



## LAW ADVOCATE GROUP, LLP

9701 Wilshire Blvd. Suite 1000 Beverly Hills, CA 90212

Phone: 310-651-3065 Fax: 310-601-7110

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# Doron F. Eghbali Entertainment Law

## [What Is Copyright Infringement?](#)

Sunday, October 13, 2013 by [Doron F. Eghbali](#)

Copyright infringement is referred to as violation of any of copyright owner's exclusive rights without permission which falls within the definition of infringer under the Copyright Act 17 USC Section 501. In this article, we explore in some depth what constitutes copyright infringement, including its elements and disparate types of copyright infringement as recognized by statutes and courts.

### 1. ELEMENTS OF COPYRIGHT INFRINGEMENT

Plaintiff in a Copyright Infringement action must prove two elements (see, *e.g.*, [Narell v Freeman](#) (9th Cir 1989) 872 F2d 907, 910):

1. Ownership of either the copyright in question or an exclusive right under it; AND
2. Unauthorized copying of protected elements by the defendant amounting to unlawful appropriation; i.e. violation of the exclusive rights listed in 17 USC Section 106:

#### 1) COPYRIGHT OWNERSHIP

To prove copyright ownership, a copyright registration certificate is a prima facie evidence of the facts stated in the registration. 17 USC Section 410(c); [United Fabrics Int'l, Inc. v C&J Wear, Inc.](#) (9th Cir 2011) 630 F3d 1255.

To rebut this presumption, the challenger bears the burden of rebutting this presumption as articulated in the copyright registration certificate. [United Fabrics Int'l, Inc. v C&J Wear, Inc.](#) (9th Cir 2011) 630 F3d 1255.



## 2) COPYING COPYRIGHTED MATERIAL

Even though, theoretically, alleged copying of the copyrighted work can be demonstrated by admission of the defendant or third parties witnessing the copying, it is often the case that proving copying by such methods is improbable. Often, defendant denies copying and there is no or little direct evidence linking defendant to copying. Accordingly, practically, to prove copying plaintiff is left to present evidence to prove such copying.

### i) DIRECT COPYRIGHT INFRINGEMENT

To establish the prima facie case of direct copyright infringement in the Ninth Circuit, Plaintiff must show (A&M Records, Inc. v Napster, Inc. (9th Cir 2001) 239 F3d 1004, 1013; Narell v Freeman (9th Cir 1989) 872 F2d 907, 910):

- The Plaintiff's ownership of the work;
- The Defendant's copying of the copyrighted elements of the work or other violations of the Plaintiff's exclusive rights as copyright holder.

Nonetheless, as indicated, in most cases the evidence of direct copyright infringement is not easy to find or ascertain. Consequently, in most other cases, the Plaintiff needs to show that:

1. The Defendant (infringer) had access to the copyrighted work; and
2. The 2 works are substantially similar.

Now, to ascertain substantial similarity, Ninth Circuit employs two tests: Extrinsic Test and Intrinsic Test:

### 1. EXTRINSIC TEST FOR SUBSTANTIAL SIMILARITY

Extrinsic test is an objective test that focuses on "articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters and sequence of events."Kouf v Walt Disney Pictures & Television (9th Cir 1994) 16 F3d 1042, 1045.

The Ninth Circuit in Metcalf v Bochco (9th Cir 2002) 294 F3d 1069, enunciated the Substantial Similarity Test. That case involved writers who alleged the contents of their script had been stolen for television show. The Court, applying the Substantial Similarity Test, found that there was a genuine issue of triable fact as to substantial similarity. The Court reasoned that the similarities between the treatment writers alleged to have been copied and the television shows produced by defendants were beyond similarities of theme and such similarities were no literary accident. The Court found that "infringement can be based on original selection and arrangement of unprotected elements." 294 F3d at 1074.



## 2. INTRINSIC TEST FOR SUBSTANTIAL SIMILARITY

Intrinsic test is a subjective test focusing on whether an ordinary audience member would find the two works in their entirety as substantially similar. The test is whether "defendant took from plaintiff's works so much of what is pleasing to...lay [persons] who compromise the audience for whom such popular [works are] composed, that defendant wrongfully appropriated something which belongs to the plaintiff." Sid & Marty Krofft Television Prods., Inc. v McDonald's Corp. (9th Cir 1977) 562 F2d 1157, 1165; Berkic v Crichton (9th Cir 1985) 761 F2d 1289.

### ii) INDIRECT LIABILITY FOR COPYRIGHT INFRINGEMENT

Even though the Copyright Revision Act of 1976 does not expressly provide for indirect copyright infringement, the case law has recognized some circumstances under which liability could arise even if the party did not directly engage in the infringing conduct. See MGM Studios, Inc. v Grokster, Ltd. (2005) 545 US 913, 162 L Ed 2d 781, 125 S Ct 2764. In Grokster, Court found defendants liable for distributing a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken, to foster such infringement, regardless of the device's otherwise lawful uses.

Generally, there are two types of indirect liability for copyright infringement:

1. Contributory Infringement
2. Vicarious Infringement

**1. CONTRIBUTORY INFRINGEMENT:** Contributory infringement is when defendant materially contributes to another's direct copyright infringement of the plaintiff's works and the defendant engages in such acts with knowledge of the infringement. Ellison v Robertson(9th Cir 2004) 357 F3d 1072, 1080.

**2. VICARIOUS INFRINGEMENT:** Vicarious infringement involves situations where defendant receives direct financial benefit from the copyright infringement of another. Unlike contributory infringement where proving defendant's knowledge of the acts is necessary, for vicarious infringement plaintiff does not have to prove defendant's knowledge of the copyright infringement. Ellison v Robertson(9th Cir 2004) 357 F3d 1072, 1080.

### SALIENT NOTE

This article NEITHER supplants NOR supplements the breadth or depth of such esoteric topic. In fact, this article ONLY provides a rudimentary analysis of such rarefied subject matter. For questions, you should contact [Doron Eghbali](#).

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[DORON EGHBALI](#) is a Partner at the Beverly Hills Offices of [Law Advocate Group, LLP](#). [Doron](#) Primarily Practices [Business](#), [Real Estate](#) and [Entertainment Law](#). [Doron](#) Can Be Reached at: 310-651-3065. For More information, Please, Visit: [HERE](#).