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The Fair Use and Public Domain Defenses

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Intellectual property litigation is quickly replacing defamation and invasion of privacy as the most serious – and expensive – threat to media companies. For this reason, OBPP has created a series of articles which will help educate our brokers about the new exposures faced by their clients as media-related companies are scrambling to meet the public's appetite for information, news and entertainment. This issue exposes the limited applicability of the defenses of "fair use" and "public domain" and reveals the associated insurance implications. The next issue discusses infringement claims involving the "fair use" defense.

Fair use and public domain are IP doctrines which can appear seductively simple and straightforward to laypersons. However, while these legal principles reflect common sense and practicality, applying them to real-life situations often calls for an expert's analysis. Writers, artists and other content providers must resist the temptation to rationalize their use of copyrighted material based on uninformed (and often too-generous) notions about the protection that the fair use and public domain defenses may afford. The safest path: when in doubt, obtain a license.

It's not uncommon for an author or producer, when quoting or incorporating another's copyrighted content into his or her work, to characterize the borrowing as simply a "fair use" of the original material. Alternatively, it's sometimes asserted that the original material was not copyright protected at all, but was rather available for third-party use by virtue of being "in the public domain." Unfortunately, the context in which such statements are most often made is in a legal pleading or a courtroom, as a defense against a claim of copyright infringement. Fair use and public domain, though separate legal doctrines, are similar in that they both entail complex legal issues, often mixing questions of

law and fact. As a result, each poses definite challenges and thus stands as a very uncertain basis for defense against an infringement claim. The only sure bet in such cases is that the defendant's cost of litigation will be significantly more than the cost that would have been incurred to license the material in the first place.

Fair Use. As will be seen below, this defense has "a lot of moving parts" and can be relied on only with extreme caution. Fair use intricately balances four separate statutory factors to determine whether or not a third party's use of a copyrighted expression (without the copyright holder's permission and without paying a licensing fee) was reasonably "fair" and thus non-infringing. The four factors have been set out in federal law (17 USC Sec. 107); they are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit 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 for or value of the copyrighted work.

The first factor goes to the defendant's purposes for using the protected content, and it is extremely relevant to the fair use analysis. Generally speaking, reproducing copyrighted work in a non-commercial context is more likely to be considered fair use than where the defendant's work is of a commercial nature. Also, a public use will be favored over one that is for personal gain. Thus, a court is less likely to find infringement if the unoriginal content is used for an educational or non-profit

use as opposed to a use by a competitor for a commercial enterprise.

Similarly, the nature of the copyrighted work itself is a factor courts will carefully consider. This second factor is often summarized by noting that it is in the public's interest to encourage the dissemination of factual information. For this reason, the use of fact-oriented content in subsequent works will tend to be more protected. Conversely, creative content—novels, poetry, original artwork—is less subject to a fair use analysis, and writers, artists and producers must be circumspect when borrowing from such works. Also note: quoting from already published content tends to be seen as more fair than quoting from an unpublished work, on the theory that an author deserves to control the first public expression of his/her creative content.

The proportion of the original work used by the alleged infringer is the third fair use factor. This requires both quantitative evaluation of the amount of the work taken, as well as a qualitative assessment as to whether the part used was consequential. For example, reprinting a sentence or two from a full-length novel or a feature-length movie is much more likely to be considered a fair use than taking one sentence from a two-sentence rhyme or poem. However, the qualitative aspect can never be ignored, and even a few words may be found fully protected, if they're at the heart of an original work. (Think: "Life is like a box of chocolates...") Thus, while "less is more" does stand as a sort of rough guiding principle in this regard, no entirely reliable safe harbor exists. One occasionally hears that "twenty seconds or less" is an acceptable use of a video or musical

composition, but this and similar rules of thumb are pure urban legend, without basis in law or fact.

Under the fourth statutory factor, courts will look at whether an infringement has deprived plaintiff of the economic benefit of his or her property right in the creative work. If the nature of a work is such that the defendant's use has impacted the same market in which the economic value (or potential value) of the original work lies, then a defense based on fair use may not be legally supportable. For all these reasons, then, it should be apparent that a content provider's unlicensed use of third party material really must be evaluated by experienced intellectual property counsel. This is especially true in the case of for-profit, commercial providers, whose access to the fair use defense is narrower than that of academics and nonprofits. A final caution: it is all too common for a defense to be undercut by the damaging paper trail left after an infringer, having first tried to obtain a license, finds it too expensive and then goes ahead and copies the original material anyway, relying upon fair use. As mentioned above, it is almost always true that the license would have been a bargain when compared to the ultimate legal expense in defending its claimed fair use.

Public Domain. It should be noted at the outset that certain expressions may not be creative at all, but rather are building-blocks of expression that belong to the public. Examples would be musical notes or letters of the alphabet. Obviously, once manipulated and/or utilized in a certain, distinctive manner, these rudimentary bits can become an original expression, raising the question as to whether copyright protections will apply. With regard to original, creative expression, "public domain" has

applicability only to materials that are not copyrighted. The legal protections afforded to private copyrighted works can be given up, either by way of waiver or lapse of time, and such works can become part of the public domain in the future.

Public domain (not to be confused with "eminent domain", the doctrine by which government can appropriate private property) includes all the general material that was never copyrighted and has never been thought of as belonging to anyone; for example, the Bible, Shakespeare's plays, most nursery rhymes, the Declaration of Independence. In many circumstances, the term also refers to exceedingly dated material which, while originally copyrighted, has now outlived its original legal protections and thus no longer carries any proprietary rights. For example, Mark Twain's novel, *The Adventures of Huckleberry Finn*, and the poetry of Emily Dickinson are now within the public domain and may be used without liability for copyright violation. Note, however, that copyright may exist in new formulations of such older works.

Additionally, a work can enter the public domain if: (1) a work of the federal government; (2) a work dedicated by the author to the public domain; or (3) the work was first published before 1978 without proper copyright notice. Again, a layperson's assumptions about whether or not a work has fallen into the public domain can be extremely dangerous. Consider for example the little ditty every American has heard and sung so often, *Happy Birthday to You*. It is in fact copyrighted material, the rights to which are vigorously enforced through ASCAP; it will not pass into the public domain until 2030 under current law.

Insurance Implications. Based on the expenses associated with these complex infringement defenses, media insurers are hesitant to cover commercial works that incorporate unlicensed matter based upon an assertion of fair use or public domain. Regardless of the merits, insurers look to avoid the legal costs necessary to prove a use was, indeed, fair. For this reason, any new work that relies upon unlicensed third-party content creates challenges for the media liability underwriter. Often, the carrier will require an insurance applicant to warrant that all licenses have been procured, or it may specifically exclude the unlicensed work from coverage. For a publisher looking to obtain coverage for such a risk at a reasonable premium and self-insured retention level, it will be important to arrange for a vetting letter from intellectual property counsel. Such a letter will explain why the unlicensed use was appropriate under the circumstances. Proactive use of experienced counsel is a sound investment and should always be part of every production budget.

The next issue of *Intellectual Property 101* discusses specific infringement claims involving the fair use defense.

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