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Baum on Copyright — Fair Use: Some Thoughts

by **Marsha L. Baum** (Associate Professor of Law & Director, Law Library, Univ. of SC School of Law)

Copyright law is a complex balancing of interests of copyright owners and users of copyrighted information. To protect the value of copyrighted works and to encourage creative activities, the Copyright Act provides a bundle of exclusive rights for copyright owners.⁽¹⁾ To ensure that society benefits from the creative expression, exceptions to the exclusive rights are incorporated into the statute. An important exception is fair use.⁽²⁾

Determining if the use of a copyrighted work is a fair use is difficult. To help determine fair use in educational organizations, safe harbor guidelines setting out minimums for classroom copying⁽³⁾ were developed following passage of the Copyright Act. The guidelines are not the rule for the maximum amount of copying that can be done; the guidelines merely set a minimum amount of copying that can be done without violating copyright.

The many users who do not have guidelines to determine if a use is fair must rely on the provisions of the Copyright Act and court interpretations of fair use. Although section 107 includes four

factors for fair use determination,⁽⁴⁾ the concept of fair use is not a settled area of copyright law. The determination of fair use is made on a case-by-case basis. The courts apply the four statutory factors to determine if the use of the copyrighted work is fair.

One fair use case which has come under heavy scrutiny is the 1992 Federal district

court case, American Geophysical Union v. Texaco, Inc.⁽⁵⁾ In Texaco, the court held that photocopying of copyrighted journal articles by a scientist employed by a for-profit organization was not a fair use. At issue were copies of scientific articles made by a Texaco research scientist for his files. In applying the four statutory factors to the scientist's copying, the court determined that the purpose of the use was commercial and that the use was not a productive use, that the nature of the work was essentially factual, that copying an entire article was copying the entire work, and that the value of the copyrighted works was harmed by the scientist's copying.

The court held that the first factor, the nature of the use, favored the plaintiffs because the use was commercial. The scientist copied the articles for his research purposes, his research was for Texaco, Texaco will profit from his research, so the use was commercial. The court was not persuaded by the argument that the copies were going to be used for the individual scientist's research. This analysis, if upheld, could affect researchers in other companies and firms, where the company has an ultimate commercial/for-profit focus but where the copies are being used for research by an individual in that company.

The court found that the third factor, the amount used, also weighed in favor of the plaintiff publishers. The court held that copying an article constituted copying of the entire copyrighted work. Texaco had argued that an article is part of an issue of a journal and that copying an article did not equal copying an entire copyrighted work. In other contexts, the Copyright Act and associated guidelines make a distinction between an article and a periodical; for example, the classroom guidelines for copying under section 107 and the section 108 library exemptions both identify an article as part of an issue of a periodical, not as an entire copyrighted work. Although the Texaco situation involves a profit-making entity as opposed to an educational institution or a library, the Texaco analy-

sis may undermine the present treatment of journal articles as parts of a copyrighted work.

The final factor which weighed for the plaintiffs was the effect on the market for the work. The court found that the publishers had "demonstrated a substantial harm to the value of their copyrights through such copying" based on the many ways in which Texaco could have paid for the copies at a reasonable cost and burden to Texaco (e.g., paying royalties to the Copyright Clearance Center or ordering articles from document delivery services which have license agreements with publishers). This finding disregards the fact that operations such as the Copyright Clearance Center are not relevant to the discussion of fair use; if a use is a fair use, royalties do not have to be paid. If Texaco had a single subscription to a journal and made multiple copies cover to cover of each issue to send to locations throughout the company, there would be harm to the value of the copyright and a detrimental effect on the potential market for the title.⁽⁶⁾ But where a research scientist made copies of individual articles for his own research files and where the company had purchased multiple subscriptions to copyrighted works, the harm to the publisher's potential market is not so clear.

Fair use is also a concern for electronic publications and sources. Researchers want to download data into publications, educational organizations want to create multimedia packages, Internet users want to ftp documents from remote locations, and libraries want to develop electronic collections to ease space and preservation problems. The Internet, CD-ROM, online databases, fax transmissions, modem transfers, and local and wide-area networks make the transfer of information rapid and easy. While users are concerned about access and the opportunity to take advantage of new technologies for information creation and transfer, publishers and vendors are concerned about loss of value of their copyrighted products as informa-

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Baum Footnotes

⁽¹⁾ 17 U.S.C. § 106 sets out five exclusive rights held by the copyright owner: the right to reproduce the work, the right to prepare derivative works, the right to distribute the work, the right to publicly perform the work, and the right to publicly display the work. 17 U.S.C. § 106 (1988 & Supp. V 1993).

⁽²⁾ 17 U.S.C. § 107 (1988 & Supp. V 1993). Reproduction by libraries and archives is another exception to the copyright owner's exclusive rights (17 U.S.C. § 108 (1988 & Supp. V 1993)).

