
In the April 2009 issue of the MediaLawLetter we published an opinion article on news aggregation and fair use. In "What's 'Fair' In Love And War?" David Hosp and Mark Puzella of Godwin Procter argued that established copyright law protects online sites that republish the headline, lede and hyperlink to an original source. David Tomlin of The Associated Press has written an opposing view on the application of fair use law to aggregation.

Little Is "Fair" in Love and War

By David Tomlin

David Hosp and Mark Puzella tried to show in their April *MediaLawLetter* article that a court would probably find that unlicensed aggregation of news headlines and lede paragraphs on a Web site is fair use under the Copyright Act. Their analysis goes wrong at every turn.

What "Fair Use" Means

Their first mistake is ignoring the most significant passage in Section 107 of the statute, the overture that describes a fair use as one made "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."

This language expressly confines fair uses to those in which the taker of a protected work does not merely copy and republish it but adds social value by creating original expressive content or context so that the new whole serves one of the specified purposes. Only then is the infringement entitled to the four-factor analysis that follows. Compiling unauthorized and unembellished copies of others' works as news aggregators do cannot satisfy this prerequisite.

Purpose and Character of the Use

Hosp and Puzella ignore the problem and skip straight to the first fair use factor. They say news aggregators win on the "purpose and character" question because they somehow "transform" copied headlines and ledes into news links and because such use is not commercial since online news is generally "free to consumers." Good faith is dismissed as immaterial.

Hosp and Puzella are wrong on all counts. Aggregating headlines and ledes does not change the purpose and character of their use in any way. They remain news content, published without permission for the same purpose intended by the rightful owner. Appending links to additional news content does not magically remove the curse of the unlawful taking.

Nor does it help, as Hope and Puzella seem to think, that courts in readily distinguishable cases have found that displaying works in search engine results is fair use. News aggregations are not search engines. They are finished products packaged, marketed, displayed, monetized and consumed as news pages. Hosp and Puzella cite no case that addresses any aggregator Web site, let alone one purporting, as many news aggregators do, to corner an entire global content category.

Hosp's and Puzella's argument that aggregations can't be commercial because most news published online is free to consumers misses the point entirely. News may be free to consumers, but it is not free to publishers. Aggregators' displays ape the main news and section front pages of good faith publishers who create or pay for content. Copyright law reserves to the content owner the exclusive right to control its display, and whether the audience pays is neither here nor there.

Free-riding news aggregators cannot pretend to be "good faith publishers," and Hosp and Puzella address this uncomfortable truth by wishing it away.

Nature of the Copyrighted Work

Hosp and Puzella claim to believe that the law provides only the scantiest protection to news reporting. They imply that news articles are little more than compilations of facts and therefore barely even copyrightable.

In fact, news content that consists of an unadorned accumulation of facts is the exception, not the rule. The vast majority of ledes and headlines are highly creative and expressive distillations not only of facts but ideas, analyses, hypotheses and arguments. Composing them calls for an agile mind and all the craft of highly skilled expository writing.

Notwithstanding Hosp's and Puzella's unsupported assertion, there is no "well established legal principle" that banishes journalism to the margins of what copyright law protects. On the contrary, courts have found the reverse in a variety of cases.

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Amount and Substantiality of the Portion Used

Hosp and Puzella argue that if a use “copies only as much as necessary for the intended use, then the third factor will not weigh against fair use.” This is not true for uses that are unfair to begin with, as unlicensed news aggregations clearly are.

The argument also misstates the essence of the court’s inquiry on the “amount” fair use factor, which must concern itself not just with the quantity but also the “substantiality” of the taking. Courts have found the taking of an entire work to be “fair” in some cases, but they have declared the taking of only a tiny fractional part to be unfair in others.

Headlines and ledes painstakingly crafted to encapsulate the hearts of the stories they tell are just the kind of takings that are much less than the whole but nevertheless highly substantial. News aggregators acknowledge as much by selecting them for compilation.

Effect Upon Potential Market or Value

Hosp and Puzella repeat here their misguided argument that since news content owners generally display their works without charge to their audiences, they cannot show any market harm from others’ unauthorized displays.

But copyright law does not specify how a content owner must extract commercial benefit from his works. Most news publishers have exercised their exclusive rights to display their works online at no charge to users in order to engage and build their audience. The audience in turn is an opportunity for advertisers. Displays supported by ad revenue are entitled to the same copyright protection as displays supported by subscriber revenue.

Legitimate news publishers are now struggling in plain public view to replace their shrinking print revenues with new streams from digital distribution and display. It defies common sense to argue, as Hosp and Puzella do, that publishers suffer no commercial harm when aggregators copy the most substantial portions of their works, often within seconds of their first appearance on the Internet, and sell advertising against them just as they, the rightful owners, seek to do.

Hosp and Puzella also ignore the plight of news wholesalers whose business is licensing their original content to good faith

publishers. The commercial harm that follows when unlicensed aggregators appropriate and publish without paying the license fee is self evident.

Hosp and Puzella speculate that a court in a news aggregation case would blame a victim for failing to block scraping by aggregators. Copyright law imposes no such burden on a content owner, any more than a burglary victim can’t press charges if he failed to lock his door.

The Value of News Collections

As they rush to the wrong judgment on the four factors, Hosp and Puzella make a more fundamental logical error. They apply their fair news analysis as if a news aggregation were an individual work and as if the taking under discussion were of a single headline and lede from a single news article.

In fact aggregations are continuously updated headlines and lede paragraphs from hundreds, even thousands, of articles. While each individually protectable item has beneficial usefulness by itself, its market value is multiplied by its inclusion in a collection.

This enhanced value is what prompts consumers to buy newspapers, tune in to newscasts, and visit Web sites operated by real news publishers. Consumers know they are likely to find what interests them among the contents of a collection. This is exactly the value proposition that unlicensed news aggregators wrongfully appropriate for themselves.

Conclusion

Every copyright lawyer knows that fair use analysis of the unauthorized use of a single work can be highly subjective and the outcome in any particular case difficult to predict. But in a copyright case against a news service that copies and aggregates unlicensed news headlines and ledes, the outcome is far easier to predict. A calculating stranger who times his surprise arrival for the dinner hour, after the groceries are bought, the cooking done and the table set, is not entitled to share the meal.

David Tomlin is Associate General Counsel of The Associated Press.