

Legal Update from Brian Flagler

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Clarity in Determining Fair Use Still on Reserve

By Brian Flagler and Craig Gipson

A federal court in Georgia recently weighed in with its effort to clear up the murky standard of “how much is too much” when it comes to fair use (1). The court attempted to draw some bright-line rules to guide publishers and libraries but may have only added another layer of confusion to an area already lacking clarity.

Background

The dispute surrounded Georgia State University’s electronic reserve system and whether its database of unauthorized copyrighted works constituted fair use. Professors selected portions of academic texts for students to access through the library’s online reserves. Whether the amount of text was enough to warrant requesting permission from the publisher was a decision left to faculty members, although the university did provide a fair use checklist as a guide. As Tom Allen, president of AAP, noted at ELS in May, three publishers challenged the practice, claiming the university was engaged in systematic copyright infringement. The school countered that the works available through its reserves system were protected by fair use.

Fair Use

On the whole, the opinion appears to be bad news for publishers seeking a narrow interpretation of fair use. The court largely sided with the university, finding fair use in 95 percent of the alleged infringements. The nature and character of the university’s use was, of course, educational, so publishers could not claim the school was improperly profiting from a commercial exploitation of the works. Does this mean that a nonprofit organization (such as a nonprofit publisher) publishing for education’s sake could make similar use of copyrighted works and claim fair use? Probably not. The university context of this case seems to be an integral part of the decision. There was no financial transaction between student and school with regard to the works. At most, the university realized the attenuated and tangential benefit of students paying tuition, something that was likely to occur with or without the use of copyrighted works. The purpose of using the works was solely to enrich course curriculum and expose students to a wider array of sources.

Additionally, the works were academic in nature, and as the court pointed out, would have been produced even without financial incentive as scholarship was a part of most of the authors’ jobs. In fact, for the majority of the works, the authors themselves were not receiving any financial gain from the works other than their salaries as professors. Their motivation in creating the works was more related to the ideas of professional esteem, prestige, and scholarship. With no commercial use in question, publishers instead claimed the amount of the works made available as electronic reserves was too excessive to

qualify as fair use, and to find otherwise would damage the publisher's market for earning licensing revenue.

The meat of the decision – and the question everyone wanted answered – lies in how much of a work may be used for nonprofit, educational purposes before it crosses the line to infringement. To this, the court offered a surprisingly definite standard: for books of nine or fewer chapters, the court established a benchmark of less than 10 percent of the total page count; for books of 10 or more chapters, the threshold was less than one chapter. Invariably, for uses that fell within these guidelines, the court found fair use. If a use exceeded these standards, the next line of analysis examined how substantial the licensing fees were for the work and whether the text included in the library's reserves went to the "heart" of the work. The court found that in most instances, the portion of the work used was not the "heart" or main point of the work. If it had, there may have been a different outcome for certain works on the infringement question.

The other factor emphasized by the court was the availability and ease of securing licenses or permissions. In instances where the license for a work was readily attainable at a reasonable price (i.e. through the Copyright Clearance Center (CCC)), a finding of fair use was less likely. If no license was available, the court reasoned, the university was not damaging the market for licensing the work. If licenses for a work generated substantial revenue for a publisher, the likelihood of finding fair use was also diminished. The difficulty of this element is, of course, that libraries and universities do not have information on the licensing fees earned by a particular work. Even the court acknowledged the virtual impossibility of libraries considering this factor when making a fair use determination.

The next step in the case will be the court's determination of whether to enter an injunction against Georgia State. The publishers prevailed on five claims, meaning they may be entitled to some relief in the form of an injunction to prevent further infringement. On May 31, the publishers submitted to the court a proposed order including terms that would give publishers oversight of the university's electronic reserve system. The court will now decide if the publisher's five successful claims warrant the relief sought, and if their proposed terms enjoining the university's actions are in accord with the court's decision.

The Future of Fair Use

First, the opinion issued in this case is just a starting place. The decision will likely be appealed and the thresholds set by this court may be upheld, struck down, expanded, or limited within the next year. Although far from being final, the opinion may give libraries confidence that using less than 10 percent of a work or a full chapter places them within the confines of fair use protection. If the decision stands, publishers wanting to litigate over fair use would face an uphill battle in cases where the use fell within the 10 percent or one chapter parameters. However, the court left plenty to debate. Up in the air is the question of how much beyond those boundaries is safe, or if those boundaries apply when the portion of a work used is the true "heart" of the work. Also left open is the question of which nonprofit organizations may claim this type of fair use protection. Only colleges and universities? Religious organizations? And while the Georgia State University library can claim a victory, other librarians are less enthusiastic about the rigid fair use standard established. Before now, the threshold of "how much is too much" was a fluid mark more open to interpretation.

Unintended Consequences

As in most cases, some unexpected winners may have also emerged. New York Law School Professor James Grimmelmann noted that some surprising beneficiaries from the opinion may be the CCC and certain parties tied to the ongoing Google Books litigation. The CCC was funding a portion of the publishers' litigation costs and would have preferred a different opinion. But that doesn't mean it lost. The court emphasized that a finding of fair use is less likely when the library could have easily and affordably obtained a license to the work. Indirectly, there is now an incentive for publishers to consider more fully the licensing options offered by the CCC. In doing so, publishers may claim that a party allegedly infringing a work could easily have obtained a license.

Grimmelmann also noted the case's potential impact on publishers keeping a watchful eye on the Google Books project. Before deciding the fair use question, the court rejected several of the publishers' claims because the alleged harm was so small as to be legally insignificant. These instances were when works placed in the library reserves were never actually downloaded or viewed by a student. The act of placing a digital version of the work in the database for display is a technical infringement of copyright, but the court essentially said that if no one viewed the work, the publisher had no infringement claim. For the HaithiTrust, which houses a substantial number of works scanned by Google, this could offer some form of legal cover if no one has viewed the scanned files yet.

Google Books

A larger fair use decision may loom on the horizon. In the now six year-old lawsuit against Google, the judge on May 31 gave the Authors Guild the green light to proceed toward trial. The court found the Authors Guild well-suited to litigate the question of whether Google's large scale scanning of books without the copyright owners' permission for the purpose of displaying snippets of those works is fair use or infringement. With a reported 12 million books scanned, the case could have massive implications for Google, publishers, and the law of fair use.

(1) Cambridge University Press v. Becker, No. 1:08-CV-1425-ODE (N.D. Ga. May 11, 2012)



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