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Anne Klinefelter

University of Miami Law Library

Anne F. Jennings

Sinkler & Boyd

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Legally Speaking

The Copyshop Coursepack, Not Fair Use in the Sixth Circuit

Column Editor: Anne F. Jennings (Sinkler & Boyd) <sblibrary@charleston.net>

by Anne Klinefelter
(Head of Public Services,
The University of Miami Law Library)
<aklinefe@law.miami.edu>

"Multiple copies for classroom use" is listed in section 107 of the Copyright Code as an example of fair use reproduction of copyrighted works, but the Sixth Circuit in November of 1996 held that a commercial copy service's copying and selling of coursepacks without copyright owners' permission was not fair use. The decision, *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381 (6th Cir., 1996) is in line with a 1991 New York federal district court decision, *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991), which found Kinko's production and sale of educational coursepacks to be a violation of copyright. The Sixth Circuit decision replaces a vacated decision by a three-judge panel of that court which found that Michigan Document Services was within the law in preparing the coursepacks. Seven court members join Judge David A. Nelson in the full court majority opinion, while five members dissent.

The Michigan Document Services case highlights the difficulty and beauty of the vagueness of the statutory fair use provisions. Section 107 codifies a court developed doctrine which permits exceptions to the copyright monopoly in order to reach the Constitutionally mandated goal of copyright, "[t]o promote the progress of the Sciences and useful Arts..." (United States Constitution, Article 1, Section 8.) Each use of copyrighted material in effect requires a judicial determination as a matter of fact as to whether it constitutes a fair use exception to prohibitions against various uses of a copyrighted work. Additionally, the application of the statutory language involves questions of law which are far from settled. Few fair use cases have been decided since the enactment of the 1976 Copyright Act codifying fair use, so the Michigan Document Services case may have great impact on the development of the fair use doctrine.

The coursepacks in the Michigan Document Services case were collections of excerpts from copyrighted works selected and provided to the copyshop by professors who then assigned their students the materials available in the coursepacks. Six excerpts from mostly academic works were at issue. These selections included from five to thirty percent of the total of each copyrighted work excerpted.

Michigan Document Services' corporate owner, James Smith, is characterized by the Sixth Circuit as "something of a crusader." Mr. Smith publicized his belief that the "Kinko's" decision was wrongly decided and advertised that his copyshop could provide coursepacks without the delay associated with getting permission from copyright owners. Naturally, the publishing industry took note and, three publishers, Princeton University Press, MacMillan, Inc. and St. Martin's Press, Inc., filed suit against James Smith and Michigan Document Services.

The full court majority decision by the Sixth Circuit exam-

ines four factors listed in the fair use section of the Copyright Code to determine whether the coursepack's production and sale were acceptable. While "multiple copies for classroom use" are in the opening list of fair uses in section 107, the court explains that this enumeration does not provide blanket immunity for those uses. The court relies on the recent "Pretty Woman" decision of the Supreme Court (*Campbell v. Acuff-Rose*, 510 U.S. 569, 114 S.Ct. 1164 (1994)) in deciding that uses listed at the beginning of section 107 must be evaluated in light of the four factors which follow in that section.

The fourth factor listed in section 107 is "the effect of the use upon the potential market for or value of the copyrighted work." The Sixth Circuit considers the market effect to be the factor which is of primary importance. The burden of proof regarding market harm, the court says, falls on the copyright holder if the challenged use is a commercial one. The characterization of the

use as commercial or non-commercial is one of the most contested points in this case. The court finds that although the students' use of the coursepacks is non-commercial, the challenged use is the duplication by Michigan Document Services. The court describes this use as the duplication of copyrighted materials for sale by a for-profit corporation which sought to give itself competitive edge by refusing to pay royalties, or permission fees, for the duplication. This use, the court concludes, is commercial.

The court then finds that Michigan Document Services failed to prove a lack of market harm resulting from the coursepack production. The court goes on to say that even if the publishers should carry the burden of proving market harm, the publishers had provided this proof. The court reasons that a valid test for market harm is a showing that if the challenged

use became widespread, the potential market for the copyrighted material would be harmed. The court notes that the amount of permission fees that Princeton, MacMillan, and St. Martin's presses had collectively received per year was almost \$500,000, a sum which the court points out would be lost if all copyshops refused to pay royalties.

Judge Ryan, who wrote the now vacated opinion of the three-judge panel of the Sixth Circuit, is joined in his dissent by Judge Daughtrey where he argues that the use to be evaluated as commercial is not the mechanical duplication, but a use which involves a profit from exploiting material based on an assessment on its content. Judge Ryan characterizes the duplication of submitted materials to Michigan Document Services as an "exploitation of professional copying technologies and of the inability of academic parties to reproduce printed materials efficiently, not the exploitation of copyrighted, creative materials." Judge Ryan further argues that the students' use qualifies as a "transformative" use, which favors a finding of fair use.

Chief Judge Boyce F. Martin, joined by Judge Moore, also dissents from the majority opinion, and says that the identity of the person operating the photocopy machine is irrelevant. A third dissent by Judge Merritt, also joined by Judge Daughtrey,

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argues that the copyshop should be able to "stand in the shoes" of the students and professors requesting the copies.

The full court majority rejects the argument that to base a finding of market harm on lost permission fees is circular. Michigan Document Services had argued that if fees were not due, loss of those fees was not a proper measure of market harm. The full court opinion concludes that if the copyright owner has developed a mechanism for exploiting a market such as permission fees for photocopies, lost fees were a valid consideration in a fair use analysis.

