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The Copyright Doctrine of Fair Use and the Internet: Caselaw

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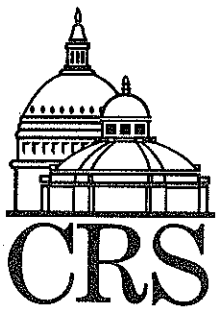

ABSTRACT

This report examines the evolving copyright doctrine of fair use within the context of copyrighted works published or placed on the Internet. American courts have been examining the various property rights of copyright owners concurrently with the unauthorized use of these copyrighted materials by Web site operators, Internet consumers, access providers, and other interested parties. This report analyzes the early fair use copyright cases concerning Internet use, as well as the most recent judicial interpretations.

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The Copyright Doctrine of Fair Use and the Internet: Caselaw

Summary

Copyright owners possess certain exclusive rights of ownership in their creative works. However, the fair use doctrine in copyright law allows, under certain circumstances, the unauthorized use of copyrighted works. Originating under common law, the fair use doctrine was codified in the Copyright Act of 1976. Under the fair use doctrine, four criteria are considered in the determination of whether the unauthorized use of a work is a "fair" use, or whether it is an infringing use: 1) the amount and character of the use; 2) the nature of the copyrighted work; 3) the amount copied in relation to the whole copyrighted work; and 4) the effect of the copying on the potential market for the copyrighted work. The courts have scrutinized the factual circumstances and applied these criteria on a case-by-case basis.

The Internet is a cooperative network of networks. Millions of users are linked nationally and internationally, including: individuals, schools, libraries, governments, and corporations. No single individual or organization owns or controls the Internet. As a result of the use of copyrighted materials placed on the Internet, various questions concerning the control, ownership, and fair use of copyrighted materials on the Internet have arisen. Copyright owners have pursued their ownership rights against the unauthorized use of their works by service providers, corporate users, individual users, and others. Generally speaking, the American courts have treated the publication or posting on the Internet as another form of communication or publication. Hence, American courts have applied the four fair use factors to individual situations involving the unauthorized use of copyrighted materials on the Internet. This report examines the case law development from the earliest cases to the most recent.

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The Copyright Doctrine of Fair Use and the Internet: Caselaw

Domestic case law has been developing which examines the copyright doctrine of fair use within the context of copyrighted works placed on the Internet without the permission of the copyright owner. Various efforts are being undertaken by the courts, Congress, and the industry to divide enforcement responsibilities and protection rights among the various interested parties: the copyright owners, the access providers, Web site operators, and Internet consumers.[1]

Generally speaking, American courts have considered the placement or publication of copyrighted materials on the Internet to be another form of expression or communication. Hence, the courts have applied a fair use legal analysis in Internet cases similar to that applied with respect to more traditional forms of communication. The report examines the statutory background and development of the fair use doctrine in copyright law and its application to works placed on the Internet.

Background

The copyright owner possesses various exclusive ownership rights in the work.[2] However, the fair use doctrine permits, under certain circumstances, the unauthorized use of copyrighted works. The doctrine, which has its origins in common law, was first codified in the Copyright Act of 1976.[3] The statute provides four criteria for the determination of whether the unauthorized use of a work is a "fair" use, or whether it is an infringing use.[4] These are: 1) the amount and character of the use; 2) the nature of the copyrighted work; 3) the amount copied in relation to the whole copyrighted work; and 4) the effect of the copying on the potential market for the

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[1] This report is limited to an examination of the domestic issues concerning the copyright doctrine of fair use within the context of the Internet. International copyright law and the Internet may present various currently unresolved concerns and legal issues.

[2] 17 U.S.C. § 106. These ownership rights include the rights to do and to authorize: 1) *reproduction* of the work; 2) preparation of *derivative works*; 3) *distribution* of copies of the work to the public by sale or other transfer; 4) with literary, musical, dramatic, and choreographic works and other works, *performance* of the work publicly; 5) with literary, musical, dramatic, and other works, the *display* of the copyrighted work publicly; and 6) in the case of sound recordings, public performance of digital audio transmissions.

[3] 17 U.S.C. § 107.