⁽³⁾ Section 107 of the Copyright Act identifies four illustrative factors to be considered in determining if a use is a fair use. The statutory language does not limit consideration to these four factors but the courts have tended to concentrate on the statutory elements. The four factors are:

- (1) the purpose and character of the use,
- (2) the nature of the work,
- (3) the amount and substantiality of portion used in relation to the work as a whole, and,
- (4) the effect of the use upon the potential market for or value of the work.

17 U.S.C. § 107 (1988 & Supp. V 1993).
⁽⁴⁾ Minimum guidelines were also developed for interlibrary loan under § 108(g)(2) of the Copyright Act. 17 U.S.C. § 108(g)(2) (1988).

⁽⁵⁾ American Geophysical Union v. Texaco, Inc., 802 F. Supp. 1 (S.D.N.Y. 1992).

⁽⁶⁾ In Pasha Publications v. Enmark Gas, 22 U.S.P.Q. 2d 1076 (D.N.D. 1992), the company had subscribed to one copy of the newsletter, Gas Daily. The company copied it cover-to-cover and faxed the entire newsletter to company employees in other locations on a regular basis. The court held that the multiple copying and transmission of the newsletter was not a fair use.

⁽⁷⁾ Victoria Sind-Flor, "West Moves to Protect Opinions; Infringement Prosecuted," Nat'l L. J., Dec. 27, 1993, at 3.

⁽⁸⁾ Id.
⁽⁹⁾ Peter H. Lewis, "Student Accused of Running Network for Pirated Software," N. Y. Times, Apr. 9, 1994, § 1, at 1.

⁽¹⁰⁾ Junda Woo, "Copyright Laws Enter the Fight Against Electronic Bulletin Board," Wall St. J., Sept. 27, 1994, at B11.

⁽¹¹⁾ Information Infrastructure Task Force, Green Paper: Intellectual Property and the National Information Infrastructure, A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights (July 1994).

⁽¹²⁾ Two of the recommended changes are the addition of "transmission" as a means of distributing copyrighted works and a prohibition on devices that are intended to override or defeat methods for preventing unauthorized uses of copyrighted works (e.g., programs which bypass copy protection on software).

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tion is rapidly transmitted around the globe with no accountability or copyright safeguards.

Publishers of CD-ROM products and online databases have resolved some of their concerns by retaining ownership and merely licensing their products, effectively removing them from the realm of copyright and fair use. The license agreements may forbid download and transfer of data and other uses which can reduce the economic value of the product. CD-ROMs and online database licenses generally limit access and prohibit downloading or use of the data for creation of new resources without permission. Access may be monitored to count the number of uses or the frequency of printing or downloading to establish royalty charges.

Other publishers are finding answers in litigation and criminal prosecutions. **West Publishing Company** has filed infringement suits against document delivery companies which fax case reports to clients. ⁽⁷⁾ **Mead Data Central** (LEXIS/NEXIS) settled a suit with a defendant in Georgia and prevented the use of MDC's case reports in the defendant's CD-ROM products. ⁽⁸⁾ In April, a Federal grand jury indicted an MIT student on one felony count of conspiring to commit wire fraud for operating a bulletin board from which people copied software programs. ⁽⁹⁾ In August, another bulletin board operator was indicted on charges of criminal violation of copyright laws and wire fraud. ⁽¹⁰⁾

The issues of copyright in the electronic environment are being discussed at the national level. In July, the **Working Group on Intellectual Property Rights of the Information Infrastructure Task Force** (IITF) issued a draft report ⁽¹¹⁾ on intellectual property and the National Information Infrastructure (NII).

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software, film and video, and network publishing. It holds conferences and seeks submissions from governments, trade and professional associations, and charges that might be necessary.

As a result, reflecting copyright legislation in the USA and elsewhere, Berne

The draft report made several recommendations for amendments ⁽¹²⁾ to copyright law to adapt to the changes in information exchange resulting from widespread availability of publications in electronic form. These recommendations are the subject of much debate among concerned groups, including publishers and librarians.

While the Working Group's report did not recommend changes in the fair use or library exceptions to the copyright owner's exclusive rights, the report did recommend that a conference be held to discuss fair use for digital works and online services. On September 21, 1994, the Information Infrastructure Task Force Working Group on Intellectual Property Rights held a conference to develop fair use guidelines for libraries and schools for copyrighted works transmitted via the National Information Infrastructure (NII). The IITF Working Group's hearings and conferences have produced potential solutions and a point of discussion for the evolution of copyright law.

The goal of copyright law is to balance the copyright owner's economic interests and society's interests in providing access to information. Fair use has provided a mechanism to promote research, comment and criticism while safeguarding the copyright owner. The balance may be shifting with the possible reduction in fair use copying for researchers in commercial enterprises based on the Texaco fair use analysis. With the advent of electronic publishing and the NII, answers must be found to fair use questions to ensure access while protecting copyright owners. The balancing of interests anticipated in the Constitution continues to require a delicate assessment of rights and responsibilities for users and producers of copyrighted information. ☛

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