A final point regarding the market harm factor concerned a statement signed by professors requesting coursepacks. All such professors signed that they would only request and assign photocopies of excerpts when they would not assign the full text. While one professor is on the record saying that he had experienced serious delays from a competing copyshop because of permission fees procedures, the court notes that none of the professors said they would refrain from assigning any work or portion of a work if permission fees had to be paid. The court's implied conclusion seems to be the "progress of Science and the useful Arts" through higher education might be slowed but would not be stopped by the interposition of permission fees paid to copyright owners for excerpts of works.

With this analysis of the market harm factor out of the way, the court finds that the other three factors listed in section 107 of the Copyright statute are "considerably less important." The court quickly disposes of the question of the "purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes" by restating that the use at issue is of a commercial nature.

The court does, however, go on to discuss three points relevant to the nature-of-the-use fair use factor. First, the court dismisses the point that the copyshop is merely doing more efficiently for the students or professors that which would be fair use if they were to do the copying themselves. While the copyshop can do the copying itself more efficiently, the court points out that competing copyshops which pay permission fees are also able to serve the educational needs more efficiently than if the students or professors were to do the copying themselves. Additionally, the court refuses to concede that if students or professors were to do this copying themselves, the copying would be fair use. The court also concludes that the verbatim copies of excerpts, even when juxtaposed against other works and packaged conveniently, is not a variety of "transformative" use like the parody at issue in the *Campbell v. Acuff-Rose* case.

The next factor considered by the court, "the nature of the copyrighted work," was not disputed by the parties. The court says that Michigan Document Services did not contest the copyrightability of the excerpts and concludes that this factor weighs against a finding of fair use.

The last factor taken up by the court is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." The excerpts represented five, eight, sixteen, eighteen and thirty percent of the copyrighted works from which they were taken. The court considers all percentages, even the five percent, to be "not insubstantial." The court further considers the value of the excerpts and looks to the ultimate use of the materials in determining that the professors must have selected portions which were important.

After moving through an analysis of the four statutory factors, the court looks to legislative history as a separate consideration in evaluating fair use. The Sixth Circuit explains that legislative history could assist in clarifying the "troublesome" statutory issue of fair use. The court identifies the "Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions With Respect to Books and Periodicals," usu-

ally referred to as the "Classroom Guidelines," as a persuasive component of the legislative history of the 1976 Copyright Act. The Classroom Guidelines are a negotiated agreement among groups representing educational institutions, authors and publishers created during the development of what became the Copyright Act of 1976. The Guidelines attempt to draw lines for copying based on spontaneity and brevity. Professors are allowed nine instances of multiple copying for classroom use per semester, and the limits on quantity are rather severe — basically, 1,000 words from an article or book. The court concedes that these Guidelines purport to be only a "safe harbor" and draw only the boundaries for clear minimal fair use and not for the maximum allowable. However, the court says that Michigan Document Services is "light years away" from the uses allowed in the Guidelines, and concludes that the legislative history supports a finding of no fair use.

A final fair use analysis in the Sixth Circuit opinion attempts to resolve copyright ambiguities through the basic purpose approach set forth by the Supreme Court in 1984 in *Sony Corp. of Am. v. Universal Studios, Inc.* (464 U.S. 417, 104 S.Ct. 774.). The Sixth Circuit distinguishes between the immediate effect of copyright, compensation for the creator, and the ultimate aim of that law, general benefits to the public. The court then reasons that while academic writers like those whose works were copied for the coursepacks in this case may prefer wide dissemination of their works rather than strict collection of royalties, the publishers who own the copyrights need monetary incentives to publish these works. The court then concludes that the loss of permission fees for coursepacks would inhibit the publication of academic writings and would result in a loss of general benefits to the public.

The Sixth Circuit also reviews the district court's findings that the infringement of copyright was willful, justifying the imposition of higher damages than would otherwise be awarded. The Court of Appeals says that fair use is one of the most unsettled areas of law and the defendants' belief that their duplicating was fair use is not so unreasonable to qualify as willful within the meaning of the statute. While the damages awarded were well within the statutory limits, the language of the lower court opinion reflected an intention to send a warning to a willful infringer. Accordingly, the Sixth Circuit remands the case for reconsideration of the damages.

In addition to having to pay damages, Michigan Document Services was enjoined by the district court "from copying any of the plaintiffs' existing or future copyrighted works without first obtaining the necessary permission." The Sixth Circuit upholds this enjoining against duplication of future works, but remands for clarification of the prohibition against copying all copyrighted works. The Sixth Circuit requires the district court to carve out allowances for copying which might be allowed under copyright, as long as the rationale is not fair use.

The dissent by Merritt makes much of this tentatively upheld injunction. Since fair use is a matter of fact, Judge Merritt argues, this injunction's "gross overbreadth" reaches far beyond the statutory limits of the copyright monopoly and violates the First Amendment.

Susan Kornfield, attorney for Michigan Document Services, reports they are hoping the Sixth Circuit *en banc* opinion is not the final word. Michigan Document Services is filing a petition seeking review by the Supreme Court, though Ms. Kornfield admits the odds are something around 75 to 8,000 that the Court will review the case.

In the meantime, libraries should be alert to this important Circuit Court opinion giving a limited definition of fair use. While the holding is binding only in the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee) and should apply only to commercially produced coursepacks, the paucity of fair use decisions means Michigan Document Services will stand as persuasive authority across the country for a range of fair use issues.