

**CASE  
CLOSED**



## Highlights of the latest court cases concerning copyright law, along with frequently asked questions

BY GREG SATER

In the fluid and fast-paced world of electronic retailing, it's not a bad idea to keep abreast of the latest developments in copyright law as you and your competitors continue to tread the fine, ill-defined line that separates "fair use" from copyright infringement. In 2006, there were several notable copyright decisions reported by federal courts in the United States. Following are brief overviews of a few cases, along with some commonly asked questions.

**Is it legal to make a copy of another person's copyrighted work, so long as the copy you make is small and thumbnail-sized?**

***Perfect 10 v. Google.*** Perfect 10 publishes a magazine and runs a website, both of which feature copyrighted photographs of nude female models. Google's search engine has an "Image Search" feature that enables Google users to find images online. Perfect 10 sued Google for two reasons: First, because Google's search results were replete with "thumbnail" images that displayed tiny reproductions of Perfect 10 photographs (images which had been found

online and then stored by Google's web crawler in Google's cache); and second, because Image Search had an "in-line" linking or "framing" feature permitting Google users to click on the thumbnails and see the images in question, as they were displayed on the underlying (non-Google) web pages. The court ruled against Google with regard to the thumbnails, rejecting Google's "fair use" arguments and granting an injunction. However, the court ruled in favor of Google with regard to the in-line linking and framing feature of the "Image Search" program. The decision is reported at *415 F.Supp.2d 828 (C.D. Cal. 2006)*.

***Bill Graham Archives v. Dorling Kindersley.*** Concert promoter Bill Graham owns the rights to a number of "Grateful Dead" concert posters. Graham sued the publisher of a biographical book about the Grateful Dead because the book included a few tiny thumbnail-sized images of some of those concert posters, when discussing the history of the band. The court ruled against Graham and in favor of the book publisher, ruling that the book's use of the tiny images was a fair use. (It is interesting to contrast this result with the very different Google thumbnail result, discussed above.) The decision is reported at *448 F.3d 605 (2d Cir. 2006)*.

**Is it legal to edit another person's copyrighted work, so long as what you are doing is cutting out the sex, nudity or profanity?**

**Clean Flicks v. Soderbergh.** Clean Flicks, a company in Utah, sells DVDs to the public. Its basic business plan is to take the DVDs of popular Hollywood movies—legitimate and non-counterfeit DVDs that Clean Flicks has purchased and has the right to rent or resell—and, for each such DVD, to make one digital copy that it edits by removing or replacing any audio or visual content that Clean Flicks considers to be offensive. Clean Flicks then sells the edited version to its

customers, each such edited version being sold with the original, authorized, unedited version that Clean Flicks lawfully purchased. Several Hollywood studios filed suit. The court ruled in their favor, rejecting Clean Flicks' fair use arguments. The decision is reported at *433 F.Supp.2d 1236 (D. Colo. 2006)*.

**What's original and creative enough to be protectable under copyright law, and what isn't?**

**JB Oxford v. First Tennessee.** JB Oxford is a financial services firm that ran a television and print advertising campaign featuring a balding Caucasian man

named "Bill" (think, dollar bill) dressed in a full-body costume designed as an exact replica of a one-dollar bill. The theme of the "Bill" advertising campaign was that Bill was lazy: a metaphor for one's money not being put to work, not earning a good rate of return, and thus, needing to be invested with JB Oxford. First Tennessee is a financial services provider that, subsequent to JB Oxford, started its own advertising campaign featuring print ads and a TV commercial broadcast during the Super Bowl, each of which also portrayed men dressed as one-dollar bills, appearing to be lazy, out of shape and in one case bald, with many differences from the ads of JB Oxford but with the same general theme, "lazy money." The court found that while the general idea of having a man wear a dollar-bill costume for a TV ad about financial services was not copyrightable, this particu-

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lar character's traits had been sufficiently established by JB Oxford, in its TV commercials, to be protectable. Thus, the court ruled the issue of infringement would need to be decided by a jury, and could not be decided on summary judgment as JB Oxford's competitor had hoped. The decision is reported at *427 F.Supp.2d 784 (M.D. Tenn. 2006)*.

**A company was sued for selling a portable defibrillator product, which used the same list of words and same instruction protocols as the plaintiff's product, in instructing people on how to perform CPR.**

**Express v. Fetish Group.** Fetish designs, manufactures and sells lingerie. One of Fetish's products was a camisole with scalloped lace edging along the hemline and around the top and a three-flower embroidery design below the right hip. Express, which is an apparel retailer, began selling a camisole that resembled Fetish's camisole in several respects. The court analyzed the competing lingerie products and decided that, although normally clothing designs are not protected under copyright, Fetish's particular lace and embroidery accents were not utilitarian, were not functional and had a sufficient level of creativity to qualify for copyright protection (although the court ruled it would be "thin," meaning only identical copying thereof would be an infringement). The decision is reported at *424 F.Supp.2d 1211 (C.D. Cal. 2006)*.

