Recent Fair Use Cases, and Trends to Watch: ACRL Copyright Update

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June 29, 2013 - ALA Annual, Chicago – ACRL Copyright Update
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Recent Fair Use Cases

Appropriation art

• *Prince v. Cariou* (2d Cir 2013) – Various edits to blown-up photographs. Dist. Ct. ordered impoundment/destruction, outraging art world; 2d Cir. On appeal found 25 out of 30 works were “transformative”; 5 were bounced back to District Court for review. *En banc* hearing denied; Cariou plans to petition for *cert.* 2d Circuit: It is not necessary to comment on the original work to transform the work; the author’s intent to comment is also not the final word. Lots of art criticism in this opinion!
  
• *Morris v. Young* (CD Cal 2013) – 2 out of 3 retouched/tinted photos were *not* fair use; 1 may have been.

Crossing media

• *Harney v. Sony* (1st Cir 2013) – Oft-reprinted documentary photograph depicting a father/daughter in a notorious legal case was re-created for a TV show; fair use, because the position & general appearance of the subjects were non-copyrightable factual elements.

• *SOFA v. Dodger* (9th Cir. 2013) – Playing an Ed Sullivan clip introducing a band on TV, to introduce actors pretending to be the band during a theatrical performance, was a fair use; only a small section was used, to call up the historical significance, not to substitute for the value of the actual performance.

Other purposes of non-fictional works

• *AP v. Meltwater* (SDNY 2013) – Commercial news clipping service is not fair use. The lede is the “heart of the work”, leaning away from fair use; Meltwater competes with AP in terms of licensing work for clipping services.

• *White v. West* (SDNY 2013) – Summary judgment for WestLaw for copying legal briefs into its database; reasoning & final judgment to come later.

• *Amer. Inst. of Physics/Wiley v. Winstead* (ND Tex 2013) – Use of copyrighted documents in patent applications is a fair use. See also 2 other pending cases by same plaintiffs, and recent US PTO position paper on this matter (http://www.uspto.gov/about/offices/ogc/USPTOPositiononFairUse_of_CopiesofNPLMadeinPatentExamination.pdf).

• See also *Hollander v. Steinberg* (2d Cir 2011); *Practice Mgt Info v. Am Med Assn* (9th Cir 1997); *CCC v. MacLean Hunter Market Reports* (2d Cir 1994)

• Watch: *Allen v. Nelson* (filed SD Cal 2012)
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Trends & Issues to Watch

Legislation
• “Next Great Copyright Act” – Hearings.
• WIPO negotiations on treaty for blind & print-disabled [including “circumvention”]
• DMCA unlocking phones – Recent hearings.
• Aaron’s Law, reforming CFAA in wake of Aaron Swartz prosecution & suicide
• Reawakening interest in “formalities” (renewal, registration)

Rights Over Content You Own/Have Lawful Access to
• First Sale - Lobbying in wake of Kirtsaeng: electronic first sale;
• Rebroadcasting / online DVRs - Aereo 2d ok; AereoKiller not ok, pending 9th
• Unlocking technology (cell phones)

Search & Indexing
• News clipping services: AP v. Meltwater; German legislation
• Orphan Works/Mass Digitization – “Next Great Copyright Act”
• Licensing terms – see scholarly communication, below!
• Authors Guild v. Google (BookSearch)
• Authors Guild v. HathiTrust – on appeal to 2d Cir
• Orphan Works legislation in various EU countries (France; UK now)

Scholarly communication
• Publishers versus libraries & universities: HathiTrust; Cambridge Univ. Press (GSU ereserves); Canada; India; Zookal textbook rental in Australia
• Pearson v. Boundless – Can an “open access” textbook publisher copy the TOC of a commercial textbook and “recreate” it with public domain materials?
• White House OA Directive & proposals; FASTR (Congressional)

Accessibility
• WIPO negotiations (commercial non-availability not required; circumvention; international)
• DMCA AntiCircumvention
• Authors Guild v. HathiTrust – on appeal to 2d Cir

Fun public domain & fair use cases
• Public domain?: Happy Birthday; Sherlock Holmes; Zorro
• Fair use?: Faulkner quote (trial 2014)