Against the Grain

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Cases of Note -- Copyright: Useful Articles

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Endnotes

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2. **Stanley H. Friedelbaum**, *The Quest for Privacy: State Courts and an Elusive Right* 65 Alb. L. Rev. 945-46 (2002).
3. **Judith DeCrew**, Privacy, in *The Stanford Encyclopedia of Philosophy* (2006); available at *http://plato.stanford.edu/entries/privacy*.
4. **John Stuart Mill**, *Of the Limits to the Authority of Society over the Individual*, On Liberty (4th ed. Longman, Roberts & Green, 1869); available at *http://www.bartleby.com/130/4.html*.
5. **Randall P. Bezanson**, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 Calif. L. Rev. 1133, 1138-39 (1992).
6. **Samuel D. Warren** and **Louis D. Brandeis**, *The Right to Privacy,* 4 HARV. L. REV. 193 (1890); available at *http://www.ilrg.com/download/4harvlrev193.txt*.
7. *id.* at 195.
8. ***Mitchell v. Random House, Inc.***, 703 F.Supp. 1250 (S.D.Miss., 1988).
9. ***Moldea v. New York Times Co.***, 15 F.3d 1137 (C.A.D.C., 1994).
10. ***New York Times Co. v. Sullivan***, 376 U.S. 254 (1964).
11. **Warren** and **Brandeis** at 214-215.
12. *id*. at 216.
13. *id*. at 218.
14. *id*. at 218.
15. *id*. at 218.
16. *id*. at 219.
17. **Randall P. Bezanson**, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 Calif. L. Rev. 1133, 1140-41 (1992).
18. ***Griswold v. Connecticut***, 381 U.S. 479; 85 S. Ct. 1678; 14 L. Ed. 2d 510 (1965). ***Griswold*** based its privacy upon the 3rd Amendment, 4th Amendment, and 9th Amendment. Even more controversial, ***Roe v. Wade*** used the 9th Amendment and the 14th Amendment. ***Roe v. Wade***, 410 U.S. 113; 93 S. Ct. 705; 35 L. Ed. 2d 147 (1973).
19. State Librarian **Bartholomew A. Kane** and his Special Assistant, **John R. Penebacker**, requested the Hawaii Attorney General opinion. The opinion was written by Staff Attorney **Hugh R. Jones**, and approved by the director of the office, **Kathleen A. Callaghan**. OIP Opinion Letter No. 90-30 (October 23, 1990), Department of the Attorney General, Office of Information Practices, State of Hawaii. Available at *http://www.wku.edu/~bryan.carson/librarylaw/*.
20. Hawaii Attorney General Opinion. *See Generally*, ***Martin v. City of Struthers***, 318 U.S. 141 (1943); ***Talley v. California***, 362 U.S. 60 (1960); ***Gibson v. Florida Legislative Investigation Committee***, 372 U.S. 539 (1963); ***Bates v. City of Little Rock***, 361 U.S. 516 (1960); ***NAACP v. Alabama***, 357 U.S. 449 (1958); ***Thomas v. Collins***, 323 U.S. 516 (1945); ***Griswold v. Connecticut***, 381 U.S. 479 (1965); ***Lamont v. Postmaster General***, 381 U.S. 301 (1965); ***DeGregory v. Attorney General of New Hampshire***, 383 U.S. 825 (1966); ***Sweenzy v. New Hampshire***, 354 U.S. 234 (1957); ***Stanley v. Georgia***, 394 U.S. 557 (1969); Texas Open Records Decision No. 100 (Jul. 10, 1975).
21. ***New York Times Co. v. Sullivan***, 376 U.S. 254 (1964).
22. **Michael Grossberg**, *Some Queries About Privacy and Constitutional Rights*, 41 Case Western Reserve Law Review 857, 858 (1991).
23. **Grossberg** at 858-59, quoting **Dunlap**, *Where the Person Ends, Does the Government Begin? An Explanation of Present Controversies Concerning "The Right to Privacy"* 12 Lincoln Law Review 47, 49 (1981).
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Cases of Note — Copyright

Useful Articles

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Universal Furniture International, Inc. v. Collezione Europa USA, Inc. United States Court of Appeals for the Fourth Circuit, 2006 U.S. App. LEXIS 22212 (2006).

