



Play Nice to Avoid Attorney's Fees in Copyright Cases

By: James B. Astrachan

A large publisher was smacked with \$813,000 in legal fees when it lost a copyright suit involving federal court opinions to which the publisher claimed copyright.

The Copyright Act permits federal judges to award attorneys' fees to prevailing copyright litigants so all litigants will have equal access to the courts to vindicate their statutory rights. To be eligible for an award of fees, a plaintiff generally must register the copyright within three months after the work is first published. A prevailing defendant is not bound by any such restriction.

What does the court consider when awarding fees? In this case, the court focused on the publishers conduct and its motivation in failing to follow certain technical requirements of the Copyright Act.

The Copyright Act prevents someone from claiming copyright in works created by the United States government including judicial opinions. Some publishers add bits of original material to a government work and then place a copyright notice on the entire work in order to

obfuscate that portion of the work over with they have no copyright claim. Yet, publishers who place a copyright notice on government works are required to delineate those portions of the work that are not protected, as government works, and those that are, such as original additions. This publisher intended to discourage public dissemination of the government work. After fruitlessly attempting to reach a resolution, the plaintiff sued the publisher to vindicate the public's interest in wide dissemination of those federal judicial decisions.

Plaintiff won and requested an award of attorney's fees. The court had to decide whether plaintiff's efforts should be so rewarded and it looked for guidance to a 1994 Supreme Court decision involving Credence Clearwater Revival rocker/songwriter John Fogerty.

Fogerty had been sued for infringement of "Run Through the Jungle," a song he wrote in 1970 and had earlier transferred to the plaintiff's predecessor in interest. The plaintiff, after paying for the tune, was miffed when in 1985 Fogerty wrote "The Old Man Down the Road," a song that resembled "Run Through the Jungle."

The United States Supreme Court heard the appeal of denial of fees and stated that the purpose of copyright protection is

...not to reward the labor of authors, but to promote the Progress of Science and useful Arts'. To this end, copyright assures authors the right of original expression, but encourages others to build freely upon the ideas and information conveyed by a work.

So if the point of copyright is to enrich the public through access to creative works, defendants who seek to advance meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious infringement claims.

Because Fogerty's defense was successful, the public benefited from a new work, which in turn, might spawn the next new work.

In the end, the Supreme Court ruled that factors such as frivolousness, motivation, objective unreasonableness and the need in particular circumstances to advance considerations of compensation and deterrence may be used to guide a court's discretion in awarding fees, if the factors remain faithful to the purpose of the Copyright Act and are applied to prevailing plaintiffs and defendants in an even handed manner.

Other courts have awarded attorney's fees because a party has taken action in a manner intended to delay litigation or to increase the opposing party's costs to litigate. Sometimes, the refusal to make or accept a reasonable offer of settlement is all it takes to justify an award of fees in a copyright case. And this should be taken to mean that meritorious cases should be promptly and reasonably settled.

So what of the publisher, who, the court reasoned, refused to recognize that there was an open question over its right to obtain copyright protection in court opinions, and worse,

...used every effort to avoid an adjudication of its rights and to make it difficult...to determine what portions of the reported opinions were in the public domain and could be freely copied.

And while the publisher's arguments may not have been frivolous, its conduct of the litigation was.

In the end, the publisher was hanged with its own rope, and ordered to pay for the plaintiff's legal fees, including those of inside general counsel. The lesson here is that copyright litigation is no place to behave like a child.