

THE © COPYRIGHT & NEW MEDIA LAW newsletter

Editorial

In the late 1980's I worked with the government on the receiving end of lobbyists, preparing discussion papers and background research on copyright reform issues, and participating in meetings between copyright stakeholders. This was the pre-Internet days when the interests of copyright owners were comparatively more clearly divided. Authors were creators and not publishers, publishers were distributors and not bookstores, and libraries were consumers of copyright-protected materials and not gatekeepers to our vast world of content. At the time, garage bands were in garages and not on the Internet, and Google did not exist. From a policy making perspective, what we civil servants welcomed from the public was real life examples. We wanted to hear how copyright-protected works were used and by whom. We also wanted to hear when the law did not make sense because it prohibited distribution of, and access to, content either because of lack of speed, cost of access, or the inability to reach copyright holders to obtain permissions to use their works.

The role of lobbyists was to ensure that we stuck to the balance that copyright was aimed to protect. The lobbyists and interest groups were invited to formal and informal meetings and round table discussions. Of course lobbyists also took the initiative to contact us by phone and send us letters and documents providing their perspective and arguing for further rights or exceptions in their particular favor.

Fast forward to 2009 where the lines between authors, publishers, and distributors of content are blurred, and where Google is building the world's greatest library while being sued for alleged copyright infringement.

One thing that has not changed is the need for all of us to voice our opinions about copyright – because copyright protects most of the content we use in almost in every moment of our lives – whether for business, education or entertainment. Those responsible for copyright policy and legislative reform need to have the full picture of how content is created, distributed and used.



Large trade associations in the U.S. have always been vocal in the copyright reform arena, including the Motion Picture Association of America, American Association of Publishers and the Software and Information Industry Association, on the owner side. And various library associations (such as the American Library Association) and the Electronic Frontier Association have been vocal about the rights of the public with respect to using copyright-protected content. However, individuals have a large role in copyright reform. Think about the many things you can do to make a difference:



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- join professional and trade associations that actively lobby for copyright reform (get active on their copyright committees)
- discuss copyright issues with friends and family (teenagers are content kings – hear their perspective and tell them yours)
- write a letter to your elected officials
- discuss with your children's teachers whether the one piece of computer software purchased for a school computer may be used on more than one computer
- become as knowledgeable as possible about copyright law

- stay aware of current developments in copyright law and copyright reform domestically and internationally
- stay balanced in your own approach. Even though you may be a creator, all of us are consumers of copyright-protected materials. We need to look at copyright issues from all perspectives, not just from the perspective of our day jobs. ■

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**COPYRIGHT RULES OF THE ROAD
 FOR BLOGGERS**

By Ronald D. Coleman

Most blog content, it seems fair to say, is original (at least in copyright parlance). Bloggers fundamentally publish online because they have original things to say. But many bloggers, especially those blogging in the political sphere, have trouble resisting the temptation of copyright infringement by the unauthorized use of photographs or video from news services, or excerpts of reporting or other writing published by mainstream media outlets. Even non-political bloggers seeking clipart or photographs for their posts often find they have a particular famous image in mind, and may not be aware that they risk liability for copyright infringement by using that content without permission. This article sets out basic issues of copyright as they relate to using content on blogs.

Fair Use

Fair use is the saving grace of copyright law, but everyone agrees that its application is not necessarily intuitive. Fair use allows a blogger, just as it allows anyone else, to reproduce the copyright-protected work of someone else for specific purposes including commentary and criticism.

The four factors considered by courts when evaluating a fair use defense to copyright infringement are:

1. the purpose and character of a use (whether one is “transforming” it by adding to it, or merely using it in the same way its creator used it)
2. the nature of the copyright-protected work (fiction is protected more than non-fiction and reporting)
3. the amount and substantiality of the portion taken, and
4. the effect of the use upon the potential market.

If there is a single most important one of these, in terms of a blogger’s likelihood of being approached by a copyright owner with a demand letter (to stop using that work), it is probably the fourth factor.

This factor is the question whether the supposed fair use replaces or undermines the need for the original work.

