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Intellectual Property, E-Commerce and Entertainment Law

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Selected Legal Info, News And Trends

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## **WHAT IS THE “FAIR USE” OF SOMEONE ELSE’S CONTENT?:**

For the last year or two we have been hearing more chatter about trademark and copyright owners being overly aggressive about protecting their intellectual property (“IP”) rights by sending out unwarranted “cease and desist” letters and filing unnecessary lawsuits. Some of the critics have argued that these IP owners have gone too far and have started to stifle the public’s right to make fair use of the IP owners’ content and brands. And while we have seen several recent cases in our office that support this concern, two recent court decisions show that it is not completely a one-way street in favor of IP owners.

The first case involved seven Grateful Dead concert posters used in a book about the Dead. The case was filed by Bill Graham Archives, LLC (“BGA”) - the owner of the posters in question – against the publisher of the book which traced the history of the band. Small “thumbnail” reproductions of the posters were used in a timeline contained in the book. BGA

claimed that reproduction of the posters was copyright infringement. The book publisher defended on the basis of the “fair use” doctrine.

[The “fair use” doctrine holds that what would otherwise be illegal copyright infringement is permissible. There are several factors<sup>1</sup> that the courts look at when analyzing whether a given use is a fair use and therefore the doctrine only applies in certain cases].

In the Grateful Dead case, the court held that the use in question – the thumbnails of the seven posters – **was** a legitimate fair use and thus **not** copyright infringement. The main reason for the court’s decision was that the court felt the publisher’s use was “transformative”. In other words, the publisher’s use was “transformative” because the book publisher didn’t reprint full-size versions of the posters and only used them to illustrate the historical evolution of the

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<sup>1</sup> Those factors include: (1) the nature of the use, e.g., commercial or educational or for purposes of parody or criticism; (2) the nature of the original work; (3) the amount of the original work taken; and (4) the effect on the market for the original work.

band. Another reason for the court's decision was that the small images were not the heart of the book and constituted only a small portion of the book which was almost 500 pages long.

In another recently-decided case, Major League Baseball ("MLB") was rebuffed in its effort to essentially rewrite one of the fundamental principles of U.S. Copyright law: there is no copyright in historical facts. A federal judge ruled earlier this month in St. Louis that MLB can **not** prohibit fantasy baseball leagues from using player names and statistics because the names and stats are not the property of MLB. We support this decision not only because it is consistent with the history of copyright law in the U.S., but because it will undoubtedly reduce the suicide rate of fantasy league participants who would otherwise have to find something real to do with their lives<sup>2</sup>.

The court ruled against MLB in a summary judgment motion which essentially threw MLB's case out of court without the need for a trial. Even though MLB cited "right of publicity" laws in addition to copyright law, the court felt that the First Amendment trumps MLB's asserted rights because fantasy sports leagues disseminate the same stats as commonly found in newspapers. The court also noted that the names and playing records of baseball players are not copyrightable.

However, the fight might not end there. Because the judge's decision was made at the trial court level and wasn't the decision of an appellate court, we might expect MLB to appeal the court's ruling.

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<sup>2</sup> With apologies to our clients and friends who may participate in fantasy sports leagues.

Another reason we might anticipate an ongoing fight is money: MLB has been taking in millions of dollars a year from online fantasy leagues that were willing to take licenses from MLB. We don't think MLB is going to let that revenue stream evaporate without a fight. But the interesting question remains: how is MLB going to get an appellate court to overturn one of the most fundamental principles in copyright law, i.e., that facts are not copyrightable?

These cases remind us of another interesting fair use case several years ago. In that case Mattel – owner of the iconic "Barbie" doll – sued a Danish musical group named Aqua over their hit song "Barbie Girl". In "Barbie Girl" one of the band members sang in a voice as if she were Barbie; another band member played "Ken" and invited Barbie to "go party". Mattel apparently took offense at the suggestion that Barbie and Ken might party like rock stars and claimed that Barbie's reputation was being damaged. The court nevertheless held that this use of "Barbie" did not amount to trademark infringement because the song did not mislead the public into thinking that there was a legitimate connection between the group and Mattel or "Barbie" dolls. The court also held that this use of the "Barbie" trademark fell within the noncommercial use exemption under the Federal Trademark Dilution Act.

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***Topic suggestions for future issues of INTELESCOPE are welcome. Please call or write us with your ideas and suggestions!***

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