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DETT 611
Two Copyright Case Studies
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Introduction

Copyright laws exist to protect the creative works of others, but the landscape of what is protected can change significantly based on various conditions. There are many angles that need to be considered. This paper will explore two case study examples, and discuss the possible outcomes of copyright infringement, and the application of the work made for hire doctrine and fair use statute.

Case Study Example 1: A photographer who takes views of city skylines develops them into posters that he sells to local tourist shops.

Is this photographer breaking the law by using the photographs that he took to make a profit? One assumption that we can make is that the photographer owns the copyright. This could be true if the photographer is not under the employ of a company that has assigned him to take these photographs as part of his work duties. If this is true, then he is the owner of these photos and he can use them to make a profit. This is not copyright infringement.

Another assumption that we could make is that the photographer took these photos as part of an assignment for work. If that is the case, then the “Work Made for Hire” doctrine would apply and this photographer would not have the right to distribute these photographs on a poster to make a profit. According to copyright laws, if a work is made for hire, the employer is the owner of the copyright “unless there has been a written agreement to the contrary signed by both parties” (Copyright Office, 2004, p 2). Under this assumption, the photographer would not have the right to use the photographs without permission from the employer.

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Still, there is a third assumption that we could make. Let us move outside the limitations of the example given. If the pictures are used without permission, for educational reasons, and no profit is made off of them, then the backdrop of our discussion could once again change. Section 107 of U.S. Copyright Law discusses the Fair Use statute, which contains a basic guideline of four factors that are weighed and balanced to help determine whether or not an unauthorized use should be considered fair (Kelley and Bonner, 2006; U.S. Copyright, 2009). If we look at an analysis of fair use under these conditions, we see:

- Factor 1 - Purpose of use: The photo poster is used in an educational forum, or developed due to a scholastic assignment.
- Factor 2 - Nature of copyrighted work: The poster includes skyline photos.
- Factor 3 - Amount and substantiality: The amount of use is kept small; only a single photo or a couple of photos are used.
- Factor 4 - Effect on potential market: Because this for educational purposes in the confines of an assignment, there would likely be no negative effect on market.

Under these conditions, fair use may apply, but it is important to reiterate that the photographer could not make a profit off of the poster.

Case Study Example 2: A student creates a Web site to criticize Kellogg's company brand cereals and uses the cartoon figures "snap, crackle, and pop" on the site. The site also contains a picture of Tony the Tiger.

Because this case study example claims that the individual is a student, we will be assume that a password-protected scholastic website is created and that it is done in the confines of a

scholarly assignment. Once again, we look to the Fair Use statute to bring clarity to this situation.

Under the assumption that this application is for educational purposes, the usage could be considered fair use, if the following is true:

- Factor 1 - Purpose of use: The website is used in an educational forum, developed due to a scholastic assignment.
- Factor 2 - Nature of copyrighted work: The website uses copyright-protected, trademarked characters.
- Factor 3 - Amount and substantiality: The amount of use is kept small; only a few characters are used, and they are only used once or twice.
- Factor 4 - Effect on potential market: Because this is a password-protected website, and for educational purposes in the confines of an assignment, there would likely be no negative effect on market.

If the student is criticizing Kellogg's cereal outside of an educational assignment, then the outcome might be very different. While criticism is protected under factor one (purpose and character of use) of the Fair Use doctrine, Kellogg's trademark and copyright information clearly indicates that all of their characters are trademarked, and are protected from copying (Kellogg's, 2006). Any use of these characters without the explicit permission of the company probably constitutes copyright/trademark infringement. The case becomes clearer if we assume that:

- Factor 3 - Amount and substantiality: The student uses images of Snap, Crackle, Pop and Tony many times.

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- Factor 4 - Effect on potential market: The website is not restricted and not password-protected; there may be a negative effect on the market.

Under these conditions, the student is probably committing copyright/trademark infringement.

Conclusion

When comparing these two scenarios, one point becomes apparent. When looking at copyright infringement, the outcome can change based on differentiations in circumstances. Some cases are clear violations of copyright laws, as we see with the photographer who uses employer- sanctioned photographs to make a profit. Other cases are not so clear, and it is only through the weighing and balancing of the four factors of Fair Use that an impartial outcome can be determined. Kelley and Bonner (2006) state that “the use of four factors reflects an understanding that sometimes the letter of the law would violate the spirit of the law” (p. 10). The Fair Use doctrine certainly provides an important tool for determining when the unauthorized use of a work might be considered fair. Different circumstances can change the outcome drastically.

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