

FairCopy

Issue 9 Winter 2008

The newsletter for the publishing sector



Welcome to the Winter issue of FairCopy. We hope you find it relevant and interesting, and welcome any feedback or suggestions for other topics you would like to see addressed in future issues.

Manches can help you get the most out of your IP through a combination of protective measures, creative contracts and intelligent enforcement. We deal with the exploitation process from the development of an idea through to its realisation and secondary use. We also handle the IT issues that are central to the media and entertainment industries in the digital age.

Contents

Gowers update	02
You must be joking: parody and the law	02
In a fantasy world	04

GOWERS UPDATE

A summary of the responses to the consultation period for the paper entitled *Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions* was released in late August.

The Gowers Review, published in 2006, recommended that copyright law be updated so as to introduce new exemptions to copyright infringement and to modify some of the current exemptions. The consultation paper set out the Government's first steps towards implementing those recommendations. Lord Trieman, Minister for Intellectual Property, explained that the purpose of the consultation was to ensure that the UK's copyright laws are fit for the digital age.

The paper recommended several significant changes to copyright law:

- to enable schools and universities to make the most of digital technologies and facilitate distance learning;
- to allow libraries and archives to use technology to preserve valuable material before it deteriorates or the format on which it is stored becomes obsolete;
- to introduce a format shifting exemption to allow consumers to copy legitimately purchased content to another format, for example from CD to MP3, in a manner that does not damage the interests of copyright owners; and
- to provide a new exemption for parody.

Expanding the copyright exemptions for educational use would facilitate distance and online learning by enabling extracts from books, plays and copies of broadcasts to be distributed digitally. It would also reflect the greater use of interactive whiteboards in the classroom. Changes for libraries would allow the copying of sound recordings, films and broadcasts for preservation purposes and the format-shifting of works stored on obsolete or unstable media.

According to the summary of responses, rights-holders were generally in agreement with the proposals, but wanted to see limits on the extent of the proposed exemptions. The majority of respondents were in favour of the format-shifting exemption, although those respondents from the music and publishing industries were not in favour of extending the private study and research exemption. The main concerns over the proposed study exemption was that it could "open the system to abuse".

A safeguard put forward in response to the enhanced exemption was to require enhanced study and research provisions to be linked to educational institutions.

Future editions of *Fair Copy* will include an analysis of the draft statutory instrument which, it is anticipated, will come out of this process.

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YOU MUST BE JOKING: PARODY AND THE LAW

Parodies have enjoyed popularity with audiences going back as far as ancient Greece. Generally, the more widely known and famous a parodied work, the bigger the impact of the parody. By definition, therefore, parody is a genre that borrows from established works. In many cases, such works will be protected by copyright law. Different jurisdictions have adopted varying approaches to the dilemma of protecting copyright works whilst allowing the creation of parodies and we look at those of the US and the UK in this article.

US Law

The US has long accepted parody as a defence to copyright infringement under its fair use doctrine. US law recognises the value of parodies and caricatures and considers four main factors when determining whether the use of a copyright work is fair:

1. the purpose and the character of the use, including whether such use is of commercial nature or is for non-profit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for, or value of, the copyright work.

The leading case is *Campbell v Acuff-Rose Music*. Here, the Supreme Court held that a parody could evoke the fair use defence as long as it commented, at least in part, on the original work. The use could not fall under the fair use doctrine if the work merely borrowed from the copyright work to receive attention or to save time in creating something new. Under these considerations, a permissible parody must both

utilise and target a specific copyright work. The fair use doctrine will not be applied where the specific copyright work is used to target another work.

One of the factors that the court looked at in **Campbell** was whether or not a parody of the Roy Orbison song "Oh Pretty Woman" by rap act 2 Live Crew was likely to dilute the market for the original version. Perhaps unsurprisingly, the court seemed to think that the buying audiences for each version were substantively different.

Most importantly, the court went back and gave full weight to each of the individual factors of the fair use test as promulgated in the Copyright Act of 1976. Instead of dismissing the claim on the basis that the appropriated material was used for commercial gain, the court looked at the other factors of permissible fair use and determined that parody was indeed protected fair use, even though the parodists gained financially.

Parody in the UK

The UK is to a large extent bound by the European Copyright Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (2001/29/EC) and is limited in the exemptions that it can introduce within its national law. Any such exemptions should comply with what is known as the three step test (derived from the Berne Convention), which dictates that (1) exemptions are to be applied in 'certain, special cases' only; (2) such cases should not result in a 'conflict with the normal exploitation of the work or the subject matter', and (3) exemptions should not 'unreasonably prejudice' the legitimate interests of the rights holder.

