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The Uncertain Applicability of “Fair Use”

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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 discusses infringement claims involving the “fair use” defense.

The citizens of Edinburgh, Scotland celebrated with bonfires in 1774, when a local printer succeeded in efforts to overturn a centuries-old copyright monopoly which had limited dissemination of works by Shakespeare and others. Today, copyright law continues to afford creators extremely long-lived protection, with personally-owned copyrights enduring for the lifetime of the owner, plus seventy years, and corporate copyrights typically lasting ninety-five years.

Stiff copyright penalties leave few defendants dancing in the streets today. Statutory damages up to \$150,000 can be awarded for each wrongfully copied work. While the criminal penalty for shoplifting a compact disc of ten songs might be a fine of \$1,000, the record company could hold the shoplifter liable for up to \$1.5 million, if it can prove he or she willfully copied the same ten songs. To avoid the potential of such a harsh outcome, filmmakers often pay license fees of \$10,000 or more to use copyrighted material, sometimes as brief as three or four seconds of a real television show in the background of a particular scene.

As noted in the previous article in this series of loss prevention updates, such stringent restrictions and penalties have caused a number of creators to seek the refuge in the doctrine of “fair use” when seeking to adapt or incorporate protected materials into new works. However, fair use is an extremely complicated and fact intensive defense, and it often involves questions of both law and fact. Relying upon fair use can be very risky – especially if a license can be acquired. This article will illustrate that it is very difficult to glean “bright lines” from case law. As illustrated in the three examples below, seemingly similar cases can often result in different rulings, even from the same court.

In the first noteworthy case, a book comprised of trivia concerning the events and characters of the *Seinfeld* television series was claimed to have infringed on the plaintiffs’ copyright in the television show. In their defense, the author and the publisher both argued that the book did not infringe because it copied none of plaintiffs’ protected expression. Instead, it cited only specific facts, and facts themselves are typically not thought to be subject to copyright protection. Defendants also argued that even if the book did copy plaintiffs’ protected expression, the use of same was “fair use”. The court rejected each of the defendants’ arguments. It held first that the *Seinfeld* “facts” were not real facts, but were instead parts of a fiction created by the show’s producers. As a result, the trivia book copied plaintiffs’ creative expression. The court then went on to utilize the four fair use factors and held that the

defendants’ use of these fictional facts was not fair use. It found that the use of the “facts” from the series was extensive and that the book essentially deprived the plaintiffs of the opportunity to create their own book based on their television series.

Another recent decision by the same court addressed fair use in the following context: a movie company had used a photograph of a naked expectant woman with the superimposed head of actor, Leslie Neilson of “Airplane” fame. Its intent was to parody the famous photograph taken by Annie Leibovitz of the very pregnant Demi Moore, which had appeared on the cover of *Vanity Fair* Magazine. Here, the court’s analysis of the four fair use factors led to a holding that the use of the photograph was protected parody. While utilizing much of plaintiff’s protected expression, the advertisement clearly added something new to the photograph in that it imitated the photographer’s style for comic effect and parody. The court noted that although the photograph appeared in connection with an advertisement, the advertisement did not interfere with the potential market for the plaintiff’s photograph.

The final case was decided by a different court, a divided federal appellate panel. It upheld a preliminary injunction against a filmmaker who had used video clips, audio clips and photographs in a documentary film on Elvis Presley without permission of the owners of copyrights in the materials. The documentary included a number of clips, some as brief as a few seconds, others up to a full minute. Copyrighted

songs were used as background music and in excerpts of Presley concert and screen performances. Of the documentary's total sixteen hours, copyrighted works comprised perhaps five to ten percent of the footage.

The Court of Appeals found that the lower court had not abused its discretion when it determined that defendants' use of the materials was not fair use. It did note, however, that it might not have reached the same conclusion as the district court had it been reviewing the case de novo. The Court focused on the commercial nature of the documentary:

The fact that the defendants' use of the material was commercial in nature, although not dispositive, weighed against a finding of fair use, especially where, as here, the defendants sought to directly profit from the use of the copyrighted material without obtaining a license.

In sum, cases like these show plainly that an artist, writer, filmmaker or other creator who uses the works of others without permission does so at great peril. There can be no bright line test or definitive legal rule here, since each case turns on its own specific facts and on the interpretation of "fair use" by the judge. Unless and until there are major changes in U.S. copyright law, the reliance on the "fair use" defense will remain an uncertain factor in mitigating the alleged wrongful use of copyright materials in any given case.

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