[4] If a use is infringing, the copyright owner may bring an action for infringement against the unauthorized user of the copyrighted work. 17 U.S.C. § 411.

copyrighted work.[5] Courts have examined the factual circumstances surrounding each case and have applied these criteria on a case-by-case basis.[6]

The Internet is a cooperative network of networks.[7] It links millions of users nationally and internationally, including individuals, schools, libraries, and corporations. There is no single individual or organization that owns, oversees, or controls the Internet. For many users, the costs of accessing the Internet are paid by their organizations, such as universities, national laboratories, corporations, and governments.[8] Other individuals pay subscription fees to Internet service providers, like American Online or CompuServe, which provide links to the Internet.[9] The World Wide Web is the Internet's most popular application. The growing number of Web sites and bulletin boards[10] provides great distribution capabilities for all types of material. Since computers can reproduce virtually perfect copies of copyrighted works, including text, audio, and video, the Internet provides the potential for distributing and redistributing replicas of copyrighted material to large numbers of Internet users. The technological achievements of the Internet have greatly increased the possibilities for copyright infringement.[11]

Internet users who view information and download that information are copying. If the material that is being copied is copyrighted, the possibility of infringement may rest upon an application of the fair use doctrine to the circumstances surrounding the unauthorized use of the material.[12] By viewing materials on the Internet, there is a fixation of materials on a computer's Random Access Memory (RAM). This fixation in the RAM may support an infringement claim based upon the copyright owner's

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[5] 17 U.S.C. § 107.

[6] *See*, CRS Rept. No. 95-888, *Copyright and Fair Use After Acuff-Rose and Texaco;* CRS Rept. No. 93-396, *Copyright Law: Recent Case law Developments in The "Single Receiving" Exemption;* CRS Rept. No. 93-515, *Photocopying of Scientific Journal Articles: American Geophysical Union v. Texaco, Inc.*

[7] *See* CRS Rept. No. 98-649, *Spinning the Web: The History and Infrastructure of the Internet.*

[8] *Id.* at 13-14.

[9] *Id.* at 14. The extensive usage of the Web has generated various legal issues other than the fair use of copyrighted works. Among these issues are: trademarks, privacy, fraud, security, copyright first sale doctrine, trade secrets, and First Amendment issues.

[10] An electronic bulletin board is a means of exchanging information with distant areas through a computer and modem. The electronic bulletin board is comprised of an electronic storage medium (computer memories or hard disks), which is attached to telephone lines through modem devices which are controlled by a computer.

[11] Christopher Wolf, *'Net Users Could Face IP Liability,* NAT'L Law J. C34, C35 (May 20, 1996)(cited to afterward as "Wolf").

[12] Circumstances may exist where a user pays a subscription fee for the use of particular information on the Internet. The service provider may specifically address the issues of copying/downloading in the access agreements with the users. However, many Internet sites do not impose a user fee or contain copyright information concerning the material on the site.

exclusive rights of reproduction.[13] However, if the copyright owner places his/her work on the Internet, it could be inferred that the owner would expect other Internet users to read and download the copyrighted work. Legal complications arise when persons other than the copyright owner publish the copyrighted works on the Internet.

Case Law and the Internet

American courts have been seeking equitable resolutions to copyright infringement actions over the unauthorized use of copyrighted works on the Internet. Court decisions applying the fair use principles to Internet use provide some legal guidance; however, case law precedent is still developing and certain issues remain unresolved. Still, the most recent cases have continued the traditional application of the fair use principles to Internet use of copyrighted materials.

An early case that dealt with the fair use principles and online services involved an electronic bulletin board which was open to the public.[14] The scheme involved the electronic exchange of copyrighted Sega video games through the bulletin board. The bulletin board operators asserted a fair use defense which was based upon the argument that the operators themselves did not download or retain copies of any Sega video games. The court applied the four fair use factors to this situation and rejected the defendants' fair use defense. The court determined that the *use* was for a commercial purpose–to download the copyrighted games, so as to avoid their purchase from the copyright owner. Considering the *nature* of the copyrighted work, the court observed that the work involved creativity, fiction, and fantasy. Since the entire work was copied, the third factor–the *amount* of the work used, favored the plaintiff's claim. In considering the fourth factor, the *effect of copying on the potential market*, the court concluded that the unauthorized copying of the copyrighted works would adversely impact the potential market, as few persons would purchase the copyrighted works if they were available through the bulletin board. Hence, the court concluded that all four factors favored the plaintiff and that the defendants' unauthorized use of the copyrighted works was an infringing use. Another subsequent decision which dealt with the fair use doctrine and Internet use involved the same parties and a similar factual situation.[15] The court applied the four fair use factors to the facts at hand.[16] After balancing all of the factors, the court reached the same conclusion as in the earlier decision, finding that the fair use doctrine did not apply.[17]

