Part II. Bad Apple

Copyright

The MacBook Air manual ("Manual") is a collective work made of the composite parts of copy, drawings, and layout with each contributor potentially possessing a copyright in each discrete part and Apple possessing a copyright in the whole. (§101 – "Compilations")

Although sets of instructions typically are not copyrightable subject matter (Morrissey v. P&G), here, Max's copy is more than just directives. "Congratulations, you and your MacBook Air were made for each other" is a superfluous, creative statement and is exemplary of the tone and style of the copy throughout the manual. Fruit Basket will argue that the policy underpinnings of the merger doctrine (Baker) preclude a copyright in the text of the Manual, this argument will likely fail and a copyright in the text can be established. (Mitel v. Iqtel.)

Takila's sketches may be derivative works of the MacBook Air and its component parts such that Takila can obtain her own copyright in the drawings if she can show that she introduced substantial originality. (§103(a)) (The Manual includes both Takila's sketches and other graphics, such as the icons and screenshots. Even if Takila is responsible for manipulation of these other graphics, they are nevertheless recognizably copyrighted property of Apple and need not be discussed here.) The other two requirements to obtaining copyright for derivative work – permission and fixation – were clearly met here. It is unclear whether Takila had introduced substantial originality to her sketches of the MacBook Air to make this a derivative work. These sketches show enough originality to at least to meet the low bar set in Bleistein. Here too, there is an element of "personality." After all, Apple could have included snapshots of the computer and its accessories to fulfill the same purpose. Instead, Apple hired a graphic artist who made creative choices in selection and arrangement. (Burrow-Giles.) It is true that the sketches could be viewed as simply a transformation in medium, which the court in Batlin rejected as insufficient to merit a finding of originality. (Gracen, Sherry Manufacturing) However, there seems to be more difference between the derivative and the original here than in Eden Toys where the court found a copyrightable derivative work.

Despite the individually copyrightability of the text and drawings, Bonnie's arrangement of these elements on each page shows sufficient creativity and originality to meet the requirements of Feist for copyrightability of a compilation work.

Fruit Basket will have a contrary opinion of Takila's copyright – that the change in medium was only that and did not surpass the modicum of creativity requirement necessary for the drawings to be independently copyrightable as a derivative work. Fruit Basket will also argue that a copyright is precluded in the whole because the entire Manual describes a "procedure" which is classified as uncopyrightable subject matter under §102(b), "regardless of the form in which it is described. . . [or] illustrated. . ."

Ownership

To the extent that any of the elements in the Manual are "works for hire" under §201, they are owned by Apple. Apple owns Max's text for the Manual since Max is an Apple employee. (§101)

The multi-part test of CCNV v. Reid determines whether Takila is classified as an Apple employee or an independent contractor for copyright purposes. Six factors favor employee status: Takila has been working on projects for Apple for the past six years. She worked on the Manual mainly in her cubicle at

Apple, using Apple equipment, and thus lending her work to constant supervision by the project manager and Apple employee, Max. Further, Apple is certainly a for-profit enterprise in the business of manufacture of consumer electronics. Apple likely creates a manual for each product so the creation of these manuals could be considered in the scope of Apple's regular business. It is not unlikely that Apple could employ graphic designers specifically for the purpose of designing product manuals. If Takila is found to be an Apple employee under these factors, then the copyright in any work that she did on the project is owned by Apple.

Running counter to a finding of employer-employee relationship are the factors that favor Takila's independent contractor status. For instance, the artistic skill required to draw these sketches is likely beyond the abilities of the typical Apple employee; Takila, on the other hand, is a professional graphic designer. If Apple wanted to hire Takila for another project following her work on the Manual, Takila could accept or reject this assignment at will. Finally, though Takila and Apple have had a years-long professional relationship, she is always paid on a per-project basis, "a method by which independent contractors are often compensated." (CCNV citing Holt v. Winpisinger.) Takila does not receive a salary or any standard employee benefits such as health insurance or a pension. Finally, Takila has not yet been paid for her work on this project.

Although there may be a greater number of factors that tend to classify Takila as an employee, none of the factors is singularly dispositive. They must be viewed in the totality of the circumstance. So, although the factors on both sides seem fairly evenly matched, the fact that Takila has been paid on a per-project basis for the past six years and does not receive the same benefits as Max, a five year employee, tends to tip the balance more in favor of Takila's status as an independent contractor.

If Takila is indeed an independent contractor apparently without a work for hire agreement with Apple, she owns the copyright in her drawings in the manual. (CCNV.) Even so, it would appear that she has given implicit permission for Apple to use her drawings. She did not independently create sketches of MacBooks that Apple then, without permission, incorporated into its Manual. She was hired by Apple for this specific project. She worked closely with Bonnie and Max, an Apple employee and the project supervisor, to complete the Manual. If she tried to sue Apple for the copyright, the Court would likely find at least joint authorship here as in CCNV.

