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# Health Industry Online

HEALTH INDUSTRY ONLINE • FEBRUARY 04, 2009 • [STRASBURGER & PRICE, LLP](#)

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## DEVELOPING AND PRESERVING EVIDENCE OF INDEPENDENT CREATION IN DEFENSE OF A COPYRIGHT INFRINGEMENT LAWSUIT

Many expressions of ideas used in the healthcare industry are protectable by the copyright laws. Examples include educational, training and operational materials, both textual and in computer programs. In a copyright infringement lawsuit, the infringement lies in actually copying another's work. However, because an alleged infringer is unlikely to admit copying of another's work, a trier of fact often must review evidence as to whether the alleged infringer had access to the copyright author's work. The trier of fact also analyzes the similarity of the works. If the alleged infringer had access to the copyright author's work and the two works are substantially similar, then the copyright author makes its prima facie case for copyright infringement. However, if the alleged infringer can prove his/her "independent creation" of the work, then the alleged infringer can defend against the claim of copying.

When an alleged infringer raises independent creation as a defense, the alleged infringer is directly defending the allegation of copying a work. However, because of the factual issues involved, independent creation is never a certainty, and an alleged infringer usually cannot obtain summary judgment based on the defense of independent creation. Furthermore, when presenting the defense, one court has held that an alleged infringer has the burden to produce "strong, convincing and persuasive evidence," which is beyond the usual preponderance of the evidence standard. *Scholastic Inc. v. Speirs*, 28 F. Supp. 2d 862, 869 (S.D. NY 1998), *aff'd mem.*, 199 F.3d 1323 (2d Cir. 1999). Once this burden is met, the burden shifts to the copyright author to discredit or disprove the alleged infringer's evidence of independent creation, and ultimately, a trier of fact must weigh the alleged infringer's evidence of independent creation against evidence of access and substantial similarity to determine whether the copyrighted work was infringed.

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Because the burden for proving independent creation rests on the alleged infringer, authors of works should document their creation from the very beginning of their creative process, and preserve the evidence of the evolution of the creation for, among other reasons, any copyright suit. Examples of ways to document the creative process include:

- Maintain a "creative" bound notebook or journal dated and initialed on each entry and have a corroborating witness, such as a supervisor or co-author review, sign and date each entry;
- If the work is saved on a computer, make sure a new version is saved each day, week, or month as appropriate, so that each portion of the work can be tracked;
- Maintain a file for each work and keep dated and initialed notes of when you worked on certain aspects of the work, or when you published or sold the work.

The earlier and the more detailed you document independent creation throughout the creative process, the better prepared you will be if later faced with a copyright lawsuit. For example, if an alleged infringer can produce credible evidence of creation of a work before he or she had access to the copyrighted work or before the copyrighted work was created, then a trier of fact can easily conclude independent creation of the work. See *Fogerty v. MGM Group Holdings Corp.*, 379 F.3d 348, 350 (6th Cir. 2004).

Therefore, authors should develop a way to document their creative processes on a regular basis and preserve the documentation in case they are required to produce evidence of independent creation in a copyright lawsuit

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