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Magic, Pantomime, and Copyright: New Developments

By Mark G. Tratos and Bethany L. Rabe – January 7, 2015

In the courtroom, as in entertainment, what is unspoken can be the most important element in a performance. Trial evidence often involves a witness demonstrating a distance, a size, or the way another party suddenly moved; a jury may judge a witness's credibility based on his or her demeanor and body language. A prosecutor might gesture with the murder weapon during his or her closing argument at a criminal trial. Gesture can be a powerful tool in the courtroom, and the same is true in theatre and live stage performance. Gestures, movement, and positioning are important parts of dance, opera, music, theatre, and magic. Yet in terms of copyright protection, words—in the form of lyrics, monologue, or dialogue, or banter with the audience—have oftentimes taken priority over gesture or movement.

Nevertheless, at least for the last 40 years, the copyright laws have specifically afforded protection to facial expression and body movement. And while the proposition might have been stated only in reliance on Congress's inclusion of pantomime in the Copyright Act of 1976, the recent district court decision in *Teller v. Dogge*, No. 2:12-CV-591 JCM (GWF) (D. Nev. Mar. 20, 2014), confirms that pantomime performed on stage can be protected and enforced. Infringement of a pantomime can be punished and enjoined, and the Copyright Act's provisions for attorney fees can be applied.

Copyright's Mysterious Pantomime Protection

As early as 1868, courts were protecting dramatic works irrespective of dialogue; the famous *Daly v. Palmer* case involved the copying of a particularly dramatic scene depicting a rescue of a bound man from railroad tracks. 6 Blatchf. 256 (N.Y. Cir. Ct. 1868). Although there were some spoken words, the court noted that "[t]he spoken words in each are of but trifling consequence to the progress of the series of events," which the court held protectable.

Yet it wasn't until the 1976 Act that Congress statutorily recognized pantomime as copyrightable. Congress didn't say much when it officially added pantomime to the realm of copyright protection in the 1976 Act, simply noting that the meaning of the word was "fairly settled." The *Compendium of U.S. Copyright Office Practices*, which will take effect on or around December 15, 2014, defines pantomime as follows:

> Pantomime is the art of imitating, presenting, or acting out situations, characters, or events through the use of physical gestures and bodily movements. Long before Congress extended federal copyright protection to pantomimes, the Supreme Court recognized that a silent performance is worthy of copyright protection if it qualifies as a dramatic work. As Justice Holmes observed: "[D]rama may be achieved by action as well as by speech. Action can tell a story, display all the most vivid relations between men, and depict every kind of human emotion, without the aid of a word. It would be impossible to deny the

> title of drama to pantomime as played by masters of the art." *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 61 (1911).

Pantomimes and choreographic works are separate and distinct forms of authorship. The physical movements in a pantomime tend to be more restricted than the movements in a choreographic work, while pantomime uses more facial expressions and gestures of the hands and arms than choreography. Unlike a choreographic work, a pantomime usually imitates or caricatures a person, situation, or event. While choreography is typically performed with a musical accompaniment, pantomime is commonly performed without music or measured rhythm. U.S. Copyright Office, The Compendium of U.S. Copyright Office Practice § 806.1 (3d ed. 2014). The *Compendium*, however, does not have the force of law, and as the authors of one treatise have noted, "[t]here has been a dearth of judicial analysis of pantomime as a category of protected works." 3 Thomas Selz et al., *Entertainment Law 3d: Legal Concepts and Business Practices* § 16:32.40 (2008).

The Makings of Copyright's First Modern Pantomime Case

It all began in the 1970s, when a young Teller—now internationally famed as the silent half of Las Vegas–based magicians Penn & Teller—began performing an illusion he calls "Shadows." Those who have seen it know it is an emotionally powerful illusion. Teller, carrying a large carving knife, enters a darkened stage. A spotlight is trained upon a red rose in a white vase on a small table. The light casts the shadow of the rose on a white screen on an easel a few feet behind the table. Teller slowly approaches the easel and stabs various portions of the rose's *shadow*. Wherever his knife cuts the shadow, the corresponding portion of the *real* rose is cut and falls. Stem by stem, leaf by leaf, petal by petal the rose is demolished. The audience is rapt; you could hear a pin drop as the rose is destroyed—murdered, as it were. Then Teller "accidentally" pricks his finger with the knife and raises his hand to study the wound. The light casts the shadow of his hand on the screen and the *shadow* of his finger *bleeds*. Teller wipes his hand across the shadow, leaving a ghastly red smear as the stage goes black, and the audience, not realizing they've been holding their breath, lets out a collective gasp. It is easy to see why "Shadows" is Teller's most famous piece.

Teller had read about how Houdini endeavored to protect his Water Torture Cell by copyrighting it as a play. So after "Shadows" was perfected, Teller registered his copyright in "Shadows" as a dramatic work in the nature of a pantomime, in 1983. Nearly 35 years later, in 2012, he had occasion to enforce his rights when a Belgian lounge musician named Gerard Dogge decided to try to profit from Teller's now-famous illusion by copying "Shadows." Specifically, Dogge created a rose prop and wanted to sell it to others who wanted to perform the illusion. So, he videotaped himself performing "Shadows" using his prop and posted the video on YouTube. In the comments to the video, Dogge stated that he had seen the "great Penn & Teller" performing a "similar" illusion. He also tagged the video with the tags "Penn" and "Teller," among others. At the end of the video, a caption flashes across the screen: "Magic in Las Vegas style! Now available!"

