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Photocopying of Scientific Journal Articles: *American Geophysical Union v. Texaco Inc.*

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SUMMARY

A recent decision of the U.S. District Court for the Southern District of New York determined that the widespread practice of photocopying entire scientific journal articles by research scientists employed by profit-making companies for their individual use on the job was not a "fair use"[1] of the copyrighted works.[2] This holding has significant implications for the business community, as it seems to limit the unauthorized photocopying of journal articles by profit-making businesses.

STATUTORY PROVISIONS OF THE FAIR USE EXCEPTION

The Copyright Act of 1976 ("Act")[3] sets forth the exclusive rights of the copyright owner, along with certain exceptions to these rights.[4] Among the exclusive rights of the copyright owner is the right to reproduce the work.[5]

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1 Under the copyright statute, the "fair use" of a copyrighted work means that under certain very specific circumstances, a copyrighted work may be used, copied, or quoted without the permission of the copyright owner. *See* 17 U.S.C. § 107 (1988).

2 *American Geophysical Union v. Texaco Inc.*, 802 F.Supp. 1 (S.D.N.Y. 1992). *See* 44 BNA PATENT, TRADEMARK & COPYRIGHT J. 301-303 (July 30, 1992).

3 Pub. L. 94-553, Oct. 19, 1976, 90 Stat. 2541, codified at 17 U.S.C. §§ 101, *et seq.* (1988).

4 Martin, *Photocopying and the Doctrine of Fair Use: The Duplication of Error*, 39 J. OF THE COPYRIGHT SOC. 345 (1992).

5 17 U.S.C. § 106 (1988). "Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to

One of the most important exceptions to the copyright owner's exclusive rights in the copyrighted work is the fair use exception which allows the unauthorized use of a copyrighted work under certain circumstances.[6] The fair use exception is frequently used as a defense against claims of copyright infringement. In enacting the fair use exception, Congress did not create a specific test for determining whether a particular unauthorized use was to be construed as a fair use. Instead, Congress took statutory recognition of a list of four factors or variables to which the courts are to look in making their fair use determinations:

> 1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
> 2) the nature of the copyrighted work;
> 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> 4) the effect of the use upon the potential market and value of the copyrighted work.[7]

Congress apparently realized that these factors were "in no case definitive or determinative" but rather "provided some guage [sic] for balancing equities."[8] It seems likely that Congress developed this flexible set of criteria for analyzing the circumstances surrounding each fair use case, and that each case would be judicially analyzed on an ad hoc basis.

Courts usually apply each of the four fair use factors to the situation under scrutiny, and make their determination of whether the use was a "fair use," at the conclusion of this analysis.[9] Over the years, the courts have grappled with

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authorize any of the following: 1) to reproduce the copyrighted work in copies or phonorecords;...."

[6] Prior to the codification of the "fair use" exception in the 1976 copyright act, the fair use concept was upheld in a common law copyright action in *Hemingway v. Random House, Inc.*, 53 Misc.2d 462, 270 N.Y.S.2d 51 (Sup. Ct. 1967), *aff'd on other grounds* 23 N.Y.2d 341, 296 N.Y.S.2d 771 (1968).

[7] 17 U.S.C. § 107 (1988).

[8] H.R. Rep. No 1476, 94th Cong., 2d Sess. 65 (1976).

[9] One who violates the rights of the copyright owner is considered to be an infringer (17 U.S.C. § 501(a)(1988)). The owner may institute an infringement action against the alleged infringer (17 U.S.C. § 501(b)(1988)). A court may issue an injunction against the infringer (17 U.S.C. § 502 (1988)). An infringer may have to pay actual damages and profits (17 U.S.C. § 504(b)(1988)); or the copyright owner may elect statutory damages (17 U.S.C. § 504(c)(1988)). Legal fees and other expenses may be recovered by the owner (17 U.S.C. § 505 (1988)).

