Cambridge University Press et al v. Patton et al Doc. 332 Att. 16

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Copyright suit tests how much is too much

Publishers sue Georgia State officials over digital copying of book sections for student use; music professor is vexed

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Ask Georgia State University music professor N. Lee Orr about the copyright infringement suit three major academic publishers launched against his employer this week, and you'll get an earful.

"This is music school, not business school," he says. "Our books are $70 or $80."

So when Orr wanted students in his Baroque music course to look at "The Cambridge Companion to the Organ," a reference tome he says costs $250, Orr made digitized copies of 32 pages of the work and made them available for free through a university online service.

"I would be surprised if ... any of the many scholars in the country would order that book for all students," adds Orr. "My experience with the university librarians has been a ruthless not just adherence but investigation into how the law reads."

Orr says he carefully follows the university's copyright policy, which indicates that copying up to 20 percent of a work is acceptable. He copied slightly more than 10 percent of the book's 300 or so pages.

But Cambridge University Press, Oxford University Press Inc. and Sage Publications Inc. say Orr and many other GSU professors have copied too much.

In their complaint, filed in U.S. District Court in Atlanta against GSU President Carl V. Patton and four other university officials, those publishers say GSU has allowed professors to undermine the publishers' chance of turning a profit through licensing fees or direct sales by scanning in portions of copyrighted works without permission and distributing them via virtual anthologies or "course packs" that students may access through various university-run online outlets.

The publishers have not yet filed a memorandum of law, but their complaint says that GSU's copyright primer, called "Regents Guide to Understanding Copyright & Educational Fair Use" and posted online at http://www.usg.edu/legal/copyright, offers guidelines to fair use that "plainly exceed legal boundaries."

The plaintiffs are not seeking monetary damages, according to their lead attorney, R. Bruce Rich at Weil, Gotshal & Manges in New York. He says that because GSU is a public university, he'd expect a sovereign immunity defense to such a claim. He also says the publishers are suing not for punishment or recompense, but to establish good policies going forward. Edward B. Krugman and Corey F. Hirokawa of Bondurant, Mixson & Elmore are Rich's local co-counsel.

Instead, Rich's clients want Judge Orinda D. Evans to issue a declaratory judgment saying that GSU's copying violates the law. They're also seeking an injunction preventing further unauthorized use of copyrighted material.

At the heart of this suit is what may well be a novel issue in copyright law: How much of a book or monograph that exists in paper form may be digitized by a nonprofit educational institution without running afoul of the fair use doctrine, which allows limited copying, without authorization, for educational and other purposes.

Other cases have examined the issue of academic copying—Basic Books v. Kinko's, 758 F.Supp. 1522 (S.D.N.Y. 1991) and Princeton Univ. Press v. Michigan Document Services, 99 F.3d 1381 (6th Cir. 1996), both of which found against copy shops reproducing materials without permission. In American Geophysical Union v. Texaco, 60 F.3d 913 (2d Cir. 1994), a court found that the oil giant's copying of scientific articles was not fair use.

But the GSU suit is different because it involves digital copies made by a nonprofit establishment, not photocopies made by for-profit entities. Also, those cases were decided in other circuits and would be only persuasive authority in Georgia.

A GSU spokeswoman returning a call placed to university attorney Kerry L. Heyward said Wednesday that GSU officials had not yet been served with the complaint and would not comment on the suit.

How much is too much?

Although the complaint decries the university's policy that allows 20 percent of a work to be copied, the publishers' lawyer, Rich, declines to quantify the numerical parameters of what would be fair use.

That's at least in part because he can't.

Neither courts nor the Copyright Act of 1976 have delineated how much copying is too much in the educational fair use context, and no law lists specific percentages of a work that may be copied without stepping outside the boundaries of fair use, according to copyright law experts.

"Every fair use case turns on the unique facts of the case," says Kenneth D. Salomon, a partner at Dow Lohnes & Albertson in Washington and one of the principal negotiators for the higher education community on a 2002 law governing the use of copyrighted materials in online courses.

"There's no bright line," he says. "Some people think that if you use 10 percent or less, you're OK. That's not true. That is a myth."