Several online cases have involved the unauthorized use of certain written works of L. Ron Hubbard, founder of Scientology. The simplified factual situation concerning these cases follows. In unrelated litigation, the Religious Technology Center (RTC) attempted to seal an affidavit concerning church ideology. Lerma–a

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[13] *See* Wolfe, *supra*, note 11.

[14] *Sega Enterprises, Ltd. v. MAPHIA*, 857 F.Supp. 679 (N.D.Cal. 1994).

[15] *Sega Enterprises, Ltd. v. MAPHIA*, 948 F.Supp. 923 (N.D.Cal. 1996).

[16] *Id.* at 934-935.

[17] *Id.* at 936.

former follower of Hubbard–obtained the affidavit and published it on the Internet through his Internet access provider–Digital Gateway Systems (DGS). The RTC brought an infringement action against Lerma, DGS, The Washington Post, and others. Another series of cases involved the RTC bringing an action for copyright infringement against a former minister–Erlich–for posting on an Internet bulletin board certain materials containing Hubbard's published and unpublished works. The RTC also named as defendants the bulletin board operator–Klemesrud and the Internet access provider–Netcom. These cases are summarized below.

In *Religious Technology Center v. Lerma,*[18] the court dealt primarily with RTC's infringement action against the Post, certain reporters, and Lerma. This case did not deal chiefly with the Internet or online aspects of fair use. The action was based primarily upon the unauthorized dissemination of information owned by the RTC and did not address the substantive copyright issues.[19]

In another case involving the RTC's infringement action, the same defendants moved for summary judgment and the district court concluded that the fair use doctrine was applicable to the Post and its reporters.[20] In reaching this conclusion, the court examined the four fair use factors and applied them in a traditional copyright analysis. The court concluded that the purpose and character of the use of the material was for news gathering and this favored the defendants. In evaluating the nature of the work, the court deemed it to be informational rather than creative, and that a broader fair use approach was appropriate. The court determined that the amount of the work used in relation to its entirety was not significant. Finally, the court found that the unauthorized use did not adversely impact the market value of the material. The court concluded that the unauthorized use of the copyrighted material by the Post and by its reporters was a fair use.

In an unpublished opinion, the court subsequently examined the copyright infringement claim against Lerma.[21] Lerma first argued that the disputed works were not copyrightable. The court rejected this argument. He next raised the fair use defense for his unauthorized use of the copyrighted works. After examining each of the four fair use factors, the court concluded that Lerma's use could not be construed as a fair use. Finally, Lerma argued that the RTC misused the copyright. The court concluded that the RTC had not misused its copyright and that Lerma's unauthorized use of the material was an infringing use. The RTC was awarded $2,500 in statutory damages.

In another series of cases, the RTC brought actions against Erlich (the former minister), the bulletin board operator, and the Internet access provider. In two separate opinions, the district court for the Northern District of California addressed

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[18] 908 F.Supp. 1353 (E.D.Va. 1995).

[19] *Id.* at 1355-1358

[20] *Religious Technology Center v. Lerma*, 908 F.Supp. 1361 (E.D.Va. 1995).

