

# Google case adds new thoughts on 'fair use'



By Bart A. Lazar

Recently, a federal court in Nevada found that Google Inc.'s service does not infringe on the copyright rights of the owners of the information that it searches, reproduces and caches. One of the reasons the court found for the Mountain View, Calif.-based search engine company was that its

activities qualified as "fair use" under the U.S. Copyright Law.

Shortly thereafter, a federal court in California found that Google's image searching service is likely to infringe on the rights of others. One of the reasons the California court found against Google is that its activities did not qualify as fair use. What is going on here?

In my 17 years of practicing law, I have found the concept of fair use to be one of the most difficult concepts of copyright law to explain to clients. Although it is a legal test, fair use could equally be a senses test—as in "I know a fair use when I see one," or that use does not "pass the smell test."

Google's business model involves the use of copyrighted works. Google's search engine sorts through text and images and ultimately caches, reproduces or links to those works. These put fair use principles to the test.

## MARKETING AND THE LAW

To get at the heart of the fair use test, we have to look at the essence of U.S. Copyright Law, which has its origins in the U.S. Constitution. The Constitution stipulates that Congress should make laws to promote science and the arts by providing monopolies "for limited times" to authors and inventors. Thus, the copyright laws were designed to provide a commercial incentive for authors of creative works, but the copyrighted works will ultimately fall within the public domain.

The concept behind fair use is to permit the use (such as reproduction, publication, public display or performance) of a copyrighted work without the owner's consent. The intent of Congress in drafting the fair use exception was to acknowledge that there were a variety of uses that should be protected, lest the copyright laws be applied rigidly to stifle the type of creativity that the law was designed to encourage. Thus, a variety of types of uses (such as for criticism or nonprofit educational purposes) that

benefit society should be permitted.

Problems arise because no black-and-white test exists when it comes to fair use. I have often heard clients refer to rules-of-thumb, such as quotations of less than a certain number of words from a written work are OK, meaning noninfringing. Unfortunately, this is fiction—there is no such rule. Equally unfortunate is that each particular type of use must be analyzed under a four factors test. So let's go to the videotape and see what these factors are.

The two most important of the four factors are typically considered to be:

- ◆ the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; and
- ◆ the effect of the use on the potential market for or value of the copyrighted work.

The nature of the use is an important issue because the court is trying to determine whether the use is noncommercial or commercial, and if the use is commercial, whether the use is transformative.

Many companies misunderstand what is noncommercial. I have had clients often say that they are only using materials for "movie night" at the company or for internal training and education and no charge is made for the use, therefore it is a noncommercial use. This is wrong. The mere fact that there is no direct charge does not turn the actions of a commercial enterprise into non-commercial activity.

However, just because a use is commercial does not disqualify a use from being fair. The Nevada court found that the fact that Google is a commercial operation is of only minor relevance in the fair use analysis. The court also found that Google's use of Web content, which is certainly highly commercial, is "transformative," turning Web content into something different, which does not physically act as a replacement of the original. Lastly, the court found that Google's service serves different and socially important purposes in offering access to copyrighted works through its caching of pages, which does not supersede the objective of the original creations and was transformative.

Transformation is another difficult concept. When courts look for transformative uses, they ask whether the material taken from the original work has been transformed by adding new expression or meaning and whether value was somehow added to the original material through providing a greater understanding about the work. Parody can get someone off the hook for copyright infringement as well, but that will need to be a subject for another column.

The impact a particular use makes on the underlying copyrighted work is also important from a fair use perspective, since a fair use should not take away market share or value from the original work. This justification of fair use ties back to the original purpose of the copyright act and helps to not stifle the creativity that the law was designed to foster. If a supposed fair use actually supplanted, or had a commercial impact on the original work, the purpose of the copyright law would be thwarted.

One common example of a use that would not supplant or harm a copyrighted work is the use of a work for the purposes of

criticism or review. It is pretty clear that using a film clip from a movie, the cover image of a book or CD and other portions of copyrighted work for review purposes typically would not adversely affect the potential market for or value of the copyrighted work. Of course, a bad review could hurt a work, but that is not the point. The issue is the quantitative use of the work and whether the portion of the work used for the purpose would make people choose to buy or see the excerpt, rather than buy the original. Similarly, in the Google case, the court found that cached copies of a Web site do not necessarily substitute for, or take value away from, the original Web site. The California court did not agree that these principles applied to Google's image search function.

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The California Google case involves adult-oriented pictures. The plaintiff, Perfect 10 of Beverly Hills, Calif., alleged that Google's image search infringed Perfect 10's copyright rights by reproducing thumbnail images of Perfect 10's photographs as they appeared within Internet Web sites that infringed Perfect 10's copyright. The California court found two factors persuasive. First, Google apparently receives advertising revenue from some of the infringing Web sites, thus Google's use was viewed more

commercial than transformational, and second, Google's image search has an option for mobile phones, and could hurt Perfect 10's mobile phone image licensing program.

The remaining two factors are typically less important, but are considered. They are the nature of the original copyrighted works and the amount and substantiality of the use. Where a use is transformative, as in the Google situation, this factor is not important, but the more creative and original the work is, the less likely a use will be considered fair use under this factor. Finally, the amount and substantiality of the use looks at the amount of the work used. As in the Google case, even the use of an entire work can still be fair use, however, when considering excerpts or quotes from books, audio or visual works, this is an important factor.

Finally, I should mention that there are some uses that are so small and insubstantial that the fair use test does not need to be applied. These are called *de minimis* or ephemeral uses. These types of uses occur when a copyrighted work appears in the background of a film for a short period of time. In such cases, if the work is blurred or on-screen for a short period, the use is likely to be ephemeral. However, it was found to be infringement for a film to focus clearly on a copyrighted image for 27 seconds in the background of a TV show, so you really need to keep your stopwatches handy when conducting your audiovisual fair use analyses.

While it is admittedly difficult to benchmark fair use, I hope understanding the factors that courts use to analyze fair use will help you recognize when your use of copyrighted works may fall within and outside of the boundaries. ■

Bart A. Lazar is a partner who specializes in counseling, business transactions and litigation in intellectual property, advertising and promotions, privacy, Internet and related matters for Chicago-based Seyfarth Shaw LLP. He can be reached by e-mail at [BLazar@seyfarth.com](mailto:BLazar@seyfarth.com) or [news@ama.org](mailto:news@ama.org).

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