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## The Doctrine of Fair Use

### *Making Sense of the Monster*

By **Frank M. Caprio** and  
**Crystal G. Wilkerson**

The doctrine of “fair use” is an important limitation on copyright owners’ exclusive rights to their copyrighted works. In fact, the Copyright Act states that fair use “is not an infringement.” The definition of fair use was recently examined by the U.S. District Court for the Eastern District of Pennsylvania in *Warren Publishing Co. v. Spurlock d/b/a Vanguard Productions*. In this case, the court ruled that, under fair use, the defendant could reproduce, without the copyright owner’s permission, artwork by Basil Gogos as well as magazine covers that first published such artwork in a book about the work of Gogos. The court’s opinion in this case provides a thoughtful and useful analysis of the bounds of fair use.

#### **FAIR USE DOCTRINE DEFINED**

In 1976, the doctrine of fair use was codified in Section 107 of the Copy-

right Act, which states that unauthorized reproductions of a copyrighted work “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” The Act also sets forth four factors to be used in determining, on a case-by-case basis, whether a particular use of a copyrighted work is a fair use:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit 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 copyrighted work.

Because application of the doctrine of fair use involves a multifactor analysis, and the weight afforded to any single factor varies from case to case, the line between infringement and fair use is sometimes thin and can be difficult to discern. It is always fact-intensive. There is no magic number or percentage of words, photographs, musical notes, etc., that must be copied to rise to the level of infringement, or that may be taken without prior permission but with confidence, such that one can be assured of the applicability or inapplicability of the fair use doctrine.

#### **MONSTER ARTWORK CASE BRINGS FAIR USE TO THE FOREFRONT** *Warren Publishing Co. v. Spurlock d/b/a Vanguard Productions*

In the mid-twentieth century, during the heyday of monster movies, the plaintiff, Warren Publishing Co., engaged the freelance artist Basil Gogos to illustrate covers for various monster movie magazines. Decades later, in 2004, Spurlock approached Warren about collaborating on a book about the artwork and career of Gogos, but an agreement was never reached. Nevertheless, in 2006 Spurlock began selling his own work, Famous Monster Movie Art of Basil Gogos. By 2009, the book had sold at least 11,000 copies, some priced up to \$250. The book included 14 reproductions of original artwork previously used as backgrounds for covers of Warren’s monster magazines, and ten exact copies of Warren’s monster magazine covers, including the text displayed in connection with the Gogos artwork.

#### ***Infringement or Fair Use?***

On July 21, 2008 Warren filed suit against Spurlock (and his sole proprietorship Vanguard Productions) claiming 24 separate instances of copyright infringement. Nearly a year after the suit was filed, the court ruled in favor of Spurlock on summary judgment, finding the copying to constitute a fair use, not infringement.

#### ***Factor One: Purpose and Character of the Use***

While the Famous Monster book clearly had a commercial purpose and

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**Frank M. Caprio** is the Chair of the Intellectual Property Practice Group of Bradley Arant Boult Cummings LLP, and is resident in the Huntsville, AL, office. He specializes in intellectual property law and assists clients in the protection and use of their intellectual property rights, and in the litigation of various technology related disputes involving patent, trademark, copyright, trade secret, and computer issues. **Crystal G. Wilkerson** is an associate in the firm’s Birmingham, AL, office.

character, as opposed to a non-profit one, the court determined that the book's purpose as a retrospective of the work of the artist Basil Gogos (similar to a biography), far outweighed its commercial nature.

The court found that the book presented the artwork images "for an entirely different purpose" than their original use as monster magazine covers. The court concluded that the plaintiff had originally, and long ago, used the artwork "to help sell magazines, for the purpose of describing the latest in monster movies through an eye-catching display, and to convey to the reader or potential reader what topics the magazine discussed in that issue." In contrast, the defendant's more recent Famous Monster book used the artwork "in order to pay homage to his [Gogos'] artistic accomplishments."

**Factor Two: Nature of the Plaintiff's Copyrighted Work**

The court acknowledged, and the defendant conceded, that the plaintiff's artwork and magazine covers were creative expression protected by the Copyright Act. However, because the magazines at issue were out-of-print, the court afforded little weight to this second factor.

**Factor Three: Amount and Substantiality Used**

The plaintiff argued that each magazine cover should be treated as an individual copyrighted work, and that the copying by the defendant should be measured in comparison to each individual cover. However, the court agreed with the defendant's position that each of the plaintiff's copyrighted works, as a whole, consisted not only of the covers, but also the remainder of the magazines' content, with each issue ranging from 68 to 100 pages in length. Accordingly, the court found that, by copying a particular magazine

cover, only 1% to 1.5% of each magazine was copied. This determination was based in part on the fact that each of the plaintiff's copyright registrations covered an entire magazine, and the plaintiff had not obtained separate copyright registrations for each individual magazine cover.

With respect to the importance and quality of the portion copied, the plaintiff argued that a cover was "the heart" of a magazine and a "central and valuable part" of the copyrighted works. However, the court found that "[t]he covers were not the qualitative 'heart' of the magazines, but were instead used to catch the eye of potential readers at the newsstand and advertise the content of the magazine. The quality and importance of these covers as used in the original magazines are relatively minor."