[21] *Religious Technology Center v. Arnaldo Pagliarina Lerma,* 1996 U.S. Dist. LEXIS 15454 (E.D.Va. Oct. 4, 1996).

various copyright issues, including fair use.[22] Erlich did not dispute that he copied the works. He advanced a fair use defense.[23] The court granted in part the plaintiff's motion for a preliminary injunction against Erlich and concluded that his use of the RTC's materials was unlikely to qualify as fair use. In evaluating Erlich's purpose and character of the use, the court determined that it was for criticism or comment and was thus for noncommercial use. Therefore, the fair use factor was held to be slightly in Erlich's favor.[24] In looking at the nature of the copyrighted work, the court considered that some of the works were published while others were unpublished. The court determined that the unauthorized use of the unpublished works favored the plaintiffs. In assessing the third factor, the court favored the plaintiffs. As for the potential market for the work, the court concluded that Erlich's use would not have an adverse effect on the market. The court engaged in an "equitable balancing" of the factors and found that Erlich could not assert a fair use defense for his copying.[25]

In *Religious Technology Center v. Netcom On-Line Commu.,*[26] another action involving the RTC and Erlich's access provider and the bulletin board, the court granted in part and denied in part the defendants' motion for summary judgment and judgment on the pleadings, and denied the plaintiffs' motion for a preliminary injunction. The district court applied the fair use analysis to the action of the Internet access provider, Netcom. The court determined that the access provider was not liable for direct infringement; rather, the court examined it as a case of contributory infringement on the part of Netcom and determined that the plaintiffs raised a genuine issue of fact concerning Netcom's contributory infringement.[27] Although Netcom was a commercial enterprise, the court found that its use of copyrighted work was of a different nature than the plaintiffs' use. In looking at the nature of the copyrighted works, the court determined that Netcom's use of the works was merely to facilitate their posting to the bulletin board--an entirely different use from the use of plaintiffs--and therefore favored Netcom. Regarding the amount of the copyrighted work copied, the court determined that Netcom copied no more of the plaintiffs' work than was necessary to function; thus, this factor did not favor the plaintiffs. The court concluded that the postings on the Internet by Netcom raised a genuine factual issue as to whether the market for plaintiff's works was diminished. Because the court was not able to make a determination concerning the fourth fair use factor–the market harm–the court decided that the fair use defense was *not* available to Netcom on motion for summary judgment.[28] In conclusion, the court determined that there were issues of fact to be determined in the case and that a fair use defense was not available for Netcom on summary judgment.

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[22] The court examined other issues, such as trade secret and tort claims, which are not discussed in this report.

[23] *Id. at 1242-1250.*

[24] *Id.* at 1244.

[25] *Id.* at 1249-1250.

[26] 907 F.Supp. 1361 (N.D.Ca. 1995).

[27] *Id.* at 1373-1375.

[28] *Id.* at 1381. Apparently, the bulletin board provider did not assert a fair use defense; therefore, the court did not utilize the fair use analysis.

In late 1997, the U.S. District Court for the Northern District of Illinois ruled that an Internet service provider was not liable for direct copyright infringement, despite the fact that materials were directly copied on a web site that the service provider maintained for a subscriber.[29] However, the Internet subscriber was found to have infringed certain copyrighted "clip art" images by using them on the Internet. The court concluded that the subscriber's use of the clip art was primarily for commercial uses, for promoting his organization, and for generating revenue. Hence, the fair use defense was not available for the defendant and the unauthorized use of the "clip art" on the Internet was found to be an infringing use. In 1998, the same court–the U.S. District Court for the Northern District of Illinois--reached a finding of infringement in a similar case involving the use of "shareware," copyrighted software which is loaned to potential purchasers under certain conditions.[30] The court went through an extensive fair use analysis within the context of shareware.[31]

In another case concerning fair use and the Internet, still images taken from a copyrighted videotape of a celebrity couple engaging in sexual activity were placed on the Internet without the couple's permission. Applying the fair use doctrine to a rather complex factual situation, the U.S. District Court for the Central District of California held that the unauthorized placement on the Internet of still images from a copyrighted videotape was not a fair use.[32] The court considered each fair use factor within the context of the factual situation.[33]

The U.S. District Court for the Eastern District of Texas examined a unique case where the plaintiff's copyrighted works–model legal codes--had been adopted as municipal laws by various communities.[34] The defendant then posted these copyrighted works on the Internet and was sued for infringement. The court applied the fair use analysis to the factual situation at hand and determined that the fair use defense was not applicable in this situation.[35] Hence, the posting of certain copyrighted model codes, even when they had been adopted as municipal laws or ordinances, did not lose their copyright protection, and could not be posted on the Internet without the permission of the copyright owner.

