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Nevermore The Ravens' History?

Law360, New York (February 4, 2011) -- Should infringing history be obliterated from history? That's what the Baltimore Ravens football team is being told to do by the Fourth Circuit Court of Appeals.

On Valentine's Day 2008, illustrator Frederick Bouchat displayed little love by filing suit for copyright infringement against both the Baltimore Ravens football team and the National Football League over the use of his logo design for the team. What potential steps could a company undertake in the future to help avoid being sued over an unsolicited submission of ideas or content?

This fall, for the fourth time, the Fourth Circuit considered the consequences arising from the original Bouchat suit. While the Ravens have long since changed their logo, the historic footage of the team's first three seasons, of course, still features the original, infringing "Flying B" logo.

In an opinion that raises serious questions about what is correct interpretation of copyright law the court held that because "depictions of the logo in highlight films ... [were] nontransformative and commercial," the defendants were unable to successfully invoke fair use doctrine for the appearances of the Flying B logo on old highlights films.[1]

Will this require the blurring or removal of the old Ravens logo on the entire period of historic footage of the team in action? Quite possibly. This outcome, however, not only sounds impractical, but also unfortunately appears to arise from a questionable fair use holding.

Background

When the Baltimore Colts left for Indianapolis, football-mad Baltimore needed a new team. The NFL announced a fresh Baltimore identity following the departure of the team formerly known as the Cleveland Browns in 1995. Frederick Bouchat, security guard and amateur artist, submitted his unsolicited suggestion for a logo for the new Baltimore Ravens (the shield drawing). Bouchat's only requests were that, if the logo was used, he be sent a letter of recognition and an autographed helmet. When the official "Flying B" logo for the Ravens was revealed, it looked similar to Bouchat's design — yet no letter, no helmet were received. Ultimately, he decided to register his copyright and file suit in federal court.

Bouchat had faxed a copy of his shield drawing to the Maryland Stadium Authority office, requesting that the chairman (with whom he had had earlier contact) pass the illustration along to the president of the Ravens. According to the district court, the drawing was then, "through a series of misunderstandings," sent to the Stadium Authority chairman's law office, passed on to the temporary Raven's headquarters, sent to the NFL in New York, and then on to the commercially hired artists working on the new logo design.

As the district court stated, "There is no reason to believe that the Ravens or the NFL intentionally caused Bouchat's drawing to be provided to the artists. Nevertheless, the shield drawing was provided to the artists who used Bouchat's drawing as the basis for the 'Flying B Logo.' The NFL and Ravens, believing that the Flying B Logo had been developed as a completely original work, used the logo as the team's primary identification symbol."

The procedural history of the case is detailed. Suffice it to say that the most recent appeal to the Fourth Circuit followed on the heels of a series of decisions handed down 1) affirming National Football League Properties' liability for infringing on Bouchat's copyrighted shield logo; 2) affirming the jury award for Bouchat in the amount of zero dollars; and 3) affirming preclusion of damages.[2]

Bouchat ultimately sought "an injunction prohibiting all current uses of the Flying B logo and requiring the destruction of all items exhibiting the Flying B logo." [3]

The Fourth Circuit upheld the district court's finding of fair use for the depictions of the old logo in the Ravens corporate lobby where team history is displayed. Bouchat, however, will not be prevented from seeking injunctive relief for the appearances of the logo in the highlight films of the team's first three seasons. Bouchat wants his logo removed from all of the NFL highlight films for sale featuring footage from 1996, 1997 and 1998.

Discussion

Although U.S. copyright law grants a monopoly on use of a copyrighted work to the rights holder, fair use doctrine allows for use without permission in certain circumstances as a "First Amendment safeguard"... designed to prevent copyright law from stifling the very creativity copyright law is designed to encourage." [4]

Four nonexclusive factors listed in Section 107 of the Copyright Act guide the fair use analysis: 1) purpose and character of the use; 2) nature of the copyrighted work; 3) amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) effect of the use upon the potential market for ... the copyrighted work. "Absent a valid defense of fair use, defendants' current depictions of the Flying B Logo would violate Bouchat's copyright in the Shield Logo." [5]

Invoking surprising interpretations of the first and fourth factors (citing perhaps incorrectly the fourth factor as most important), the majority held that the purpose and character of the use was nontransformative and that the commercial nature of the historical footage films meant that Bouchat should not be prevented from seeking injunction regarding the use of his copyrighted work in the highlights films the Ravens had for sale.

Addressing the first fair use factor — purpose and character of the use — the Fourth Circuit's majority opinion deemed "no transformative purpose behind the depiction of the Flying B Logo in the highlight films. [Holding that] the use of the logo in the films serves the same purpose that it did when [first used by the team]: the Flying B logo identifies the football player wearing it with the Baltimore Ravens. The simple act of filming the game ... did not 'add something new' to the logo." [6]

To highlight the nontransformativeness of the use, the court used the example of a Ravens' fan watching a live game on television in 1996, compared to a Raven's fan in 2010 watching that same game as part of an old highlights film on his television. As Judge Paul Niemeyer pointed out in his dissent, however, the use in these instances is, in reality, changed from the Ravens franchise's identifying image to an incidental yet necessary part of history. In addition, the majority opinion fails to mention that the Ravens changed their logo in 1999 in response to Bouchat's original victory in the case.

