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Cases of Note

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LEGAL ISSUES

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Cases of Note

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Fair Use

Los Angeles News Service v. KCAL-TV Channel 9, 1997 U.S. App. LEXIS 4295 (March 11, 1997)

In a recent decision, the Ninth Circuit Court of Appeals reversed and remanded a district court summary judgment decision which found in favor of the defendant KCAL-TV and declared that the unauthorized broadcast of the Los Angeles News Service's ("LANS") copyrighted videotape of the Reginald Denny beating during the Los Angeles riots was a fair use by the television station.

This case involves the now familiar (some would say infamous) aerial videotape shot by LANS depicting Mr. Denny being dragged from his truck rig and viciously beaten. The film was broadcast "live" on KCOP-TV, a LANS licensee, and was subsequently seen on videotape broadcast by KCOP as well as many other television stations. KCAL requested a license from LANS and was denied. However, the station obtained a copy from another source which it subsequently broadcast on numerous occasions without permission. LANS then sued KCAL for copyright infringement and, on Motion for Summary Judgment, Judge Richard A. Gadbois of the United States District Court for the Central District of California found that KCAL was exempt from liability on the basis that the videotape was a "unique and newsworthy videotape of significant public interest and concern"; that KCAL used the tape to report the news; and, that LANS failed to demonstrate any lost or potentially lost sales or licenses as a result of KCAL's use. LANS appealed Judge Gadbois' ruling to the Ninth Circuit Court of Appeals which reversed the decision and remanded the case back to the district court for further proceedings on Plaintiff's claim.

LANS argued on appeal that the District Court inappropriately applied the fair

use factors because KCAL's use was "nontransformative, commercial, and improper; it interfered with LANS's ability to control the initial dissemination of the Denny tape; the use was substantial even though KCAL broadcast only 30 seconds of the four minute, 40 second videotape because it was the heart of the work; and it had a serious effect on the potential market for LANS's copyrighted work because KCAL's unauthorized commercial broadcasts competed directly with LANS's authorized licensees."

In turn, KCAL challenged plaintiff's view that its use was nontransformative stating that both the Supreme Court and the Ninth Circuit have recognized news reporting as a productive use (see *Harper & Row*, 471 U.S. at 561; *Los Angeles*

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News Service v. Tullo, 973 F.2d 791, 797 (9th Cir. 1992). KCAL further emphasized that the tape had been previously published and that only a small portion of the total amount of LANS's videotape was broadcast by them. Additionally, as to the diminution of the potential sale, LANS licensed more than a dozen other uses subsequent to the KCAL broadcast. Finally, KCAL asserted that because of the unique newsworthiness of the videotape

itself, the First Amendment reinforces "the conclusion that KCAL's use was fair."

Taking the above into consideration, and as there was no dispute that KCAL did in fact use LANS's copyrighted work without their permission, the Court of Appeals reviewed the issues in relation to the four factors set out in 17 U.S.C. 107 and found as follows:

The purpose and character of the use

The Court conceded that the fact that as KCAL was reporting news when it ran the LANS tape weighed heavily in its favor but, in turn, found the fact that LANS and KCAL are both in the business of gathering and selling news strongly favored LANS. LANS performs a service that its licensees choose not to do for themselves, including operating its own helicopter with news crew aboard. LANS is paid for licensing its coverage of news to the media. KCAL is a for-profit company engaged in a commercial enterprise that also gathers and indirectly "sells" news and, therefore, "stands to profit from exploitation of the copyrighted material without paying the customary price" (*Harper & Row*, 471 U.S. at 562).

The Court also found a "forceful argument that the LANS tape of the Denny beating itself became a news item shortly after it was published because its view was so extraordinary." Had KCAL run the tape as a news story, its use would weigh in its favor. However, there was no evidence that KCAL used the tape in this way. Further, it "did not attribute the tape to LANS, and so far as the record discloses, aired it as if it were KCAL's own rather than, for example, indicating that the best tape of the beating had been made by a LANS helicopter crew." The tape was simply used as part of KCAL's coverage of the riots. And, although KCAL apparently ran its own voice-over, it did not add "anything new or transformative to what made the LANS work valuable — a clear, visual recording of the beating itself."

Unlike the issues in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S.Ct. 1164, nothing in the record suggested that KCAL requested a license "in a good faith effort to avoid this litigation." And unlike the use of the original in 2 Live Crew's parody of "Oh, Pretty Woman," KCAL "obtained a copy of the tape from another station, directly copied the original, superimposed its logo on the LANS footage, and used it for the same purpose for which it would have been used had it been paid for."

The nature of the copyrighted work

The tape of the Denny beating was found to be informational and factual and news; characteristics that strongly favored KCAL. Also favorable to KCAL was the

fact that the tape was published before its use by the defendant (*Harper & Row*, 471 U.S. at 564). Although the tape did demonstrate some creativity as a result of the skills of the LANS cameraman, the Court found this factor weighed substantially in KCAL's favor (see *Tullo*, 973 F.2d at 798).