In *Kelly v. Arriba Soft Corp.*,[36] the court examined the fair use doctrine within the context of a "visual search engine" on the Internet. The defendant's visual search engine allows a user to obtain a list of related Web content following a search inquiry. The visual search engine produces a list of reduced "thumbnail" pictures related to the

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[29] *Marobie-FL v. National Assn of Fire Equip. Dist.*, 983 F.Supp. 1167 (N.D. Ill. 1997).

[30] *Storm Impact v. Software of the Month Club*, 13 F.Supp. 2d 782 (N.D. Ill. 1998).

[31] *Id.* at 787-790.

[32] *Michaels v. Internet Entertainment Group, Inc.*, 5 F.Supp. 2d 823 (D.C. Cal. 1998).

[33] *Id.* at 834-836. The final disposition of this case was reached at *Michaels v. Internet Entertainment Group*, 1998 U.S. Dist. LEXIS 20786 (1998).

[34] *Veeck v. Southern Bldg. Code Congress Intern.*, 49 F.Supp. 885 (E.D. Tex. 1999).

[35] *Id.* at 891.

[36] 77 F.Supp. 1116 (C.D. Cal. 1999).

inquiry.[37] The plaintiff argued that the use of the "thumbnail" copyrighted pictures obtained through the visual search was an infringement of his copyright interest. The court undertook an extensive fair use evaluation of the circumstances surrounding the visual search engine and the unauthorized use of the copyrighted photographs.[38] The court weighed all of the fair use factors together and determined that the defendant's use of the copyrighted photographs as part of their visual search engine was a fair use of the plaintiff's images.[39]

The posting of copyrighted news articles on the Internet has been the subject of recent litigation.[40] The defendant posted copyrighted articles from newspapers on an Internet "bulletin board" website so that visitors to the site could comment and criticize the articles. Applying the fair use factors to the instant case, the court determined that the defendant's posting of full length, copyrighted articles on the Internet was not a fair use of the copyrighted material. The court noted that the website operator could have avoided infringement if summaries of the articles had been posted or if hyperlinks to the articles on the newspapers' own websites had been provided.

The practice of "streaming"–the visual transmission of copyrighted television programming–on the Internet was the subject of a recent action. The defendant was transmitting portions of the plaintiffs' copyrighted programming on the Internet. The plaintiff sought and received a temporary restraining order.[41] The U.S. District Court for the Western District of Pennsylvania did not examine the fair use doctrine or any other copyright defenses in its opinion.

In recent litigation, several motion picture studios brought an action to prevent the defendants from providing a computer program on their Web sites that allowed users to decrypt and copy the plaintiffs' copyrighted motion pictures from digital versatile disks.[42] Although the defendants argued that their activities were within the fair use exception, the court rejected this defense and granted the plaintiffs' motion for a preliminary injunction.

Conclusion

These cases have illustrated the judicial process–the "equitable balancing"–that courts undertake in their evaluation of fair use claims. It appears that the courts are using the same analysis and criteria for Internet litigation as they have with other intellectual property determinations. The courts have examined in detail the factual situation surrounding the litigation and they have applied each of the fair use criteria

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[37] *Id.* at 1117.

[38] *Id.* at 1118-1121.

[39] *Id.* at 1121.

[40] *Los Angeles Times v. Free Republic*, (C.D. Cal., No. CV 98-7840-MMM-AJWX, 11/8/99).

[41] *Twentieth Century Fox Film Corporation v. ICRAVETV*, (2000 U.S. Dist. Lexis 1013).

[42] *Universal City Studios, Inc. v. Shawn C. Reimerdes*, 82 F.Supp. 2d 211 (S.D.N.Y. 2000).

to the case-by-case circumstances. The courts then evaluate or weigh the statutory criteria and determine whether, on balance, the evidence favors a finding of fair use of the copyrighted material or not.

While these cases provide judicial precedent, the use of copyrighted materials on the Internet is not entirely resolved. Factual circumstances may change the judicial outcome in various situations. In addition, various areas of fair use litigation and the Internet may still be developing. Among these subject areas are: possible liability for Internet server and bulletin board providers; whether online use is legally distinguishable from the use of the printed form; unintended or unintentional use of copyrighted materials; use of materials by schools and libraries; and other issues.