The Copyright Act of 1976 lays out a four-part test, says Salomon, for what constitutes fair use. The act weighs whether a work is creative or factual—a textbook, for example, gets a higher presumption of fair use than a novel; whether the use was in a for-profit or nonprofit context—the latter weighs in favor of fair use; whether the material used was substantive or tangential to the work as a whole—something that's not integral to the work is more likely to get the fair use nod; and the degree to which the copying diminished the copyright holders' ability to sell it—the more copying undercuts a publisher's ability to sell, the more likely it won't constitute fair use.

The law of Xeroxing

While online copying is relatively new, lawmakers and others addressed similar issues when the copyright law came about 32 years ago—a time when the Xerox machine was a relatively new and tempting invention offering the ability to copy works on a scope never before contemplated.

In an attempt to delineate some boundaries for fair use, educators and librarians struck up a dialogue with authors and publishers that turned into a negotiation that eventually evolved into an agreement memorialized in the House Committee Report on the 1976 Copyright Bill (House Report No. 94-1476). That report is now known as the Classroom Copying Guidelines.

Steven McDonald, general counsel of the Rhode Island School of Design, who deals with copyright issues frequently in the context of artwork, explains how those guidelines affect the interpretation of the 1976 act. "They don't have the force of law, but they are generally viewed as a safe harbor within copyright law," he says. "There's a whole set of formulas."

The guidelines provide some numerical parameters—how many pages or what percentage of a work may be copied without running afoul of fair use—but those parameters vary depending on the type of work. Courts often refer to them in their analysis of the Copyright Act.

At this nascent stage in the GSU litigation, however, it's impossible to say how those guidelines might play out. The publishers allege that as of February, the GSU library's electronic course reserves system listed more than 6,700 works available for some 600 courses. It's likely that most of this "extensive copying and distribution" was performed without authorization, the complaint alleges.

Suing "family"

Frank Smith, editorial director for plaintiff Cambridge University Press in New York, says the publishers have struck deals with Cornell University, Hofstra University, the Syracuse University and Marquette University to revamp those institutions' copying policies.

But the publishers did not get very far with GSU.

Rich, the publishers' lawyer, says, "Some many months ago, I directed correspondence to Georgia State, which provided, with specificity, examples of activities extremely similar to those that are contained in the complaint that we filed."

He says the letter invited GSU to open a dialogue about developing policies or guidelines that would give the university fair use of copyrighted materials, but would protect the publishers from unauthorized copying. Some three months later, he says, he got a short letter from the legal department essentially saying, without explanation, that GSU had concluded that its practices were lawful.

Smith is less diplomatic about that letter. "Their response was curt and not conducive to other discussion," he says.

He re-emphasizes that the publishers are not seeking monetary damages, and he declines to quantify how much unauthorized copying has cost Cambridge.

"We ... filed this suit in sorrow, not anger," he adds. "We're part of the university world, and in a sense we're suing family here."

Educational publishers and universities and their professors aren't merely family. The relationship tends more toward the symbiotic.

As Smith points out, universities depend upon the publication of books that have scholarly or literary value, but wouldn't make enough money to attract a commercial press. Also, he says, universities use publications to determine faculty hiring and promotion, and most professors publish with academic presses.

Indeed, the complaint notes that the three plaintiffs have published more than 100 books and monographs authored by GSU professors. That GSU is a nonprofit institution shouldn't have any bearing on how much unauthorized copying it can do, Smith says.

"We're a nonprofit," he points out. "I assume they wouldn't want their classes flooded with students who weren't paying tuition, but you could say there's no extra cost to filling another desk. I'm sure they would resist that, and I could see why."

He calls GSU's resistance "short-sighted."

GSU music professor Orr, on the other hand, sees the publishers' arguments as "misapplied." He says technology actually offers them some protection against unauthorized use.

"In the past, when I would put on reserve the physical book, the 25 or 30 students would make their own illegal copies, and any person with proper ID could gain access to the library and gain access to the book and copy the whole thing," he says, pointing out that GSU's online course content is password-protected. "This [digitization] is indeed a step forward in protecting the clear copyright laws."

"My experience with the university librarians has been a ruthless not just adherence but investigation into how the law reads. That's why the suit strikes me as grasping. Can they sue me for saying that?"
The case, in the Northern District of Georgia, is *Cambridge University Press v. Patton*, No. 1:08-cv-01425.