The Lawsuit
After being alerted to the video, Teller used the DMCA takedown procedure to remove the videos from the Internet and filed suit, alleging copyright infringement and unfair competition. Following a contentious discovery period, Teller filed a motion for summary judgment on both claims mid-2013. In March 2014, nearly two years after the suit began, the federal district court judge granted summary judgment as to the issue of copyright liability.

As copyright practitioners know, proof of copyright infringement essentially requires proof of three elements: copyright validity, the infringer's access to the infringed work, and whether the works are substantially similar. The court addressed each of them. Addressing the validity of the copyright, the court dispelled the idea that Teller could hold no valid copyright in "Shadows" because magic tricks are not copyrightable: "['Shadows' comprising a magic trick] does not mean that 'Shadows' is not subject to copyright protection," the court held. "Indeed, federal law directly holds 'dramatic works' as well as 'pantomimes' are subject to copyright protection. . . . The mere fact that a dramatic work or a pantomime includes a magic trick, or even that a particular illusion is its central feature does not render it devoid of copyright protection."

With respect to access, the court held that Dogge's comment to the YouTube video, stating that he had seen Penn & Teller perform "a similar trick," was sufficient to show access. As to substantial similarity, the court called the two illusions "nearly identical twins" and noted that the two would be "indistinguishable from each other in the mind of an ordinary observer." Criticizing Dogge's argument that things about the illusions that are not perceivable to the audience differ, the court noted that in evaluating substantial similarity, the proper comparison is between "the *observable* elements of the works in question." As such, the way what the audience sees is created is irrelevant—it is what the audience *observes* that matters.

The court also found that Teller had proven entitlement to attorney fees under the Copyright Act. Unfortunately for clarity in copyright law, the remaining issues were never tried; after summary judgment was granted on the copyright issues, Dogge essentially refused to participate in the case. Ultimately, the court granted default judgment on the remaining issues as a sanction for Dogge's refusal to participate, to include ignoring numerous court orders. Along with default judgment, the court also granted an award of fees and costs, as well as an injunction barring Dogge from, among other things, trading on Teller's reputation and goodwill and further injuring Teller's business reputation.

Protection of Magic Tricks
Although Teller was able to enforce his copyright in "Shadows" due to its unique nature as a dramatic work/pantomime, magicians historically have had a difficult time invoking the protections of most of the intellectual property regime, as no form of protection perfectly fits a magician's needs. Nevertheless, depending on what exactly a magician is seeking to protect, there are options available.

It is exceedingly difficult to protect a prop, standing alone. In the early part of the last century, some magicians tried by obtaining patents on their props. This strategy, however, has the serious shortcoming of making the patented material—the workings of the illusion—public after a relatively short time. For obvious reasons, this is less than desirable. A design patent, which protects the ornamental aspects of a useful object, also could potentially provide some benefit to a magician under the proper circumstances. But for the most part, those seeking to protect their props are left with the sometimes-unpredictable law of trade secrets, nondisclosure agreements, and state law remedies.

Trademark law and unfair competition are mixed in terms of protection. It is probably not useful to protect a prop, except perhaps in a very specific set of circumstances—e.g., where a unique prop itself serves as a source identifier of the magician's services. However, trademark law may of course protect the brand under which a magician offers his or her services, and should be able to prevent one magician from trading on the goodwill and reputation of another via the unfair competition cause of action.

Right of publicity, though not technically an intellectual property right, also might serve to protect well-known magicians with respect to their most well-known illusions. In the famous *Motschenbacher R.J. Reynolds Tobacco Co.* case, the Ninth Circuit reversed a district court's grant of summary judgment against a well-known racecar driver. 498 F.2d 821 (9th Cir. 1974). The driver, Motschenbacher, had sued R.J. Reynolds Tobacco Company for using footage of his racecar in a video advertisement. Although R.J. Reynolds had altered the footage with the apparent intent of distinguishing the car from Motschenbacher's—by changing the car's number, for example—certain distinctive identifiers remained.

Motschenbacher himself was not visible in the commercial, but it was clear that the car had a driver. The court held that Motschenbacher was identifiable through his car, even though he could not be seen. This was enough to warrant reversal of summary judgment. To the extent a particular set as stage design or prop, like Motschenbacher's race car, could be said to be an extension of the magician's persona, such that the magician is identifiable by the illusion or prop, an argument could be made along the same lines.

Copyright protection is a simple and viable option for protecting the story line of an illusion, though not the prop itself. Pantomime protects the story told by gesture and movement. The Copyright Office has made it clear that magic tricks themselves are not subject to copyright. But as the *Teller* case demonstrates, when a magic trick is part of a plot or story line, the plot line as a whole may potentially be registered as a dramatic work or pantomime, less, of course, anything rendered unprotectable (*scenes a faire* and the merger doctrine are two potential culprits, and indeed these doctrines played a major role in one of the only recent copyright cases involving magic, *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170 (9th Cir. 2003)).

Commentators still debate the extent to which the 1976 Act protects gesture and movement, and few, if any, cases have addressed the topic in any detail. Nevertheless, magic seems particularly

well-suited to pantomime protection under the Copyright Act. This is so because most of a magician's gestures and movements are choreographed; as part of the effort of misdirection, magicians frequently use large body movements, hand gestures, and facial expressions to create dramatic effect on the stage. Teller's meticulousness in creating and perfecting a spellbinding pantomime, describing it in great detail, and performing it time and again in the same manner as it had been described in the copyright registration enabled him to enforce his rights effectively.

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