

# Chicago Daily Law Bulletin®

Volume 157, No. 105

Friday, May 27, 2011

## Will copyright stop the Internet's 'presses'?

The recent furor over the publication in a Hasidic newspaper of the iconic Situation Room photo of President Barack Obama and his national security team watching the raid that killed Osama bin Laden earlier this month that removed the women from the photo is a strong reminder of the complex and uncertain relationship between intellectual property and news reporting in today's global news arena. While pundits in the U.S. were debating the potential copyright violations created by the publication of the edited photo, their companions in Europe were equally concerned with a decision by a Belgian court holding Google liable for publication of copyright protected headlines as part of its Google News Service. In the international arena, the boundary lines between copyright and news reporting remain as volatile as ever.

The Situation Room photo, taken by White House photographer Pete Souza, was first posted on the official White House Flickr page, with an express limitation on its use "for publication by news organizations" and a further restriction that the photo "not be manipulated in any way." Under U.S. law, it is unlikely that the modified photo can be considered a copyright violation since works of the U.S. government are expressly excluded from copyright protection. Souza's role as an official White House photographer taking a photograph of the president and his advisors during a key historical event would appear to be the epitome of a public domain work of the U.S. government. Under international law, however, the result could be distinctly different. Present international standards allow countries to extend copyright protection to government works. Thus, if the photo had been taken in the United Kingdom or Canada, for example, it might well be considered protected under a crown copyright. Unauthorized publication of even the unedited photo could, therefore, be rightfully challenged. However, even international standards are qualified when a publication falls under a "news reporting" exception.

Under both U.S. and international law, news reporting has been a long-recognized exception to copyright restrictions against unauthorized reproduction and distribution. Since 1886, the Berne Convention for the Protection of Literary and Artistic Works, the premiere international copyright treaty, expressly excepted unauthorized reproductions and translations of copyrighted works when published as "news of the day." Yet despite this long-standing exception, the question of what constitutes qualified



### Global IP

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"news" reporting within the scope of this exception remains unclear to say the least.

The United States applies the multifactor "fair use" doctrine as a defense to claims of copyright infringement arising from news reporting. Most countries, by contrast, apply the doctrine of "fair dealing." To qualify as "fair dealing" the news reporting at issue must generally relate to "current events." Thus, for example, publication by a British tabloid of previously unpublished driveway stills of Princess Diana taken the same day as the tragic accident that killed her were held to fall outside the fair dealing defense since the stills were published over a year after the accident and added no factual information to the story.

Similarly, publication of love letters by Wallis Warfield Simpson to the former King Edward VII did not qualify as fair dealing given their historical nature. This concern with timeliness undoubtedly lies at the heart of recent claims by the director of a documentary on Princess Diana's death "Unlawful Killing" that it could not be shown in the U.K. without numerous cuts to avoid legal challenges.

Even if the reporting of an event qualifies as "news" reporting, the amount taken must still generally be limited to a "fair" portion. Complete rebroadcasts of sporting events do not qualify for the news reporting exception. Even in the United States with its strong free speech doctrines embedded in fair use analysis, the court found the broadcast of an unedited video tape of the beating of Reginald Denny in the violent aftermath of the Rodney King verdict failed to qualify as a fair use since alternatives were available. This interjection of a court's judgment for what qualifies as defensible news reporting within the scope of the

associated privilege appears to be a mainstay in present fair use and fair dealing decisions.

Further clouding the discussions over copyright in news reporting, particularly for Internet news services, is the broadening scope of protection recently given to news headlines.

As print versions of newspapers struggle for survival, the role of Internet news aggregators has been put into harsh relief. At a time when a 30-second snippet of music has economic value as a ring tone, even the relatively limited creativity of a newspaper headline has become a potentially protectable work. Although Australia has held that headlines are "too insubstantial and too short" to qualify for copyright protection, the European Court of Justice in *Infopaq v. DDF* recently held that extracts of 11 words, including headlines, qualify for protection. This recognition of the copyrightable nature of extremely short extracts undoubtedly lies at the heart of a Belgian court's recent decision restricting Google's use of Belgian newspaper articles under its news service.

In *Google, Inc. v. Copiepress*, the Belgian Court of Appeal in Brussels upheld a lower court's ruling requiring Google to remove both links and extracts to French- and German-language Belgian newspapers, including cached copies. The court specifically found that cached copies qualified as a communication to the public, and not merely as transitory storage. It further found that Google did not qualify as a passive "host" since it did not simply provide information but selected, ordered and in some cases modified the excerpted news content. The court was particularly skeptical of Google's claims as an information provider given that the "information" had already been published by the respective newspapers. It stressed that free speech guarantees were limited by copyright. The absence of advertising on Google News Belgium did not favor Google since it could provide such "free" services because it was not compensating the newspapers for the use of their copyrighted works.

Google will undoubtedly appeal this decision. It is too soon to tell whether similar Internet news hosts and aggregators will also have to "stop the presses" while they obtain necessary consents for republication. And, it is not clear how the deliberate tampering of potentially copyrightable materials, as with the Souza photograph, will be effected, if at all. What is clear is that the fight over the scope of news gathering and news reporting privileges is far from over.