The distinction that the majority seemed to miss when comparing the two viewers in its example is that the 1996 viewer is watching the action with a contemporary identifier on the team's paraphernalia while the 2010 viewer is not seeing a contemporary logo design on helmets and uniforms. He is watching a part of the team's history.

The old logo's appearance as part of that is merely accompanying historical fact and presents no real current advantage to the team. "There is no evidence or suggestion that the Ravens collected the highlights from the first three years to display the Flying B Logo or to promote the team through it." [7] As the Niemeyer insists in his dissent, the original purpose was "identifying the franchise" while the new purpose is "recounting and recalling franchise history."

After finding that the second and third factors also weigh against fair use, the majority began analysis of the fourth factor — effect of the use upon the potential market for or value of the copyrighted work — by noting that it is "undoubtedly the single most importance element of fair use."

While this is, indeed, a quote from a Supreme Court case, general consensus holds that the Supreme Court's statement in *Campbell v. Acuff-Rose Music Inc.* overruled this conception, holding that all factors should be weighed together: "the importance of [the fourth] factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors." [8]

Thus, not only does the majority attribute excess weight to the fourth factor, but its finding of harm also seems amiss: a jury found in the original trial that there were no damages collectable by Bouchat as the logo is not what produced income for the team. Based on that finding, it is difficult to imagine what potential market or income the inclusion of the Flying B Logo in the highlight films for sale is being affected.

Remedy?

Even if the fair use analysis of the majority opinion was well-grounded, what possible method could the Ravens undertake to satisfy a potential injunction on the use of the Flying B logo in the highlights films? The only option seems to be to blur out thousands of appearances of the image on helmets, jerseys, fan paraphernalia, etc.

As Niemeyer's dissent notes, "[i]ndeed, the remedy Bouchat seeks is even more extensive, as he would also require the NFL to blot out the histories of any of the 24 NFL teams that played the Ravens during the 1996-98 seasons, because the memorabilia and films from those games also include incidental displays of the Flying B logo." [9]

The ramifications are unclear. If, for example, an assassin wearing an infringing t-shirt is depicted in news footage, would news organizations be prohibited from airing the footage?

The major takeaway is for companies and their lawyers to figure out how to manage and channel unsolicited ideas and content. Unsolicited ideas, if managed well, can help a company. Starbucks encourages user feedback and ideas. See <http://mystarbucksidea.force.com/ideaHome>.

The Internet and social media can make a regularized idea/content submission plan work. Why not accept new ideas wherever they come from? In other words, if the process is carefully thought out, acceptance of unsolicited ideas can be a great idea. How can a company avoid the problem of liability for idea/content submission?

1. A company should implement an idea submission policy.
2. The company should rigorously and consistently follow Rule No. 1.

3. The Company should require all idea submitters to sign an idea submission agreement which protects the company.
4. Encouraging new ideas can be beneficial if the process is carefully planned and implemented.
5. For companies that are not willing to risk accepting new ideas from others, the safest route is to never accept an unsolicited submission except from a known agent or trusted partner.

In other words, be prepared. If someone offers unsolicited ideas or content, inform them of your company's idea: follow the established policy.

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[1] Bouchat v. Baltimore Ravens Ltd. P'ship, 619 F.3d 301, 306 (4th Cir. 2010).

[2] Bouchat v. Baltimore Ravens, Inc., 241 F.3d 350 (4th Cir. 2000); Bouchat v. Baltimore Ravens Football Club Inc., 346 F.3d 514, 517 (4th Cir. 2003); Bouchat v. Bon-Ton Dep't Stores Inc., 506 F.3d 315 (4th Cir. 2007).

[3] Bouchat v. Baltimore Ravens LP, 619 F.3d 301, 306 (4th Cir. 2010) .

[4] Brief of Amici Curuae International Documentary Association at al. in Support of Defendants-Appellees' Petition for Rehearing or Rehearing En Banc, 619 F.3d 301, 323 (4th Cir. 2010) (No. 08-2381) (quoting Eldred v. Ashcroft, 537 U.S. 186, 220 (2003)).

[5] Bouchat v. Baltimore Ravens Ltd. P'ship, 619 F.3d 301, 307 (4th Cir. 2010).

[6] Bouchat v. Baltimore Ravens Ltd. P'ship, 619 F.3d 301, 311 (4th Cir. 2010) (citation omitted).

[7] Bouchat v. Baltimore Ravens Ltd. P'ship, 619 F.3d 301, 321 (4th Cir. 2010) (Niemeyer, dissenting).

[8] Campbell v. Acuff-Rose Music Inc., 510 U.S. 569, 590 n.21 (1994).

[9] Bouchat v. Baltimore Ravens LP, 619 F.3d 301, 323 (4th Cir. 2010) (Niemeyer, dissenting).

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