



Sport, Media and the Changing Landscape

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It's ubiquitous, but is it enforceable?

“This telecast is copyrighted by NFL productions for the private use of our audience. Any other use of this telecast or any pictures, descriptions, or accounts of the game without the consent of NFL productions is prohibited.”

Origins of the Fair Use Doctrine

Folsom v. Marsh (1841) and 17 U.S.C. § 107 (1976)

“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1)** the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2)** the nature of the copyrighted work;
- (3)** the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4)** the effect of the use upon the potential market for or value of the copyrighted work.”

What's changed since 1976?

More rapid change in the last 48 years than in the prior 135

- Ease of duplication
 - Press Pass vs iPhone
- Ease of distribution
 - *Sports Illustrated vs YouTube*
- Value of what's at stake
 - In 1962, NFL Commissioner Pete Rozelle negotiated his first network TV contract: a one-year deal with CBS for **\$4.6 million**.
 - The current NFL media rights deal is valued at **\$110 billion** over 11 years.

Fair Use in the digital age

Digital Millennium Copyright Act (17 USC § 512) (1998)

“TRANSITORY DIGITAL NETWORK COMMUNICATIONS.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider’s transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

- (1)** the transmission of the material was initiated by or at the direction of a person other than the service provider;
- (2)** the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;
- (3)** the service provider does not select the recipients of the material except as an automatic response to the request of another person;
- (4)** no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and
- (5)** the material is transmitted through the system or network without modification of its content.”

What's still changing?

Artificial intelligence and other facilitated content creators

- Generative AI
 - AI can't copyright its highlight reels, yet
 - DEEP FAKES Accountability Act
- Social Media and Misinformation
 - Do we need Oceania's Ministry of Truth?
 - Is it really as simple as Justice Anthony Kennedy proposes: "The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth"?

What's still hanging

AR / VR and inbound liability

- Privacy considerations
 - In order to create the experience that makes them valuable, AR / VR / XR devices necessarily collect a constant stream of demographic, biographic and biometric data, nearly all of which is protected
- Another dimension in which to protect fans
 - *The San Diego Union-Tribune* headline: “‘Pokemon Go’ players fall off 90-foot ocean bluff”
 - *The New York Times* headline: “The Metaverse’s Dark Side: Here Come Harassment and Assaults”

Thank you

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