

The perils of copyrights

By MATTHEW A. JOSEPH

In 1985, Jimmie Williams hired a band to entertain customers at Muffs, his nightclub in Olathe, Kan. The band played music copyrighted by someone else, but Williams didn't have a license to use that music. His unsuspecting act resulted in a judgment against Williams for damages and attorneys' fees. How was he to know that Muffs + a band = copyright infringement?

Like many legal specialties, copyright law is complex and arcane. But one doesn't have to be a copyright practitioner to realize that copyright law affects everyone every day — and in ways many don't expect. Lawyers and clients who usually don't give a hoot about intellectual property law need to reconsider their routines to see if someone's copyrights are being used improperly.

Copyright law protects original works of authors. It covers forms of expression, but not the ideas being expressed. Copyrights can be gained in many things, including literary works, music, dramatic works, movies, sound recordings, pictures, graphics and sculpture. A copyright owner has exclusive rights to reproduce the work, prepare derivative works, distribute copies and perform or display the work.

For works created since 1978, the copyright lasts for the author's life, plus 50 years. There are two basic elements to a copyright case: ownership of a copyright and unauthorized copying.

There's often talk about the "fair use" defense to copyright infringement. The fair use defense is only available case by case, depending on the purpose and character of the copy's use, the nature of the copied work, how much of the original work was copied and how the copying affects the potential market for the original work. *Campbell v. Acuff-Rose Music, Inc.* (holding that 2 Live Crew's parody of Roy Orbison's "Oh Pretty Woman" was fair use.)

One court wrote that the gist of the fair use defense is reasonableness and good faith. Contrary to popular myth, fair use is a narrow defense and can't be safely relied on to excuse most copyright violations. Indeed, courts are finding copyright infringement in activities many once took for granted as fair use.

Some things to look out for

■ **Software:** Software is not listed in the statute as a work protected by copyright. However, it is considered a "literary work" subject to copyright. The act of loading a software



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program onto a computer, such as a word processing or spreadsheet application, is considered "copying" under the copyright laws. *NLFC, Inc. v. Devcom Mid-America, Inc.* Thus, unless that activity is licensed, it is a violation of copyright law to buy one mass-market software program, for instance, and pass it around the office to all computer users. The fine print which comes with most individual software programs typically says it is for use on only one computer.

■ **Newsletters:** Many lawyers and clients subscribe to trade press newsletters. A recent federal district case held that photocopying one such newsletter for distribution to employees within a non-profit trade association can amount to copyright infringement and is not subject to the fair use defense. The newsletter's publisher was denied additional subscriptions as a result of the subscriber's internal distribution of copies, and that was a significant factor in finding no fair use. *Television Digest, Inc. v. U.S. Telephone Association.*

■ **Journal articles:** In a recent surprising case, the U.S. Court of Appeals for the Second Circuit ruled that Texaco infringed a copyright when one of its research scientists photocopied eight articles from scholarly journals and placed them in his files for future reference. *American Geophysical Union v. Texaco, Inc.* The court distinguished such "archival" copying from "spontaneous" copying, as might occur while running off to the lab or to court. Archival copying wasn't fair use in that case; spontaneous copying might have been.

In his dissent, Judge Jacobs claimed the Texaco case ended "fair-use photo-copying with respect to a large population of journals" and "would seem to require that an intellectual property lawyer be posted at each copy machine."

■ Electronic bulletin boards:

Devotees of electronic bulletin board services and other such destinations along the information superhighway should know that service providers might be offering bootleg material without proper authorization from the copyright owner. One should be careful when cruising the Internet, particularly when downloading information from a less reputable provider. *Playboy Enterprises, Inc. v. Frena.*

Taking another look

Decisions like these will continue to appear as the publishing community aggressively seeks to protect its copyrights and narrow the fair use defense. The impact on lawyers and their clients is obvious: When dealing with copyrighted material, everyday activities once taken for granted and routinely practiced may merit another look.

Why worry about it? Perhaps the risk of being charged with copyright infringement is low. Jimmie Williams, owner of Muffs nightclub in Olathe, Kan., might have thought so, too.

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