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Cases of Note

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Cases of Note

Column Editor: **Anne F. Jennings** (Sinkler & Boyd) (jenningsa@cofc.edu)

There has been much interesting activity in the field of intellectual property rights during the past few months. Not only do we have news from the US, but the UK and Australia as well. In Cases of Note for this issue, we have decided to focus mainly on a case involving newsletters and the de facto publication of an oral presentation. The Sidebar section accompanying this article highlights other cases and issues of note on the copyright scene.

Decided:

De Facto Publication/ Fair Use/ Copyright Infringement

Rotbart v. J.R. O'Dwyer Co., United States District Court, SDNY (1995)

In an unpublished opinion from the Southern District of New York, a federal judge dismissed a copyright infringement and defamation case initiated by a former *Wall Street Journal* reporter against a public relations journal publisher. The suit, brought by **Dean Rotbart** and **TJFR Publishing** alleged that articles published by the defendant **Jack O'Dwyer** in two of defendant's publications, infringed upon plaintiffs' copyright and defamed Mr. Rotbart. The defendants moved for summary judgment and on February 7, 1995, the motion was granted.

Dean Rotbart is President of the **TJFR Publishing Co., Inc.** which publishes newsletter regarding journalism and offers seminars to professionals in the public relations industry.

O'Dwyer is the editor and publisher of **Jack O'Dwyer's Newsletter** and **O'Dwyer's PR Services Report**. Both the weekly newsletter and monthly report address news, people and other issues with regard to public relations matters.

Rotbart offers a workshop for executives called "**Newsroom Confidential**", for which all participants must sign confidentiality agreements. On November 16, 1993, at the national conference of the **Public Relations Society of America**, Rotbart delivered an oral presentation which, although based in part on the typical "Newsroom Confidential" seminar, did not require the participants to sign a confidentiality agreement nor were there any other restrictions placed on the 200 plus registrants.

O'Dwyer attended the program and while there took handwritten notes and used a

tape recorder as back-up. Subsequently, he wrote articles and editorials in three issues of the **Newsletter** and one issue of the **Report** addressing the events at the meeting. O'Dwyer both quoted and paraphrased Rotbart and was harshly critical of his ideas. Several members of the media later asked O'Dwyer for the context of Rotbart's quotations and O'Dwyer provided them with a transcript of the program which he had prepared from the audio-tape. A second version of the transcript was later sent out which corrected some of the errors contained in the first copy. It was undisputed that both versions were incomplete and contained some errors. Later issues of the O'Dwyer publications reported reactions to the articles by media professionals. On February 18, 1994, following O'Dwyer's publication of all of the above-detailed articles, Rotbart registered his own transcription of the talk with the United States Copyright Office. On March 25, 1994, he filed suit against O'Dwyer.

This discussion will deal exclusively with the issue of copyright infringement/fair use, although it should be noted that summary judgment was granted as to the entire suit against the defendant. Under 17 U.S.C. sec. 107, fair use is determined to be an equitable doctrine which allows reasonable use of copyrighted materials. The four statutory factors to be considered when determining fair use are: (1) purpose and character of the alleged use; (2) nature of the work; (3) extent of the copying; and (4) effect of the alleged infringement upon any potential market of the copyrighted work.

The Court's findings as to each of the four factors were as follows:

1. Purpose and Character of the Use:

The preamble to section 107 of the U.S.

Code specifically cites "criticism, comment, [and] news reporting" to be among the most appropriate purposes when determining a finding of fair use. The Court herein found that defendants used portions of Rotbart's presentation precisely for such purposes and further stated that "in the present case, the newsworthy and critical elements of Defendants' article outweigh" any commercial aspect. Additionally, the court found that O'Dwyer's works were not meant to supersede the use of the original work. Citing **Campbell vs. Acuff-Rose Music, Inc.**, 114 S. Ct. 1164, 1171 (1994), O'Dwyer's fair use of the materials is further supported by the fact that his use was "transformative" in nature; it added something new to plaintiffs' work, giving it a "different character ... a new expression, meaning or message." Lastly, with regard to this requirement, the Court found that it was not O'Dwyer's intention to make a profit by distributing the transcripts as they were initially recorded for his own use. By providing copies upon request, Defendants merely demonstrated that their reporting had been accurate.

2. Nature of the Copyrighted Work

This factor requires the court to consider whether a work is creative or factual, the fair use defense being narrower for more creative works. In the case at hand, the defendants contend that the talk by Rotbart was merely a factual guide but the court disagreed, finding Rotbart's experience and ideas to be the primary source of this original work. However, the court found that the talk had been "de facto published" whereas the scope of fair use is also narrower if a given work is unpublished. And, unlike previous presentations, Rotbart delivered the talk to a public forum of more than 200 people **without** requesting confidentiality.

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Sidebar by Anne F. Jennings (jenningsa@cofc.edu)

Interesting information pertaining to copyright.

Copyright and Jenny Jones

The recent incident involving the syndicated Jenny Jones talk show wherein a male guest subsequently shot and killed another male guest who had admitted during the taping of the program that he was the former's "secret admirer" has brought to light an unusual copyright question. Can the program, which was never aired, be used in court at the trial of the defendant? Indications are that the producers will claim protection as they own the copyright license to the tape of the show. This issue was discussed on the CNI-copyright listserv and one of the discussion contributors made reference to a 1968 case entitled Time Incorporated vs. Bernard Geis Associates, Bernard Geis, Josiah Thompson, and Random House, 293 F.Supp. 130, wherein the U.S. District Court for the Southern District of New York held that the Defendants' use of photographs for the purpose of analyzing President Kennedy's assassination in a previously published book was fair use and outside the limits of copyright protection. The court further found that there was little, if any, damage to Plaintiff as a result of said use. One can anticipate reference to this case in the future should the Jenny Jones program decide to claim protection with regard to its product.