The same multi-part analysis could be conducted for Bonnie, with the only real difference being her two additional years working with Apple. However, due to the presence of the agreement between Bonnie and Apple, a finding of an employer-employee relationship is not necessary. Even with a finding of independent contractor status, under §101(2), Bonnie and Apple have expressly agreed that her work on the Manual shall be considered a work made for hire and thus, property of Apple.

As the employer or hiring party under the work for hire doctrine Apple holds the copyright to the entire compilation, the completed Manual. (§201(b))

Fruit Basket will argue that Apple does not own the copyright in the drawings and that the text is not copyrightable. Thus, instead of a collective work, the Manual is only a compilation work of uncopyrighted and uncopyrightable material and the copyright in this work is very thin. (Feist.)

Further, Fruit Basket will claim that under §103(a), that Apple's copyright of the compilation does not extend to Takila's drawings to the extent that she did not expressly license Apple to use her drawings.

Fruit Basket's Infringement

Apple will bring claims of infringement of the rights of reproduction and distribution against Fruit Basket under §§ 106(1) and 106(3), respectively.

Apple would ordinarily have to prove probative similarity to show copying before it could move on to the improper appropriation of protected elements to show taking of copyrighted work. (Arnstein.) However, here Fruit Basket is clearly taking the work itself. Fruit Basket has access to the Apple website with the link to the manual in .pdf form. As computer specialists, it would be simple for Fruit Basket to download the manual from the Apple website and send a .pdf copy to Popular. No more analysis of copying is required.

Fruit Basket will raise the defense that the Manual was freely available online to anyone who wanted it. All Fruit Basket did was to make the Manual more easily available to its customers. Apple will counter that it holds the exclusive right to distribute the Manual. Also, it will argue that the purpose of the digitally-available Manual was for Apple customers and potential Apple customers. Also, there is no such thing as a digital, first sale doctrine. If Popular wanted to defend its claims using the first sale doctrine, it would have to first show that it had legitimately bought or acquired each copy of the Manual it was giving away. (§106(3)) To bolster this argument, Popular would argue that by printing the freely available copies of the Manual and selling them with the legitimately purchased, newly refurbished Macs, it was doing no more than the defendant in Fawcett.

Any fair use argument that Fruit Basket might make will necessarily fail. The Manual is slightly commercial in nature, in that it accompanies an Apple product and Fruit Basket's use of the Manual is not transformative whatsoever. The original work was sufficiently creative to garner a copyright. Fruit Basket took the entire original work. Apple may suffer market harm if Fruit Basket's use of the printed manuals causes a case of apparent agency. Apple is very conscious in protecting its brand and making sure there is uniformity throughout.

Fruit Basket will again argue that the entire Manual is uncopyrightable since it is only a set of instructions. However, these instructions are not mere listing of ingredients or contents. They surpass the modicum of originality requirement posed in Feist.

Finally, Fruit Basket will claim that the complete Manual is a "useful item" under §113 and its elements cannot be adequately separated from its usefulness to warrant copyright. (Mazer v. Stein.) Here, Fruit Basket might have a successful claim.

Popular's secondary liability

Apple will claim that Popular is guilty of both vicarious and contributory liability. (Fonovisa v. Cherry Auction.) In addition to raising all of the defenses brought by Fruit Basket, Popular will also defend against the contributory liability claim by arguing that its policy was not to ask about the copyright of a .pdf file and thus it had no knowledge that Fruit Basket was potentially infringing. Of course, the knowledge prong in the contributory liability test can be satisfied by constructive knowledge, which arguably was met here. Popular will further argue that the Betamax case changed the standard for contributory liability and that in taking print orders, Popular is capable of many non-infringing uses. It is likely that Popular will win on this test. Also, this test is contingent on a finding of infringement on Fruit Basket's part.

However, Popular's actions meet every prong of the vicarious liability test. Printing the Manual (or any other copyrighted material) is obviously directly profitable for Popular. Also, like Cherry Auction, Popular had the right and ability to deny its printing services to anyone. The difficulty would be in imposing a duty on Popular to confirm copyright. In most cases, it would be administratively difficult for Popular to tell whether the customer submitting the .pdf file was the true copyright owner. However, in this instance it would be fairly simple for Popular to differentiate between printing a specified number of copies for a third-party customer and gaining Apple as a client. Apple would have a difficult bar to surpass in trying to impose a duty on Popular to confirm copyright, but if the Court were to look at the instant case only, Apple might win on vicarious liability.

Conclusion

Apple can likely prove that all elements of the Manual are separately copyrightable and all are individually owned by Apple under the work for hire doctrine. Thus, Apple owns the copyright in the collective work and can pursue claims against infringements of its exclusive rights to reproduction and distribution. The success of these claims will depend on the importance the Court places on the unlimited availability of the Manual on the Apple website.

***

This essay is 1984 words.