The amount and substantiality of the portion used in relation to the copyrighted work as whole

While only a small amount of the entire tape was used, the Court found that "it was all that mattered." As determined in *Los Angeles News Service v. Tullo*, "[a]lthough AVRS (Audio Visual Reporting Services) copied only a small part of the raw footage shot by LANS, it was the most valuable part of that footage. In preparing a newscast, a television station selects the most effective and illustrative shots from the raw footage available. Thus the news programs AVRS copied included what LANS's customers thought was the best of the LANS footage — its 'heart.' " This factor weighed against KCAL, for "the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression." (see *Harper & Row*).

The effect of the use upon the potential market for or value of the copyrighted work

While "news" isn't normally thought of as having a secondary market, this case was found not be "traditional" in relation to the fair use statute. The Court stated that "copying a news broadcast may have a stronger claim to fair use than copying a motion picture because the potential market for copies of news broadcasts is not as great as that for copies of movies." (*Tullo*, quoting *Sony*, 464 U.S. at 455). Also, the LANS's tape had been licensed — and published — before KCAL's use, and was licensed after its use. To that extent, this factor also weighed in favor of KCAL. At the same time, KCAL's stated purpose was to use the tape as "news" and it was a potential licensee or consumer of LANS's product. There was also evidence that KCAL's use of the LANS videotape for free and without a license would destroy LANS's original and primary market. KCAL was ready to buy from LANS and when it couldn't it went elsewhere to obtain the product. The Court found that "were this to happen more broadly, it no doubt would adversely affect LANS's creative incentives." In *Campbell*, it was determined that "courts must consider 'whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially

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TION: Firm management should review the copyright law — particularly 17 U.S.C. Sections 107-108 — as well as firmwide copying and other copyright related activities before implementing a copyright policy. At a minimum level, this should include a review of *Copyright Office Circular R21: Reproduction of Copyrighted Words by Educators and Librarians*, the *Heller/Wiant Copyright Handbook*, and *Gasaway/Wiant's Libraries and Copy-*

right: *A Guide to Copyright Law in the 1990's*.

2. Management should review carefully all firmwide online database, CD-ROM and software contracts.

3. Management should consider reviewing such seminal cases as:

Sony Corporation of America v. Universal City Studios, 464 U.S. 417 (1984).

Washington Business Information v. Collier, Shannon & Scott, No. CA 91-0305-A (D.C. Va., filed 2/26/91). (Parties settled; no court decision. But see 41 Pat. Trademark & copyright J. BNA) 389 (case

announced and described); 42 PTCJ 619 (settlement announced).

Basic Books v. Kinko's Graphics, 758 F.Supp. 1522 (S.D. N.Y. 1991).

Pasha Publications v. Enmark Gas, 22 U.S.P.Q. 2d 1076 (BNA), Copyright L. Rep. (CCH) P26,881 (N.D. Tex. 1992).

Television Digest v. U.S. Telephone Ass'n., 841 F.Supp. 5 (D.D.C. 1993).

Campbell v. Acuff-Rose Music, 114 S.Ct. 1164 (1994).

American Geophysical Union v. Texaco, 60 F.3d 913 (2nd Cir. 1994). ☛

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erty, and therefore might be expected to take a different approach from that of the USA or the UK, changes are also under way in Australia.

In September 1995 the then Commonwealth Government announced its intention to amend Australian copyright legislation to reflect modern communications technology. The resulting Bill was lost when the Government changed at the last election, but it is worth noting that it was proposed to introduce a new 'transmission right', and to introduce moral rights into Australian law. There is some doubt about the Howard Government's commitment to moral rights legislation in the form proposed, but it is still worth noting that a number of jurisdictions are now considering such rights as having an important role to play in our brave new world.

The Balance Appears to be Shifting

Copyright serves publishers, record companies, television broadcasters and, not least, the film industry. The dominance of the United States in creative works, book publishing and movie-making — drives the rigorous enforcement of US copyright law by the Courts. The position is much the same in the United Kingdom, another substantial exporter of intellectual property. If we believe that copyright, the currency in which Hollywood, the music and software industries, as well as publishers, all trade, is going to be abandoned or weakened, we are simply deluding ourselves.

The answer for scholarly publishing appears to lie in dialogue. Let us devote less energy to arguing as adversaries, and more to the constructive evolution of appropriate licensing arrangements and guidelines to the use of copyright material in the institutions for which that material is, after all, written and published. ☛

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adverse impact on the potential market' for the original" (quoting *Nimmer*, §13.05[A][4], p.113-102.61). In view of all of the above, this factor weighed against a finding of fair use.

In concluding, the Circuit Court agreed that "KCAL's use of LANS's copyrighted tape was arguably in the public interest because it was a perceptive recording of a newsworthy event. However, KCAL's use was commercial and came in the wake of LANS's refusal of a license." There was no evidence that alternatives were not available and, while the tape had been licensed and published before KCAL's use, "it was not obvious that there was no impact on the market for first publication rights as KCAL itself requested a license." Also, there was no dispute that KCAL used the heart of the tape. Therefore, a finding of fair use was not a reasonable conclusion in the view of the Court. ☛

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