Universal Furniture makes high-end original furniture while **Collezione** is at the low-end or does "lower-cost models of existing furniture" as they say trying to be delicate. **Universal's** "Grand Inheritance" and "English Manor" (woo!) lines are designed from actual 18th and 19th-century furniture in the public domain. It registered them with the Copyright Office in 2003 as "decorative sculptural designs on furniture; adaptation of preexisting decorative designs; compilation of decorative designs on suites of furniture."

And there's a reason for this as you'll see shortly.

Collezione designed some awfully similar stuff before it learned they were copyrighted. Seeking to avoid suit, it agreed to take theirs off the market and redesign. **Universal** claimed it was still substantially similar and retained the "overall aesthetic impression of the Universal collections' ornamentation.

Universal sued and asked for a preliminary injunction to keep the rival off the market while the suit meandered its leisurely way. The district court decided "the balance of hardships stood in equipoise" so **Universal** would have to show a greater likelihood of prevailing at trial than if they faced the greater hardship.

The court applied the "conceptual separability test" and found the design was not conceptually separable from the utilitarian function of the furniture. And denied the injunction.

And you're saying "huh?" Which is why I'm writing this dreadfully dry thing.

So Let's Go To That Interlocutory Appeal

Interlocutory means the appeal can be brought even as the lawsuit goes on. Not in the middle of the trial, but during that interminable period before. Which is logical given that ***Universal*** *is claiming irreparable harm.* ***Collezione*** *is selling knock-off furniture, and* ***Universal*** *can never prove that they lost sales.*

A district court abuses its discretion by making a clearly erroneous finding of fact or by misapprehending the law. See ***Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel***, 872 F.2d 75, 78 (4th Cir. 1989).

Federal courts can grant temporary or final injunctions "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." ***Copyright Act***, 17, U.S.C. § 502(a). And it has one of those grisly four factor tests: (1) plaintiff's likelihood of success on the merits; (2) possibility of irreparable harm to plaintiff if not granted; (3) harm to defendant if granted; (4) public interest. See ***Blackwelder Furniture Co. v. Seilig Mfg. Co.***, 550 F.2d 189, 196 (4th Cir. 1977).

Useful Articles

Furniture as well as other "useful articles" is not eligible for copyright. But design elements (think copyright for art) can be protected to the extent they "can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." 17 U.S.C. § 101. Hence the conceptual separability test.

Universal argued it was creating a compilation of adapted stuff from the public domain, and that originality met the test. The ***Act*** gives protection to "… original works of authorship … [including] pictorial, graphic, and sculptural works," including compilations which meet the "works of authorship" standard. But it still must be conceptually separable from the sit upon or lounge on functionality of the furniture.

Lamps Plus, Inc. v. Seattle Lighting Fixture Co., 345 F.3d 1140 (9th Cir. 2003) dealt with a combination of four preexisting ceiling lamp elements with a preexisting table-lamp base. Its lack of originality and lack of conceptual separability resulted in a holding of no protection.

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Questions & Answers — Copyright Column

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QUESTION: A music library is evaluating the feasibility of a CD preservation program and is considering the following to preserve its existing collection of CDs proactively but is concerned about whether these actions infringes copyright. (1) Create a single duplicate copy of CD holdings and store these copies in a secure dark archive. (2) Continue to circulate the originals as normal, but if an original becomes lost or damaged beyond usability, first conduct a search to see if a replacement copy can be found in-print or otherwise available on the market at fair market value. (3) If no such replacement can be found, create a new copy from the duplicate in the dark archive and use that for future circulation.

ANSWER: While the plan makes sense as a preservation matter, some of the actions do infringe the copyright. (1) The only backup copies for libraries that are permitted are under section 108(b), and that is for unpublished works only. CDs, and music CDs in particular, typically are published. Reproducing these CDs to create backup copies without permission is infringement. What the library can do is to purchase two copies of each CD and place one in a dark archive. (2) Number two follows the requirements of section 108(c) for replacement copies. (3) If no replacement copy can be found at a fair price, then the library is permitted to make a replacement copy which could be made from the purchased CD in the dark archives.

Even if the ***Copyright Act*** were amended to further library preservation, it likely would permit copying for preservation only if the work were at immediate risk of loss or destruction. CDs are not considered to be so fragile.

QUESTION: A library is considering downloading audio books as a less expensive alternative to purchasing the books on CD. Would this present copyright concerns?

