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News You Can Use
From Jay Landrum

Sometimes, you don't own what you think you do -- it's a very common problem that arises, particularly when you are working with independent contractors. Keep reading to find out why...

A Picture's Worth a Thousand Word Contract

Let's say you hire a photographer to take some product shots of your company's prized product line - a product line for which you clearly own the copyrights. You later stop working with the photographer, but you continue to use the photos you paid him to take.

Suppose now that the photographer runs out and files copyrights on all the photos he took of your products, then sues you for using them on your packaging... **who owns the copyrights to those photos?**

You would be among the majority of people if you answered that your company owns the photos, but based on a recent court decision, the copyright in the photos may in fact be owned by the photographer.

In **Schrock v Learning Curve International**, the lower court reasoned that (i) the photos of Learning Curve's toy products were "derivative works" (works based upon a preexisting work) and (ii) Schrock, the photographer, needed the permission of Learning Curve to take the product photos (which he received) and also needed the permission of Learning Curve to copyright those photos (which he did not).

This last week, the Court of Appeals for the Seventh Circuit disagreed, and reversed the lower court decision, saying that copyrights arise ***by operation of law, not by permission***,

About Jay Landrum

Jay Landrum is a member of Silicon Valley Law Group's Corporate & Securities and Intellectual Property Groups. As former General Counsel for a NYSE company and as a former CEO of a health products company, he has extensive experience representing companies in all stages of operation, including organizational matters, licensing, strategic relationship agreements, fund-raising, and merger transactions.

jay@svlg.com
ph: 408-573-5700

so Schrock was the owner of the copyrights to the photos to the extent of their incremental original expression. The Court of Appeals for the Seventh Circuit also clarified the law about derivative works, saying there is no "heighted standard" of originality for copyright in a derivative work - the only originality required is enough variation from the public domain or other existing work "to be readily distinguishable from its predecessors."

Whether a photograph of a preexisting copyrighted work is a derivative work is a subject of deep disagreement among the courts and commentators, the Court noted. However, the Court determined that the only times a photograph would not create a derivative copyright is in the limited case where the goal is to reproduce the works exactly like the original, such as in creating a transparency of a painting. But in this case, where a 3-dimensional product is made into a 2-dimensional product, the derivative copyright is clearly created by operation of law.

Importantly, the Court pointed out that while the parties could have altered this "default rule" by agreement, the parties in this case failed to do so - if they had, the photographer would not have owned the copyrights to the derivative works. In other words, had a written contract between the parties prohibited the photographer from obtaining copyright protection, that contractual provision would have controlled instead, and Learning Curve would have retained the copyrights.

So, protect your copyrights, and develop clear contractual arrangements to secure ownership of all derivative works. That way, you'll always make sure you get what you paid for.