were based upon analyses of both the written composition and the sound recording.
- Accordingly, the sample at issue—a six-second, three-note sequence with a single background note, isolated from the sounds created by Plaintiff's performance techniques — cannot be protected as a matter of law.
- Good summary of sampling under 3. Defendants' Sampling of Plaintiff's Work Is De Minimis

Article on originality issues for digital tools that repaint pix of people:

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1709529](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1709529)

- This Article addresses a few of the issues that confront digital artists and modeling companies in the context of copyright law's requirements of originality and independent creation, and provides a comparative look at potential protection for these types of digital models under differing definitions of originality. In an age when animators deal with pixels as well as paint brushes, the laws of the United States potentially offer digital artists less protection in this context than do the laws of other countries, such as the United Kingdom and Australia. Specifically, the requirement of originality after Feist and the lack of sui generis database protection in the United States provide less protection for digital visual effects artists engaged in modeling reality than do the laws of these other jurisdictions. This Article examines some examples of recent advancements in digital imaging technology; specifically, the ability to create digital clones of preexisting things, such as living or deceased personalities and other, non-human, objects. The Article then provides a comparative analysis of copyright's requirement of originality in the United States, United Kingdom, and Australia, followed by a brief look at sui generis protection under the European Union's recent directive on the legal protection of databases.