ANSWER: Yes, it would present copyright concerns if the intent is to download books onto a server so that multiple users can listen to them rather than paying a license fee. While individuals may purchase downloads from **Audible.com** and other companies, the license agreement to which they must agree assumes that the downloading is being done for one listener. The proposed activity is equivalent to buying one copy of a printed book and then making photocopies of it to lend rather than purchasing multiple copies. It may be possible to obtain a multiple listener license from these companies, which the library should do if it intends to substitute downloads for purchasing books on CD.

QUESTION: A school takes the position that fair use does not apply to podcasts since they are syndicated and are not confined to the classroom. Is this correct?

ANSWER: Actually no. A podcast is simply a way to disseminate a speech or a talk. So, it depends on the podcast and the copyright owner. The owner may be delighted to have the podcast made public to everyone; on the other hand, the owner may restrict access or require anyone who obtains access to agree to the terms of a license. Fair use does apply to podcasts, but if the work is licensed, the license agreement trumps fair use.

QUESTION: When posting materials on Blackboard for a class, if the articles and chapters are documented and properly cited, is it necessary to seek permission to post them? Or is documenting/citing the source enough to satisfy copyright concerns?

ANSWER: This question mixes two things: copyright and plagiarism. The copyright concern is copying the materials in the first place since reproduction is one of the exclusive rights of the copyright holder. Plagiarism is claiming original authorship of someone else's work or incorporating it without adequate acknowledgement. So copyright is not concerned with citing or attribution typically but with reproduction, distribution, display, etc.

Before the Web and course management software, faculty members often photocopied handouts and distributed them to the members of a class. The **Guidelines on Multiple Copyright for Classroom Use** were negotiated guidelines that **Congress** endorsed in 1976 as a good balance of the interests of publishers and those of educators. They specified which activities and within what limits would constitute fair use for producing handouts of copyrighted works for students in nonprofit educational institutions. One requirement is that the faculty member seek permission when the same item is used as a handout for a second term. Applying the guidelines to the electronic environment means that posting an article for a class on **Blackboard** (within the limits of the guidelines) would require permission for use the second semester.

An excellent alternative is to provide a link to the item on the Web or to a licensed resource to which the educational institution subscribes. It requires no permission to post the link.

QUESTION: May a library place on reserve a copy of a journal issue that is personally owned by a faculty member? If so, may it remain on reserve for multiple semesters?

ANSWER: Yes. If the journal issue is owned either by the library or by a faculty or staff member, it may be placed on reserve indefinitely. Putting an original copy on reserve does not implicate copyright in any way since the library is not reproducing the work for reserve. If it is a photocopy that is being placed on reserve, whether personally owned by a faculty member or made by the library, it is a reproduction and permission should be sought for use after the first term it is on reserve for that faculty member.

Cases of Note
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Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) with its incredibly low standard for originality nonetheless dealt with a compilation of data and not sculptural design.

Now this semi-mystifies me because adding knobs and doo-dads to a bed seems more creative than putting business phone numbers in a separate section from home numbers. And knobs and doo-dads are sure separate from bed qua bed of box springs, four legs and mattress. Indeed, in a world without mosquito nets or overhead mirrors for the sexually raunchy, bedposts serve no functional use whatsoever.

Nonetheless, the Fourth Circuit goes with their distinction between utility and decoration as laid down in ***Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., Inc.,*** 74 F.3d 488 (4th Cir. 1996).

"[T]he industrial design of a unique, aesthetically pleasing chair cannot be separated from the chair's utilitarian function, and therefore, is not subject to copyright protection. But the design of a statue portraying a dancer, created merely for its expressive form, continues to be copyrightable even when it has been included as the base of a lamp which is utilitarian. The objective in designing a chair is to create a utilitarian object, albeit an aesthetically pleasing one; the objective in creating a statue of a dancer is to express the idea of a dancer." *Id.* at 493.

Well, that doesn't make a lot of sense to me. But the Fourth Circuit is in Richmond, VA. and these judges must decorate their Federalist mantles with bronze dames with clocks in their bellies.

And incredibly, they go on to say that an Illinois district court laid down a stringent test that design compilations detached from the furniture must be works of art as traditionally conceived. Which would at least be easy to apply. Knobs and doo-dads off a bed: not art. Bronze naked dame absent the clock: art. But this got reversed on appeal by the Seventh Circuit.