Digital Media and the New US Copyright Office Practices

Impact of Copyright Office recently released draft Compendium of U.S. Copyright Office Practice overhaul on digital standards and practices.

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Much has been written about the so-called "monkey selfie" and the dispute about whether nature photographer David Slater owns a photo snapped by a macaque monkey. The popular story sprung out of the U.S. Copyright Office's proclamation, in its new draft Compendium of U.S. Copyright Office Practices, that it will not register works produced by "nature, animals or plants." But as entertaining as that story is, there are more practical and far-reaching consequences for businesses that arise out the Copyright Office's overhaul of its standards and practices. This is especially true for digital and Internet-based businesses and technologies. This article identifies some of those issues—and raises questions that remain as the Copyright Office works to finalize and implement its new standards by the end of this year.

Background of the New Compendium

In August, the Copyright Office released its first revision to the Compendium of U.S. Copyright Office Practices in nearly three decades. The Compendium is used by Copyright Office staff as a general guide to policies and procedures—and it's a good resource for businesses and practitioners seeking copyright protections. And while the Compendium has no legal force in court, it could potentially serve as persuasive authority in copyright litigation, similar to the way the U.S. Patent and Trademark Office's Manual of Patent Examining Procedure is cited in patent litigation.

The 1,200-plus-page revised Compendium, which will remain in draft form until December, constitutes a major overhaul of standards and practices. Departing from previous editions, the proposed revisions are intended to render Copyright Office practices more transparent. For example, the new Compendium features detailed examples and other tools designed to render the nuances of copyright law more navigable for both practitioners and the general public. But one of the more striking features is that it contains lots of new information on digital and Internet-based media and technologies.

Mechanical Processes: 3-D Printing and Beyond

While the new Compendium provides extensive guidance on many issues associated with copyright registration, its explanation of the human authorship requirement in the cotext of mechanical processes is perhaps the most consequential to the technology industry—and, in particular, to the evolving 3-D printing industry.

Chapter 306 of the Compendium addresses mechanical processes, and states that "[t]he Office will not register works produced by a machine of mere mechanical process that operates randomly or automatically." As an example, the Compendium describes a mechanical fabric-weaving process that randomly produces irregular shapes in the fabric without any discernable pattern. The Copyright Office concludes that the output of this process would be ineligible for copyright registration because it lacks creative input or intervention from a human author.

This example is particularly interesting for the 3-D printing industry. In theory, the Compendium's requirement of creative input or intervention from a human author is easy to understand. In practice, however, the Compendium offers little guidance over the amorphous "separability" framework courts often use to discern functional elements that are not eligible for copyright protection, from nonfunctional or design elements that are eligible for copyright protection. The "separability" analysis has no definitive test and can be difficult to prove in litigation. Thus, while the new Compendium attempts to provide some clarification in this space, businesses should continue to monitor case law developments closely for further guidance.

Website Content

The new Compendium features an entire chapter devoted to websites and website content. This is particularly noteworthy considering that the last major revision occurred in 1984, before the wide use of the Internet, and when cutting-edge technology included Apple's Macintosh and the first version of Microsoft's Windows operating system.

What Is Eligible for Copyright on a Website? Recognizing that a website in and of itself does not constitute copyrightable subject matter, the new Compendium identifies three layers of potentially copyrightable material on one:

1. Perceptible content (i.e., text, photographs and audiovisual works).

2. Compilation authorship (i.e., authorship in the way in which the copyrightable text and/or digital files are selected, coordinated and/or arranged).

3. Underlying markup language or style sheets that structure, arrange and coordinate the manner in which the user views or otherwise perceives the content on the site.

While the first two categories are fairly straightforward, understanding the third category requires consideration of other issues addressed by the Compendium. Specifically, it identifies the following website elements as ineligible for copyright protection: functional design elements, domain names, hypertext links and the "look and feel" of a website. Furthermore, consistent with the human authorship requirement, HTML code generated by design software is unlikely to qualify for registration. And the Copyright Office will not register HTML code as a computer program because HTML does not constitute source code.

Authorship and Ownership on a Website: The new Compendium provides considerable guidance on ownership rights in the cotext of website development—an issue that is all too often overlooked in the process of launching a new site. For instance, it makes clear that an individual or entity hired to create

a website is considered an independent contractor who retains ownership of the work. Thus, as the Compendium suggests, a business that wishes to retain formal ownership rights of a website would be wise to obtain a signed, written agreement that transfers the rights in the work. Failure to adhere to this formality is now perhaps less excusable in the face of these explicit instructions.

User-Generated Content: Another unique issue in the cotext of websites is the ownership of user-generated content—i.e., user comments, reviews, photographs or videos posted to sites like Facebook, Instagram or Flickr. The Compendium notes that users, like third-party contractors, are authors of their own content. For this reason, websites often seek to acquire ownership of user-generated content by requiring users to accept a website's terms of service before uploading content.

Observing that "th[e] issue has not been addressed by many courts," the Compendium states that the Copyright Office will accept applications from website owners on user-generated content so long as there is a written, digitally signed transfer agreement. In this sense, the Copyright Office's stance on user-generated content tracks the generally recognized state of the law. Still, the Compendium offers little practical guidance on the associated issues that should be considered when developing a policy regarding user-generated content.

Any site that features user-generated content should consider adopting not only a policy governing transfer and ownership, but also guidelines describing how these issues are presented to users as part of the overall terms and conditions of the site. Site owners should understand the obligations imposed by enforcement regimes such as the Digital Millenium Copyright Act and the oft-litigated infringement defense of fair use. As such, any business developing or revising terms and conditions for its website with any eye toward user-generated content should consult counsel for site-specific advice.

Streaming Media

Generally speaking, copyright law has struggled to define the metes and bounds of what it means to publish a copyrighted work in the Internet age. The new Compendium states clearly that the Copyright Office considers a work "published" when it is copied or made available online via an offer to distribute to a group of persons for purposes of further distribution, public performance or public display. But what about streaming or browsing—in which temporary copies ("buffer copies") of a work are routinely made as part of the process of delivering media content?

Wading into a murky issue, the new Compendium reveals that the Copyright Office does not consider streaming "publication" because, as a practical matter, the user does not receive a copy. The most consequential aspect of this position is the implication that "streaming" a work may not result in publication in a copyright cotext. In certain scenarios, this can affect the length of the copyright term, as well as the presumption of validity and right to statutory damages and attorney's fees in an infringement action.

Conclusion

The new Copyright Office Compendium offers considerable insight and beneficial guidance on nearly all aspects of copyright law—beyond the issues of the now-famous "monkey selfie." And while the manual leaves some questions unanswered—and notes that "it is important to consult court opinions

on copyright-related issues"—unlike past versions, the manual is now a good resource for anyone whose business involves digital or Internet-based technologies.

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