**Hutchins v. Zoll Medical.** A company was sued for selling a portable defibrilla-

tor product, which used the same list of words and same instruction protocols as the plaintiff's product, in instructing people on how to perform CPR. The court ruled for the defendant, holding that the allegedly copied words and instructions were not copyrightable. CPR protocols on the timing and the

quantity of chest compressions are merely processes or procedures; they are not subject to copyright protection, the court wrote, "even if plaintiff had invented CPR" (which he had not). The court found that the phrases in common between the two competitors' products were functional, were expres-

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sions of ideas that can only be expressed in a limited number of ways, and therefore, were not copyrightable. The decision is reported at *430 F.Supp.2d 24 (D. Mass. 2006)*.

**Can someone do a webcast of your show, on his or her website?**

**Live Nation Motors Sports v. Davis.** The producer and promoter of "Supercross" motorcycle racing events, which broadcasts the events live on the radio, on TV and on the Internet, sued the owner of a website that was "streaming" the live audio webcasts of the races,

without permission, through a link to an authorized website. The court held that the plaintiff's live Internet webcast was copyrightable, and that it had been infringed by the defendant's live distribution of the content on the defendant's website. The decision is reported at *2006 WL 3616983 (N.D. Tex. 2006)*.

**Is it legal to download music from an online "peer-to-peer" file-sharing network?**

**BMG Music v. Gonzalez.** BMG Music sued a woman for downloading copyrighted music through KaZaA. She downloaded 1,370 songs and kept them

on her computer until she was caught. The decision focused on 30 of the songs, which she admitted she had never legitimately owned or had prior to her download from KaZaA. Although the woman argued "fair use," contending that she was "just sampling" in order to determine which songs she liked enough to buy at retail, the court rejected her argument, observing that "as file sharing has increased over the last four years, the sales of recorded music have dropped by approximately 30 percent," and holding in no uncertain terms that songs that are downloaded for free from peer-to-peer websites on the Internet are substitutes for legitimately purchased music, and thus, constitute copyright infringement, even if it is "only 30." The decision is reported at *430 F.3d 888 (7th Cir. 2005)*.

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**MGM v. Grokster.** In this landmark U.S. Supreme Court case, the defendants were accused of distributing file-sharing software (software that permitted third-party computer users to share their electronic files through peer-to-peer networks over the Internet). The defendants offered the software for free, on their website, and thus, supported the site through advertising revenue. While there could be "fair uses" for the software in question, the high court, nevertheless, found that the defendants were liable for contributory copyright infringe-

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ment because, in the real world, the primary use for their software was the dissemination of copyrighted material from one person to another, without any payment to the copyright owners thereof. Thus, it ruled that the promoters of the software were contributory copyright infringers. (It did not help the defendants that the record was “replete with evidence that when they began to distribute their free software, they clearly voiced the objective that recipients could use it to download copyrighted works” and that “after the notorious file-sharing service, Napster, was sued for facilitating copyright infringement, the defendants marketed themselves as Napster alternatives.”) The decision is reported at 125 S.Ct. 2764 (2005), with the most recent decision on remand reported at 454 F.Supp.2d 966 (C.D. Cal. 2006).

**Does Google commit copyright infringement when its search engine software creates a “cache” file of the content that it has found on your website?**

**Field v. Google and Parker v. Google.** Google’s search engine software “crawls” the web and organizes the content that it finds into a searchable index. When a user types in a query, this proprietary technology produces a list of hyperlinks organized by relevance. In providing this service, Google makes a copy of each website that its “crawler” has found and stores the copy in a “cache” or temporary storage tool. Two different courts in 2006 came to the same conclusion regarding this practice, which was that Google was not committing infringement because this was “automated, non-volitional conduct” and it was a “fair use.” The two court decisions are reported at 412 F.Supp.2d 1106 (D. Nev. 2006) and at 422

F.Supp.2d 492 (E.D. Penn. 2006). While 2006 certainly was a busy year in terms of cutting-edge copyright decisions, 2007 is sure to be even busier, as there are many fascinating copyright issues now percolating through the court system as a result of the massive amount of downloading, file-sharing, copying,

and unauthorized use of copyrighted content on the Internet. Stay tuned.  **Greg Sater** is an attorney with Rutter Hobbs & Davidoff Inc., a law firm based in Los Angeles. He can be reached at (310) 286-1700, or via e-mail at [gsater@rutterhobbs.com](mailto:gsater@rutterhobbs.com).

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