



Infringement of Legal Forms

By: Jim Astrachan

Theorizing that a little paranoia can keep one safe, I began to look around my office wondering whose copyright I might be infringing in my everyday legal practice without any intent whatsoever. After all, I told myself, innocence is not a defense, and it would be embarrassing to be wrong.

And then it hit me, and my stomach leaped to take my heart's place in my chest. Legal forms! Pleadings and contracts. Those forms lawyers can't practice without and whose ownership are taken for granted daily. Can copying all these legal forms in everyday use be copyright infringement?

As I began to research this question, I knew I had too much free time on my hands. But still, I had to know, being aware that of the very few lawyers who even remotely considered this problem, the vast majority now consider copying legal forms not to be an act of copyright infringement.

And boy are they ever wrong, for among those who study copyright law, the consensus is clear that legal forms are subject to copyright protection. My pulse quickened.

For copyrights to subsist there must be copyrightability of the subject matter and originality in the author. With the exception of some century-old law dealing with the functionality of forms, controversial since decided and distinguishable in any event, there would appear to be no bar whatsoever to finding that legal forms are a proper subject for copyright protection. Modern cases - and scholars of copyright law - have so said. Any original expression qualifies as an appropriate subject for copyright protection.

In one case of first impression dealing with the language of forms for municipal bonds, the defendant attempted to justify its copying of the plaintiff's language by introducing evidence from the industry that bonds are always generated by marking up precedents from earlier transactions. Additionally, the defendant attempted to show that the bond industry is rather cliquish and that all bond documents follow similar forms and contain similar language by virtue of legal disclosure requirements. The defendant also claimed, as its justification to copy, that the industry custom of relying on precedents decreases costs. *Merritt Forbes & Co., Inc. v. Newman Investment Securities, Inc.*, 604 F.Supp. 943, 949 (S.D. N.Y. 1985). It was a good defense. My breathing became rapid.

The court refused to bite. Instead, it went to the leading copyright commentator who notes that

"there appear to be no valid grounds why legal forms such as contracts, insurance policies, pleadings and other legal

documents should not be protected under the law of copyright."

My mind was immediately struck with the clarity of Professor Nimmer's thoughts on pleadings, knowing that in his view, like most copyright scholars, fiction deserves the most protection.

The court in the bond case addressed the other factor as well. There the originality of the forms was not seriously disputed (or the defendant may have blown it by not introducing sufficient evidence). The bond type at issue was a novel combination of prior bond features and was unprecedented in the industry. Nonetheless, the typical form in the legal profession may have a much more varied history and may often be itself an amalgamation of prior forms and language. This defense must be raised and pursued in discovery by the defendant early, however, because once a plaintiff has received registration and demonstrates that to the court, the burden shifts to the defendant to show ownership is invalid.

But even if the forms are copyrightable subject matter and sufficiently original, there is one more issue to be decided even where a court is inclined to rule that a work is the proper subject of copyright protection. That is whether some sort of policy issue prevails. In other words, even if an individual has a valid copyright, is the public's need to access of information dominant over an individual's right to control his or her work?

I thought about a plaintiff's motion for summary judgment on the sole issue of infringement. After all, if ownership and copying are uncontroverted facts, why

wouldn't the plaintiffs be entitled? Because if a court can be convinced to examine the public policy issue that might entitle a defendant to rely on a fair use defense, a balancing of the equities should take place and it seems that at trial is the only appropriate place for this to occur. In the end, after balancing the need of the public against the rights of the individual, a court might conclude that infringement of a legal form might be justified given the particular nature of the document and the alleged infringement. Nonetheless, what could be the public policy justification? It is doubtful that a judge or jury would likely give much benefit to an attorney who copied a form simply to save himself some effort (and his client some expense, of course). On the other hand, the hubris of the legal profession has allowed many to posit there is often (if not always) one, and only one, way to express an exact legal concept. Any deviation would change the meaning in some way, perhaps minor, perhaps major. Public policy prohibits one from monopolizing an idea, it allows only the incorporation of an expression. Where ideas and expressions merge, the public policy prohibiting their monopolization carries the day.

I tried to summarize for myself what my pre-senility wonderings have brought me. Yes, everyone you speak to is wrong because legal forms are copyrightable. Depending on the nature of the form, and its use, a court might conclude, if the defense is asserted, that infringement is assuaged by the doctrine of fair use. To prevail, however, a full trial would be required. If a defendant can convince the court that the legal form is dictated solely by function, requisite originality may be missing, but that struck me as a long shot. Finally, the argument that the underlying idea can only be conveyed in a more or less stereotyped manner is an argument, by the way, that Professor Nimmer rejects.

My pulse began to settle and my breathing became regular. In the privacy of my own office, after all, what could go wrong? And I looked across the desk at that pleading with another firm's copyright notice and wondered.

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