Anthologies in Australia

In Australia, several educational institutions successfully defended on appeal an action brought by the Copyright Agency Ltd. (otherwise known as CAL; this is the Australian equivalent to the Copyright Clearance Center). The action in Copyright Agency Ltd. vs. VUT (Victoria Colleges) was instituted by CAL and several publishers charging that anthologies compiled by the universities were being sold at a profit and, as such, they were not within the statutory license for educational copying purposes. VUT would mark up the course packs 30% over the actual copying charge to cover overhead expense. The higher court affirmed a prior judgment and held that the charge did not constitute selling at a profit.

Copyright and Monopoly

An opinion issued on April 6, 1995, by the European Court of Justice supported its earlier ruling that copyright cannot be used to create an abusive monopoly but rather the copyright holder must grant a license for use. In Magill Publishing vs. Radiotelevis, the Court held that "so far as a dominant position is concerned, it is to be remembered at the outset that mere ownership of an intellectual property right cannot confer such a position"; i.e. copyright cannot create an "abusive monopoly." Briefly, this case involved a claim by Magill, an Irish weekly magazine, against Irish television, or Radiotelevis, for abusing its dominant position and prohibiting Magill from publishing weekly television listings. While RTE did allow newspapers and magazines to publish daily listings without payment of a fee, it restricted weekly listings to its own publications.

The Church of Scientology and the Internet

Another interesting and newsworthy copyright case involves a suit filed by The Church of Scientology against a former minister, a bulletin board operator and Netcom On-Line Communication Services, the Internet service provider, for copyright infringement after the minister, Dennis Erlich, posted church tax records and allegedly secret teachings onto the Internet. The Church asserts that the teachings are "trade secrets." Netcom, which is represented by Lance Rose, attorney and author of the recently published *Netlaw*, says the outcome of the cases will be important as regards this new area of the law and believes its involvement to be "inapplicable." Rose argues that it is reasonable that the Internet providers would not be able to monitor every posted message.

World Trade Agreement

The *New York Times* reported on March 27, 1995 that under a new Library of Congress rule, foreign creative artists such as composers, film makers, writers and others whose works are copyrighted in their respective countries but were considered public domain in the U.S. will now receive protection. This change was one of the intellectual property provisions included in the 1994 world trade agreement.

Copyright Extra!!! Texaco Case Settles!!!

As we are going to press, the May 16, 1995 issue of the *Wall Street Journal* reports that Texaco Inc. has reached a settlement agreement with the Copyright Clearance Center in the frequently discussed case involving a research scientist's copies of articles from the *Journal of Catalysis*. The scientist had claimed the articles were archival or for his personal files. Texaco asserted the "fair use doctrine" prevented their being liable. In an opinion issued in 1992 the district court disagreed with Texaco and the Second Circuit Court of Appeals affirmed the lower court opinion in October 1994. The next step for Texaco would have been to file a writ of certiorari with the United States Supreme Court asking them to hear the matter. The Court would then have had the opportunity to accept or deny "cert". The terms of the settlement are said to include the payment by Texaco to CCC (Copyright Clearance Center) of slightly more than one million dollars together with a retroactive licensing fee. Additionally, Texaco will sign a licensing agreement for a period of five years with the Center. Peter Urbach, Chairman of the CCC, said settlement will first be subject to the approval of the 83 publishers named in the case.

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Also, Rotbart was aware of the presence of at least two reporters in the audience. In Harper & Row Publishers, Inc. vs. Nation Enters, 471 U.S. 539, 105 S.Ct.2218 (1985), the Supreme Court held that:

In a given case, factors such as implied consent through de facto publication or performance or dissemination of a work may tip the balance of equities in favor of prepublication use.

Therefore, as Rotbart had "published" his work at the proceeding, it is subject to fair use by the defendant.

3. Amount and Substantiality of Work Used

This factor requires consideration of both quantitative and qualitative substantiality. Relevant is the amount and substantiality after an expression has been used and not the factual content. Rotbart's presentation was over 14,000 words and defendants published a total of 793 words with no single article quoting more than 602 words. Campbell vs. Acuff-Rose Music, Inc. found that the amount of reasonable copying depended, among others, on how much the copy served "as a market substitute for the original." The Court found it extremely doubtful that anyone would accept O'Dwyer's news report as a substitute.

4. Effect of the Use on Market Value

As noted by the Supreme Court, this final factor is the most important and central fair use factor. The defense of fair use is allowable in such cases as where the Defendants' use of Plaintiffs' work does not diminish its potential sales or fulfill the demand for the original work. In this case, Rothbart argued that the direct competition by the parties and the use by Defendant of information which disparaged Plaintiff is both Plaintiffs' loss and Defendants' gain. However, this "fourth factor looks to the adverse impact only by reason of usurpation of the demand for Plaintiffs' work through the Defendants' copying of protectible expression from such work." Plaintiffs' argument as to the Defendants' campaign to damage his reputation are not relevant and once O'Dwyer's use is determined to be fair use, his purpose is doing so is unimportant.