**Factor Four: Effect on Potential Market Value**

The plaintiff contended that he had long been interested in publishing a coffee-table book chronicling his monster magazines and magazine covers and that the defendant's book had negatively affected the potential market for such a book. However, because the plaintiff had completely failed to exploit his copyrights for several decades, the court allocated only limited weight to this factor. The court also appeared to be persuaded by the fact that some of the original Gogos artwork copied by Spurlock had apparently been rescued from a garbage dumpster outside of the plaintiff's office in the 1970s, suggesting the plaintiff had evidenced no real interest in exploiting the works until the defendant paid homage to the career of Gogos.

Giving the first and third factors, which favored the defendant, the bulk of the weight in the fair use balancing act, the court found that the defendant's copying constituted fair use.

**FAIR USE LESSONS FROM THE WARREN DECISION**

***Protect the Copyrighted Work***

Copyright owners should be proactive in using and protecting their copyrighted works. The court did not go so far as to determine that the plaintiff had abandoned his copyrights, which would generally require an unambiguous statement or overt act of abandonment indicating intent to dedicate the work to the public domain. However, the court was heavily persuaded by the plaintiff's apparent disregard for his copyrighted works. It was only after the defendant made profitable use of the plaintiff's works that the plaintiff regained interest in his rights as a copyright owner.

If the plaintiff in *Warren* had treated his copyrighted works as valuable assets, as opposed to allowing at least some of the original cover art to end up in a garbage dumpster, or had he made bona fide efforts to market and commercialize the artwork and magazine covers during the many intervening years, the court may have given more weight to the second and fourth factors of the fair use analysis, which were in favor of the plaintiff. Accordingly, it would be wise for copyright owners to treat their copyrighted works as valuable assets. This would include, for example, keeping the copyrighted works in a safe place where they cannot be mistaken for abandoned property, and using a proper copyright notice (e.g., © 2009 Jane Doe).

***Register All Significant Aspects of Work with the Copyright Office***

While the plaintiff in *Warren* owned copyright registrations for each of its magazines, the copyright registrations covered the magazines as a whole. The plaintiff had not registered each magazine cover as its own, separate, copyrightable work. This failure led the court to side with the defendant, who

had copied only the covers of the magazines, which constituted a relatively small portion of the overall protected work. If the plaintiff had also obtained a separate copyright registration for each work of cover art, the defendant would have been copying an entire work, as opposed to a small portion.

When considering copyright registration, the copyright owner should seriously assess whether the work has individual elements which stand alone and separately qualify for copyright protection. A single registration for a collective work would be most cost-effective, yet may leave valuable elements such as individual photographs, artwork or stories under-protected. Multiple registrations to separately cover all portions of the collective work, however, may be beneficial only if there is significant potential for small portions of the work to be copied by an infringer.

#### ***Obtain Permission from Owner Of Original Work Before Copying***

Before copying even a small portion of a copyrighted work, the prudent course is to first obtain the permission of the copyright owner. In the Warren case the defendant first sought to collaborate with the plaintiff on the Famous Monster book, but when the plaintiff decided not to go forward with the project, the defendant proceeded with publishing the book without the plaintiff's permission. While the defendant did include acknowledgement of the plaintiff as the original publisher of the Gogos monster magazine covers, simply acknowledging the source of a copyrighted work will not avoid an infringement claim.

A creator of a derivative work should not fear that requesting permission of the copyright owner may be used against him later. Case law shows reluctance to use the fact that an alleged infringer requested the permission of the copyright owner as later evidence against the alleged infringer, at least in the fair use analysis.

#### ***Consider Whether Fair Use Applies And Assess Risk of Infringement***

While one can never know with legal certainty whether a use is a fair use or an infringement until determined by a court, the fair use factors can serve as a guidepost to predict whether a use will be considered a fair use.

Some questions that should be considered before copying a copyrighted work without the owner's permission include:

- Will the copying be for a non-commercial purpose that is within the traditional categories of fair uses (e.g., criticism, news reporting, classroom use, etc.), or will the proposed use be purely commercial?
- Will the new work be a transformative use of the original work, in a new matter or adaptation, different from its original use? Or is it merely a copy that serves the same purpose as the original?
- Is the original work a work that has been idle and unused for decades, or is the work in current use by the copyright owner?
- Will only a small portion of the original work be copied, or the entire work?
- Will only an insignificant portion of the original work be copied, or will the new use exploit the "heart" of the original work?
- Will the derivative work prejudice the sale, or diminish the profits, or supersede the purpose, of the original work?

If the answers to these questions suggest that the use would not be a fair use, then the author of the new work should avoid copying from the works of another without the permission of the copyright owner.

#### ***IMPACT OF WARREN V. SPURLOCK***

The court's opinion in *Warren v. Spurlock* is a good example of the fact-inten-

sive inquiry that is required for a court to determine whether an unauthorized use of a copyrighted work is fair use or copyright infringement. Even the smallest factual details can be instrumental in a court's application of the doctrine of fair use. Likewise, the opinion illustrates the court's broad discretion to allocate more or less weight to any of the fair use factors. Accordingly, copyright owners, creators of derivative works and lawyers considering the doctrine of fair use should bear in mind that each of the fair use factors are important, as any one factor could be considered by a court to be the most significant and determinative of the outcome of an infringement suit.