Mainstream Media

Keeping in mind the factor of how a blogger’s use of a copyright-protected work could affect that work’s commercial value helps avoid the fallacy of assuming that it is legal to use “a little bit” of a published news story. For example, the view of the Associated Press (“AP”), and a number of other publishers, is that the headline and the lead paragraph of a news story may not be reproduced verbatim by a blogger. The headline, publishers argue, and the “lead,” are “what they sell.” That proposition has not been tested in court, but it is not an unreasonable one – as demonstrated by the fact that it is indeed those elements that bloggers are tempted so sorely to “borrow.”

Many media outlets are somewhat flummoxed by this problem, because they recognize that many, though of course not all, bloggers link back to the story from which they are excerpting. In fact, failure to do so is considered a serious breach of blogging “Netiquette,” and is usually counterproductive for a blogger. That is because the vast majority of blogs do not have the resources and, hence, the credibility of major news outlets, and it is precisely by recourse to the authority of the “MSM” (“Mainstream Media”) that blog items borrow that credibility and provide the launching pad for their commentary. The media companies are aware that such links, especially if they come from leading blogs, can be a major source of Internet traffic to their own Web sites.

Defending a Copyright Infringement Claim

One problem that arises from using content from MSM is that the original story emerges, by virtue of what sometimes turns out to be unwelcome attention, criticism or analysis, as incorrect, biased or otherwise problematic for the news service.



This can result in spurious copyright claims, by which “old media” outlets, that is, MSN, threaten the potentially severe sanctions of the copyright law, or invoke the *Digital Millennium Copyright Act’s* (“DMCA”) self-executing takedown provisions, to silence or blunt the message of upstart “new media”, that is, blogs.

Because the DMCA provides sanctions to victims of bad-faith takedown notices, it is important for a blogger to know if and when the notice he has received advising him that his blog has been taken down based on a copyright infringement is legitimate or an attempt at intimidation based on content. At that juncture, it is usually a good idea to get expert legal assistance. (The Media Bloggers Association provides some free and reduced cost legal advice. It also provides liability insurance for bloggers.)

An important point regarding “comparative infringement” should be noted. What a copyright lawyer will tell an inquiring blogger is that the determination of whether a copyright infringement claim is meritorious is not based on a comparison of whether similar or even identical uses of a work were the subject of a takedown notice. There are many infringing uses, Web sites and blogs online at any given time, and it is never a defense to infringement that others are doing the same thing or that an infringer is being “picked on” merely because the owner of the copyright does not like the message.

Posting Photographs in Blogs

As dicey as excerpting journalistic or other published copyright-protected works, utilizing photographs published by news services can be far more complex. There is little to justify copying and posting an AP or *New York Times* or Getty Images picture to illustrate a blog posting about the subject of the picture. Illustrating a posting is not a purpose covered by fair use, and permission from the copyright holder is necessary for this use.

Is there any situation where reproducing another’s photograph on a blog can be defended as a fair use? Consider a blog that posts pictures or video for the purpose of commenting on the photo or video itself: Michael Shaw’s BAGNews Notes (www.bagnewsnotes.com/). Each blog posting comments on the journalistic, cultural or semiotic issues raised by a given photograph published by a news source. BAGNews Notes is a rare example using contemporary news photos on a blog that may be defended by the fair use doctrine.

Keeping this in mind, a blogger contemplating reproducing an MSM or other published photo may ask himself, is there anything about this use that could arguably be compared to the use of photos on BAGNews Notes? Or do I just want to have a good picture for my story or comment the way Fox News or the *Washington Post* does?

Conclusion

Although following rules of any sort somewhat contradicts the role of the blogger who is often sharing his stream of consciousness with the world, it is important to be aware that copyright law applies to blog postings and the circumstances in which fair use may be a defense when using text or photographs in a blog. ■

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News Brief UK DISCUSSES A DIGITAL RIGHTS AGENCY

In a recently released discussion paper called *Copyright in a digital world: What role for a Digital Rights Agency*, the U.K. government sets the stage for a digital rights agency. The paper clearly states that it is the role of the government to examine how it can facilitate a market space for simpler and easier negotiations to take place, and to encourage rights holders to create business and distribution models that meet the needs of consumers. The paper is posed to start the discussion about how a rights agency might work and comments are requested from stakeholders and public discussions forums will be held. See: www.ipo.gov.uk/digitalbritain.pdf.