96-845 A
October 22, 1996

CRS Report for Congress

Congressional Research Service • The Library of Congress

The Copyright Doctrine of Fair Use and the Internet

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SUMMARY

This report examines the evolving copyright doctrine of fair use within the context of copyrighted works on the Internet. Attempts are being made by the courts, Congress, and the industry to divide enforcement responsibilities and protection rights among the various interested parties: copyright owners, access providers, Web site operators, and Internet consumers.[1]

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] Congress has provided four statutory elements for the courts to consider in their analysis of particular situations: 1) the amount and character of the use; 2) the nature of

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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.

[2] 17 U.S.C. § 106 (1988). 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 (1988).

[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 (1988)

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.[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 computer network of networks.[7] It links many national and international users such as schools, libraries, individuals, and corporations. There is no single individual or organization that owns, oversees, or controls the Internet. The costs of providing Internet services are allocated among its chief users: universities, national laboratories, high-tech corporations, and governments.[8] The World Wide Web is the Internet's most powerful search tool. Various commercial subscription services--such as CompuServe and America Online--link consumers to the Web and to the Internet.[9]

Through the Internet, a user can produce virtually perfect copies of copyrighted works; computers can reproduce copies of text, as well as video and audio components, which are nearly identical to the originals. The Internet has great distribution capabilities through the large number of Web sites and bulletin boards[10] which have developed and continue to develop. Hence, a copyrighted work--whether it is audio, visual, or the written word--has the potential of being distributed and redistributed in perfect form to a large number of Internet users through Web sites and bulletin boards. 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

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5 17 U.S.C. § 107 (1988).

6 *See* CRS Rept. No. 95-888, *Copyright and Fair Use After Acuff-Rose and Texaco*; CRS Rept. No. 93-396, *Copyright Law: Recent Caselaw 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. 96-242, *Welcome to Cyberia: An Internet Overview*.

8 *Id.*, at 5-6.

9 *Id.* 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 to 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").

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 in a computer's Random Access Memory (RAM). This fixation in the RAM may support an infringement claim based upon the copyright owner's exclusive right 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 place/use copyrighted works on the Internet.

CASELAW AND THE INTERNET

American courts have been seeking equitable resolutions to copyright infringement actions which have developed through the unauthorized use of copyrighted works on the Internet. Recent court decisions applying the fair use principles to Internet use provide some legal guidance; however, caselaw precedent is still developing and various issues remain unresolved.

An early case that dealt with the fair use principles and on-line 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; therefore they argued that they should not be held responsible for the actions of independent subscribers or users of the bulletin board. 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.

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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.

13 *See* Wolf.

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

Certain recent online cases involved the unauthorized use of certain written works of L. Ron Hubbard. In related actions, the Religious Technology Center (RTC), the copyright owner of the works, brought infringement actions against Lerma--a former follower of Hubbard, Lerma's Internet access provider, and The Washington Post.[15] The factual situation follows. In unrelated litigation, the RTC attempted to seal an affidavit containing church ideology. Lerma obtained the affidavit and published it on the Internet through Digital Gateway Systems (DGS), his Internet access provider. RTC brought an infringement action against Lerma, DGS, The Washington Post and others.[16] The defendants moved for summary judgment and the district court concluded that the fair use doctrine was applicable to the case at hand. 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 purposes 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 impact of the unauthorized use did not adversely impact the market value of the material. Therefore, the court concluded that the fair use doctrine was applicable in this instance and that there was no infringing use. The court did not directly or indirectly address the liability or potential liability of the Internet access provider.

A series of cases involved the RTC bringing an action for copyright infringement against a former minister--Erlich--for posting on a bulletin board on the Internet certain materials from L. Ron Hubbard's published and unpublished works. RTC also named as defendants the bulletin board operator--Klemesrud--and the Internet access provider--Netcom. In two opinions,[17] the district court for the Northern District of California addressed various copyright issues, including fair use.[18]

Erlich did not deny that he copied the works; rather he advanced a fair use defense.[19] The court granted in part and denied in part the plaintiff's motion for a preliminary injunction against Erlich and concluded that Erlich's use of

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15 One case dealt primarily with RTC's action against the Post and is not analyzed here, as it did not deal directly with the Internet or online aspects of fair use. *See* 908 F.Supp. 1353 (E.D. Va. 1995).

16 *Religious Technology Center v. Lerma*, 908 F.Supp. 1362 (E.D.Va. 1995).

17 *Religious Technology Center v. Netcom On-Line Comm.*, 907 F.Supp. 1361 (1995); 923 F.Supp. 1231 (1995).

18 The court examined other issues as such as trade secret and tort claims which are not discussed here.

19 923 F.Supp. 1242-1250.

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 for noncommercial use; therefore, the first factor was held to be slightly in Erlich's favor.[20] 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 large portions of unpublished works were copied by Erlich. Concerning the potential market of the work, the court concluded that Erlich's copying 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.[21]

In a subsequent action concerning the access provider and the bulletin board, the court granted in part and denied in part the defendants' motions 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 actions of the Internet access provider, Netcom.[22] 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.[23] Although Netcom was a commercial enterprise, the court found that its use of the copyrighted works was of a very different nature than the plaintiffs' use. In looking at the nature of the copyrighted work, the court determined that Netcom's use of the works was merely to facilitate their posting to the bulletin board which was an entirely different use from the use of the plaintiffs, and therefore favored Netcom. Concerning the amount of the copyrighted work copied, the court determined that Netcom copied no more of the plaintiffs' works 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 plaintiffs'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.[24] Apparently, the bulletin board provider did not assert a fair use defense; therefore, the court did not utilize the fair use analysis.[25] In conclusion, the court determined that there were issues

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20 *Id.* at 1244.

21 *Id.* at 1249-50.

22 907 F.Supp. 1361 (1995).

23 *Id.* at 1373-1375.

24 *Id.* at 1381.

25 *Id.*

of fact to be determined in the case and that a fair use defense was not available for Netcom on summary judgment.

CONCLUSION

These cases have illustrated the judicial process--the "equitable balancing"--that courts undertake in their evaluation of fair use claims. Apparently 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 have applied each of the fair use criteria 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 or not.

While these cases provide some precedent, they leave various issues unresolved concerning fair use and the Internet. Among these issues are: potential liability of the Internet server and bulletin board providers; whether on-line use is legally different from use of the printed form: unintended or unintentional use of copyrighted materials; and other issues.

Two bills[26] were introduced in the 104th Congress which incorporated the legislative proposals of the Administration's "White Paper" on "Intellectual Property and the National Information Infrastructure," known as the "NII" [27] which proposed changes relating to the distribution of works by transmission.[28] While this legislation did not directly impact fair use, it had indirect implications.[29] The Intellectual Property Working group convened a Conference on Fair Use ("CONFU") which has been discussing nonstatutory guidelines for "browsing" through works in electronic form, and other forms of expression.[30]

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[26] H.R. 2441, 104th Cong., 1st Sess. (1995); S. 1284, 104th Cong., 1st Sess. (1995).

[27] *See* Information Infrastructure Task Force, *The Report of the Working Group on Intellectual Property Rights* 211 *et seq.* (1995)

[28] *See* CRS Rept. No. 95-1166, *Copyright Proposals for the National Information Infrastructure*.

[29] For example, one provision of the of the legislation would have permitted the digital copying of certain works for libraries, archives, and the visually impaired.

[30] *Id.* at 16-17. No formal report has been issued to date.