



Featured News

**COPYRIGHT ALERT**

**De Minimis Use Is Not an Affirmative Defense for a Copyright Infringement Claim**

In September 2021, in the case of *Bell v. Wilmott Storage Services, LLC*, the Ninth Circuit, reaffirmed that the “*de minimis* use” defense is inapplicable if actual copyright infringement is established under 17 U.S.C. 106. In *Bell*, the lower District Court had dismissed the plaintiff’s copyright infringement suit on summary judgment, based on a putative *de minimis* use defense. The Ninth Circuit reversed the dismissal on appeal.



Under federal copyright law, the defense of *de minimis* use is available to a defendant when a plaintiff establishes that the defendant copied a protected work. Under the defense, if the defendant can show that that the minimal use of the protected work is not substantially similar to the original work, the minimal use will be deemed non-infringing. In other words, in evaluating the merits of the *de minimis* use defense, the Court looks to the actual amount, percentage and/or totality of the author’s work that was incorporated by the defendant, into the allegedly infringing work, and the prominence that the copied information has in the defendant’s “new” work. Music, and in particular, hip hop and rap music involving artists “sampling” other artists’ earlier musical works (i.e., borrowing several bars from the earlier work, creating a loop out of those bars, and mixing that loop into their “new” composition), presents perhaps the most common example of an artist utilizing another artist’s earlier work, and encompassing part of the earlier work into a “new” song. Indeed, such *de minimis* use in the form of “sampling” by one artist, of another artist’s music, has been the subject matter of multiple high-profile lawsuits over the last three (3) decades. In such cases, the *de minimis* use defense has been asserted both successfully and unsuccessfully, depending strictly on the extent to which the earlier work was incorporated into the later work and the subjective interpretation of courts and juries.

The facts of *Bell* are factually unique from a technological standpoint. The *Bell* plaintiff published a photograph online that he had taken of the downtown Indianapolis skyline. Subsequently, the plaintiff’s image was downloaded by VisitUSA.com and stored on their internal web server. However, the image was never displayed publicly or posted on the defendant’s website. *Wilmott Storage Services* then purchased VisitUSA.com.

The photo at issue was accessible only through the website in one of two (2) ways: either by manually entering the specific website address/URL; or by using a “reverse image search”.<sup>[1]</sup> The Ninth Circuit acknowledged that the only way the plaintiff was able to locate his image on the defendant’s website was through his “reverse image search”.

Upon discovering that his photo was accessible on the defendant’s website, the plaintiff notified the defendant. Thereafter, the defendant failed to properly

restrict access and/or remove the photo. (Wilmott attempted to take remedial action by renaming the image). Despite plaintiff's efforts, his photo continued to be accessible through reverse image searches. The Ninth Circuit, in *dicta*, acknowledged that the average Internet user would not have been able to access the photo by navigating the options available on the defendant's website.

Notwithstanding, however, the Court concluded that when defendant's server transmitted the photo, such that the photo could be displayed, an actual infringement occurred.

*Bell* once again demonstrates that if a complete copy or transmission of a copyright work takes place, infringement has taken place. *Bell* also stands for the proposition that liability can apply to a defendant even if that defendant undertakes preventative measures (and fails) to stop unintentional acts of copyright infringement. If a *prima facie* case of copyright infringement occurs, in order to avoid legal consequences, a company should consult with counsel who possess both the legal knowledge of the aspects of the claim of infringement, along with the technological skills incident to curing the alleged infringement.

If you have questions or would like further information regarding copyright infringement claims, please do not hesitate to contact us.

[1] A "reverse image search" occurs when a search engine builds a mathematical algorithm around an image to analyze and locate similar images it has indexed throughout the web in lieu of using traditional word searches.



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