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Copyrights

Augmented Reality and Fair Use: Narrowing the Standard

EMERGING TECHNOLOGY

Augmented reality is a technology that superimposes visual elements onto an image of the real world. As the applications for AR continue to expand, companies in the space should be aware of potential copyright infringement risks and courts' narrow interpretation of the fair use defense, attorneys at Venable LLP write.



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Augmented reality is everywhere. Just in the past few years we have seen its addition to social media platforms, games, automobile design, interior decorating, and even the improvement of impaired human sight. While it is easy to see the usefulness of this capability—superimposing digital content on top of a “live” view of one’s surroundings—it is also important to be aware of its possible risks under U.S. copyright law. In particular, courts are tempering the fair use defense to copyright infringement, which may present problems for augmented reality producers’ reliance on the “transformative” defense to infringement.

Courts Are Narrowing the Fair Use Defense

Given the non-dispositive and subjective nature of each fair use factor, the application of this doctrine can

vary meaningfully over time and between courts. From 2013 to 2015, it seemed the pendulum had swung decidedly toward increased findings of fair use in a number of varying situations. However, more recently, likely in response to criticism that fair use was becoming so broad as to usurp copyright, the pendulum appears to have swung in the other direction.

Most recently, Judge Rakoff of the U.S. District Court for the Southern District of New York opined that “[f]air use . . . is not a jacket to be worn over an otherwise infringing outfit” (*Penguin Random House LLC v. Colting*, S.D.N.Y., No. 1:17-cv-00386, 9/7/17). Although that case dealt with a defendant’s condensed and edited children’s versions of various classic novels, known as “KinderGuides,” (which the court held didn’t fall under the fair use defense to copyright infringement), the analysis could apply equally to augmented reality applications. In particular, the court concluded that the KinderGuides weren’t transformative at least in part be-

cause they used the vast majority of the underlying work for a commercial purpose.

In another example, the U.S. Court of Appeals for the Second Circuit held that a defendant's use of Abbott and Costello's two-minute routine, "Who's on First?" in the play "Hand to God" didn't qualify as fair use. The court held that the play's use wasn't transformative because it didn't modify the work or use the work to express critique or analysis (*TCA Tel. Corp. v. McCollum*, 839 F.3d 168 (2d Cir. 2016)). The court rejected the defendant's argument that it was used, not for its comedic purpose, but for a very different purpose as a "theatrical device that sets up the plot, but is of little or no significance in itself." The court held that the play used the "heart" of the work for a commercial purpose and that its use in the play could negatively impact the original work's licensing market.

This critical look at whether the use is commercial and whether there was adequate transformation is also found in *Disney Enters. v. VidAngel Inc.*, C.D. Cal., No. 16-4109, 12/12/16. There, the court found that offering \$1 videos that could have filters applied to remove offensive content wasn't a fair use of the underlying works. The court rejected the defendant's claim that filtering content was transformative. The court also found that VidAngel's use was clearly commercial, that it used the vast majority of the works, and that likelihood of market harm "may be presumed" because the use was for commercial gain.

Implications for AR Applications

What does this mean, then, for companies creating augmented reality applications? While none of these cases dealt with augmented reality, AR applications that merely overlay existing copyright material for purposes of a commercial enterprise are likely to face a similar analysis.

First, the application must be more than a "jacket." In other words, merely overlaying augmented reality

onto copyrighted material is unlikely to be good enough to avoid infringement. Despite the novelty of the technology, augmented reality application developers should expect that courts will look critically at the application's use of the underlying copyrighted material, and are likely to question whether there is a transformation of the underlying material.

Second, courts are also likely to put a premium focus on the commercial nature of the augmented reality application and further, whether it is likely to negatively impact the market for the underlying copyrighted work, including the market for licensing the work.

Take, for example, an app that could morph or alter an advertisement, movie poster, or other creative work. Though this augmented reality app may use the underlying work for a different purpose or arguably transform the work by adding a funny image or text, for instance, a narrow view of transformative use coupled with courts' increased attention to commercial impact could tip the scale against fair use.

On the other hand, overlay of augmented reality on a copyrighted work for purpose of parody, commentary on that underlying work, or even other social or political commentary, will likely tip the scale towards fair use because it will be considered not only more transformative but also the type of use that is less likely to be licensed—and thus less likely to affect the licensing market.

The doctrine of fair use is by its nature subjective and case-specific, but copyright practitioners and businesses look for trends to aid in their analysis of the defense in clearance, due diligence, and litigation. As such, those in the augmented reality space should be mindful that the pendulum is swinging away from a permissive view of fair use and should take a close look at their existing product development approach and rights clearance protocol in light of their business risk tolerance.