the application of the fair use exception in various circumstances, and have given varying weight to the fair use factors in the different judicial determinations.[10] The following examples demonstrate how some courts have interpreted certain fair use factors. In evaluating the first factor, the purpose and character of the work, courts have not always held that use "of a commercial nature" negates a fair use finding,[11] nor does a "nonprofit educational" purpose mandate a finding of fair use.[12] However, a defense of fair use on the basis of the first criteria will more often be recognized when the work of the defendant is for educational, scientific, or historical purposes.[13] Consideration of the second factor, the nature of the copyright work, must be evaluated upon the facts and circumstances of each particular case. Courts have interpreted the scope of the fair use doctrine narrowly regarding unpublished works which are held confidential by their authors.[14] In consideration of the amount and the substantiality of the portion of the work used, courts have looked at the quantitative factor, how much of the work is used,[15] and also the qualitative factor, e.g., the "heart" or essence of the work which is used.[16] The fair use doctrine is usually not considered to be applicable when the copying is nearly a complete copy of the copyrighted work, or almost verbatim.[17] Courts have examined the defendant's alleged conduct to see whether it poses a substantially adverse effect on the potential market for, or the value of the plaintiff's work.[18] These fair use considerations illustrate the considerable care which is taken by the courts in their application of the fair use doctrine on a case-by-case analysis.

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[10] *See*, CRS Report No. 89-30A, *Videocassette Recorders: Legal Analysis of Home Use*, and CRS Report No. 90-304A, *Copyright Law: Fair Use of Unpublished Material.*

[11] *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 593 (1985)(Brennan, J. dissenting): *Consumers Union of U.S., Inc. v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983).

[12] *Marcus v. Crowley*, 695 F.2d 2272 (9th Cir. 1983).

[13] *See, Italian Book Corp. v. American Broadcasting Cos.*, 458 F.Supp. 65 (S.D.N.Y. 1978).

[14] *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987), *reh'g denied,* 818 F.2d (2d Cir. 1987).

[15] *Consumers Union v. U.S., Inc. v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983).

[16] *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d Cir. 1986).

[17] *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1978).

[18] *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

***American Geophysical Union v. Texaco Inc.*[19]**

The central issue in this case was whether the practice of making individual photocopies of journal articles by scientists at a profit-making company was a fair use of the copyrighted works. Scientists at Texaco, a profit-making company, routinely photocopied scientific journal articles for their personal use at the office. Texaco subscribed to various journals and paid fees to the Copyright Clearance Center ("CCC"), a non-profit clearinghouse that grants permission for a fee to photocopy copyrighted materials.[20]

The plaintiff publishers brought a class action against Texaco on behalf of all the publishers who held copyrights in scientific and technical journals registered with CCC. The plaintiff contended that Texaco extensively photocopied journal articles and only made token payments to the CCC. The court examined the files of one randomly chosen Texaco scientist to view the amount of photocopied journal articles. Texaco argued that the photocopying of journal articles was a "reasonable and customary" practice in the industry, and was necessary for the conduct of scientific research and constituted a fair use of the copyrighted work.[21] The court ultimately rejected Texaco's fair use defense.

In his detailed opinion, Judge Leval first reviewed the development of the fair use doctrine. The court examined each of the fair use factors in turn and applied the criteria to the case at hand.[22] At the outset, the court noted that courts have frequently favored secondary uses that did not merely copy and offer themselves as a substitute for the original.[23] The fair use exception was utilized when the matter taken from the work was used for some creative objective or use, and where the original was transformed, instead of superseded--e.g., used as a substitute. The court observed that a two-part system of interpreting the purpose and character of the use of the work had developed.[24] Usually, the court noted, secondary users prevailed on this first fair use factor on either of two bases: the work was a transformative, non-superseding use of the original; or the use was noncommercial with a socially beneficial or widely accepted purpose. In its evaluation of the first factor in the context of the

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19 *See* note 2.

20 It was contended by the plaintiffs that Texaco underreported its photocopying of journal articles to the CCC. *See Company's Photocopying Of Articles In Scientific Journals Isn't Fair Use*, 61 U.S.L.W. 1017 (Aug. 11, 1992).