While the three step test acts as a guideline, there is no consensus among the EU Member States as regards a general exemption status for parody. While some Member States such as Germany and France provide for an explicit exemptions similar to those in the US, others such as the UK do not, as yet, attribute a special exemption status to parody in questions of copyright infringement.

Currently in the UK, the owner of copyright work has the exclusive right to carry out, and prevent others from carrying out, a number of restricted acts under the Copyright, Designs and Patents Act 1988 (the CDPA). Restricted acts include copying and performing a work and it will be an infringement to copy or perform the "whole or any substantial part of it".

Fair dealing defences such as criticism and review provide a

defence to a copyright infringement. The UK currently provides five purposes for which appropriation of a work, or a substantial part thereof, can be excused as fair dealing, namely: research, private study, criticism, review and reporting current events. These purposes have been construed strictly in the past. There is no separate exemption for parodies and the restrictions are in direct conflict with the parasitic nature of the genre.

Infringement therefore boils down to the question of what a substantial part is and whether any fair dealing defence under the CDPA can be evoked. So far the UK has not afforded parodies special status in copyright. The test for parodies is the same as it is for any other copyright infringement, despite the fact that some early cases suggested that there may be a question of requisite mental labours and other qualities playing a part. This means that the only way to establish a defence to copyright infringement for parodies remains to follow the normal route of assessing whether or not a substantial part of the underlying original work has been used.

Proposed revisions to the scheme

The Gowers Review in 2006 recommended that a new copyright exemption should be created by 2008 for the purpose of caricature, parody or pastiche (recommendation 12).

The new exemption to copyright infringement for parodies is proposed to be on a fair dealing basis, providing that commercially competitive use of copyright material will not be allowed.

The current suggestion for the revision to copyright law is that the new exemption should not have retrospective effect, but should apply whether the work being parodied existed before or was created after any change in the law.

If the UK adopts the recommendation given in the Gowers Review, it will provide an explicit exemption for parodies from copyright infringement. This exemption is, however, not a free ride for parodies. It is unlikely that parodies will be unchallenged where the copyright holder of the parodied work is concerned that the parody will compete with the original work and dilute the market for it.

It remains to be seen whether the introduction of this new exemption will make much of a difference in terms of the actual caseload before the courts concerning copyright infringement by parodies. It had been pointed out in the consultations to the Gowers Review that parodies had flourished under the old system and often consent or licensing had resolved arising issues in the past.

The exemption, if drafted according to current thinking, will come at a price. The parody will have to acknowledge the owner of the underlying copyright work to enable the defence to apply. Whereas before the parody could rely on the available defences under the fair dealing heading without such a counterintuitive acknowledgement, under the envisaged scheme the creator of a parody would have to label his creation appropriately. This particular requirement may prove difficult for different mediums. While a picture or sculpture can be clearly labelled, suitable acknowledgements may be more intrusive in live performances and radio broadcasts.

In the end it is likely that whatever form the exemption in the UK takes, the overall approach from the courts to parodies will resemble the US approach of fair use and courts will be likely to view each parody on the merits of each individual case – much as before.

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IN A FANTASY WORLD

The World Intellectual Property Organisation arbitration panel have ruled that a British couple were not entitled to own the domain name <narnia.mobi> and have ordered that the name be transferred to estate of the author, C.S. Lewis.

Previous panels had struggled between the clear need to protect the rights of trade mark owners and the need to find bad faith in a registration in order to require a transfer. It had seemed that, in effect, a registrant could have rights in a term if it is not used to make a profit, mislead internet users or damage another's trade mark.

In this instance, the panel accepted Richard Saville-Smith's claim that the couple had registered the domain name in order to provide a Narnia-based web address for his son by way of a gift on his eleventh birthday and that he was not profiting from the domain name. However, the panel still found that the registration was in bad faith. Significantly, the panel's reasoning behind this was that "when a domain name is so obviously connected with a complainant and its products or services, its very use by a registrant with no connection to the Complainant suggests 'opportunistic bad faith'". This will be of great interest to those authors and publishers looking to retrieve a domain name intrinsically linked to their intellectual property, as it will now be much more difficult for a registrant to rely on the fact on they are not profiteering from such a registration.

A full transcript of the decision can be found at <http://www.wipo.int/amc/en/domains/decisions/html/2008/d2008-0821.html>.

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