21 802 F.Supp. 1, 4-8.

22 *Id.* at 9-10.

23 *Id.* at 11.

24 *Id.* at 12.

instant case, the court concluded that Texaco's photocopying was neither transformative nor non-commerical.[25] It determined that this type of photocopying was superseding, as it merely substituted the photocopied article for the original work. The court rejected Texaco's argument that its copying was productive, since its ultimate purpose was to advance scientific discovery.[26]

Turning to the second fair use factor--the nature of the copyrighted work--the court favored Texaco's copying, as the nature of the work was mostly factual, rather than creative.[27] However, one aspect of the work favored the plaintiffs, in that the works were intended for copyright protection. The court, after looking at other fair use cases, observed that the courts have broadly applied the fair use doctrine when factual materials were copied. In this case, the court determined that the Texaco copying was primarily factual, with the use of tables and graphs. The court concluded that the nature of the copyrighted work in this case was mostly factual and that its copying primarily favored Texaco.[28]

The court determined that the third fair use factor, the amount and substantiality of the copied portion of the work, favored the plaintiffs/publishers, as the articles were copied in their entirety.[29] Texaco argued that only component parts--individual articles--rather than the entire journal were copied. The court rejected this argument and determined that copyrighted works were copied in their entirety, whether the works were a single article, or the entire issue of a journal.

In applying the fourth fair use factor, the effect on the market,[30] the court determined that the extensive photocopying of journal articles did have an effect on the market for the subscriptions for the scientific journals. The court indicated that if Texaco did not utilize extensive unauthorized photocopying, it would need to purchase additional journal subscriptions and/or increase its licensing fees to the CCC.[31]

The court evaluated all of the fair use factors, without giving special emphasis to any of the factors, and found that the analysis was favorable to the plaintiffs. The court also considered and ultimately rejected several other

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25 *Id.* at 13.

26 *Id.* at 13.

27 *Id.* at 16.

28 *Id.* at 17.

29 *Id.*

30 *Id.* at 17-19.

31 *Id.* at 18-19.

arguments which Texaco advanced favoring the fair use of the copyrighted works.[32] One of these was to compare Texaco's photocopying journal articles to home recording of television programs discussed in the *Sony* case.[33] Another argument was based upon the holding from *Williams & Wilkins v. National Institute of Health*,[34] which involved copying by scientists at the National Institutes of Health and the National Medical Library. In *Williams*, the court found fair use, but circumstances were distinguishable from the present case. In *Williams*, the copying was done by a governmental nonprofit organization devoted to the advancement of science. Another factor was that the CCC licensing system was not available at the time of the *Williams* decision. Also, the fair use exception was not codified into law until 1976. The court also dismissed other arguments which Texaco had made to justify its copying as fair use. These arguments were: 1) that the authors of the articles were unpaid; and 2) that the business photocopying fit within photocopying exceptions for libraries and educational institutions.[35] Texaco appealed the district court's decision. At the present time, there is a pending stipulation to withdraw the appeal.[36]

CONCLUSION

The *Texaco* case apparently limits widescale photocopying of scientific journal articles in situations involving profit-making companies. It can be inferred that profit-making companies can no longer make unlimited copies of journal articles without reporting to the CCC, or having numerous subscriptions to the journals. To avoid future infringement actions against profit-making companies, it would appear that additional subscriptions to journals may be necessary, as well as accurate reporting to the CCC and adequate fees paid to the CCC. The case did not address the photocopying of such articles by nonprofit organizations or educational institutions. It left unresolved such issues as the downloading (printing) of articles from computers, various forms of "computer publishing," and other data-base retrievable materials. Future courts may reconcile such reproduction from the fair use perspective.

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[32] *Id.* at 21-27.

[33] 464 U.S. 417 (1984).

[34] 487 F.2d 1345 (1973), *aff'd by equally divided Court*, 420 U.S. 376 (1975).

[35] *Id.* at 27-28.

[36] No. 92-9341, U.S. Court of Appeals (2d Cir.). Case status obtained from Clerk of Court (May 18, 1993).