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## Law in Technology

*Editor's note: In this issue, we are pleased to welcome copyright attorney Roy S. Gordet, who has been working with the Foresight Institute in addressing some recently encountered copyright issues. The following text is provided by Mr. Gordet:*

**by Roy S. Gordet**

As most readers of this publication know, Foresight Institute recently encountered a rough stretch on the information highway in the form of accusations of copyright infringement. *Scientific American* accused Foresight Institute of infringing *SciAm*'s copyright by "publishing" a *SciAm* article at Foresight Institute's website. Of course, Foresight Institute included extensive and pointed criticism of the *SciAm* article, which was highly critical of nanotechnology's position in the scientific community.

*Webmaster's note: For details and further links, see [the debate overview](#).*

Foresight Institute took the position that Foresight Institute's "use" of the *SciAm* article was not an infringement because it was a "fair use." This presents a good opportunity to explain for the readership, in a condensed version, the fair use doctrine of copyright law, with particular application to the Internet. This is a formidable task, made even more formidable by the space limitations of this column.

The Copyright Act gives the owner of copyrightable work of authorship the exclusive right to publicly distribute, display, reproduce and perform the work, and to create derivative works based upon the work. However, the Act recognizes that certain exceptions should exist for purposes of criticism, comment, news reporting, teaching, scholarship, or research. According to Section 107 of the Copyright Act, in determining whether the use made of a work in any particular case is a fair use, courts must consider four factors:

- the purpose and character of the use (e.g., is it for a commercial purpose or an educational purpose?);
- the nature of the copyrighted work (is it a novel, or a factual scientific report?);
- the amount and substantiality of the portion used in relation the copyrighted work as a whole;
- the effect of the use upon the potential market for or value of the copyrighted work.

These four factors have been developed by judges, who have created the fair use "exception" to copyright infringement over the past one hundred years. The fair use doctrine became an explicit part of the copyright statute in 1978. These cases are recognized by judges as being extremely difficult, and judges and appellate courts are in constant disagreement over the application of the doctrine.

With limited exceptions, copyright law is applied the same whether a work is published on television, a newspaper, or on the Internet. The four factors noted above must be applied by the courts, one would hope, consistently. Unfortunately, because the fair use doctrine is so dependent upon the specific facts of each case, it is particularly difficult to predict with certainty how a court will rule in each instance.

In the case of the *SciAm* article, a significant factor that weighed strongly in favor of a finding of fair use was that Foresight Institute was engaging in scientific/academic debate, arguably in an attempt to maintain its scientific/academic existence. Underlying the fair use doctrine is the First Amendment, and Foresight Institute had certain First Amendment rights to effectively counter the accusations and alleged misstatements of the *SciAm* article. Foresight Institute presumably did not profit from the publication of the *SciAm* article on its website, and it was not Foresight Institute's intention to divert readership from the original *SciAm* article found in the *SciAm* publication.

*SciAm*'s primary argument may be that the publication of the *SciAm* article by Foresight Institute is a copyright infringement, because:

- Foresight Institute published the entire article, which *SciAm* maintains was more than was necessary for purposes of criticizing or commenting on the work, and
- potential purchasers of the original *SciAm* publication will have no further need to purchase the publication because they were able to read the article in its entirety at the Foresight Institute website.

Of course, Foresight Institute may argue that it was necessary to publish at its own website exactly the amount of the *SciAm* article published to effectively criticize the article and to address each and every issue and concern raised in the article. In view of the fact that the Foresight Institute web site publication likely occurs after the next edition of *SciAm* hit the news stands, Foresight Institute would argue that the limited publication of just one article out of several articles in the original *SciAm* publication was merely free publicity and promotion for *SciAm*, and had absolutely no negative effect on *SciAm*'s profits in connection with the sale of the original edition.

This is the kind of give and take analysis and factual application typical of legal disputes, and in particular with the fact-intensive inquiry required by the fair use doctrine.

*(Editor's Note: With the expected arrival on the scene of more advanced hypertext features, such as Paul Haeberli's "transclusions," future critiques will be able to display quoted materials without storing any of the quotee's copyrighted material at the quoter's Web site. For more details, see an essay by Paul Haeberli at [<http://reality.sgi.com/grafica/merge/>], or the Web site of the Xanadu project at <http://xanadu.com.au/xanadu/>.)*

With regard to the copying of an Internet posting, it is necessary to consider whether an author of such a posting would object to the publication of his/her publication on grounds of copyright infringement, and whether such a posting contains works belonging to some other author B who may or may not have given author A permission to use author B's work. For example, if you copy the entire posted article by author A, then you may be liable to author A or author B, or both. The analysis for copyright infringement may be different for each, and the fair use analysis may be slightly different for each. In any case, the courts have made it clear that the "transmission" of postings on the Internet can be considered a copyright infringement, even if none of the infringers has made hard copies of such posted or transmitted publications. Indeed, by transmitting on the Internet or posting at a website, the potential for infringing activity exceeds what is possible by the more traditional publication channels.

Before downloading or retransmitting third party works posted on the Internet, the "downloader" should consider:

- how much of the original work is being downloaded;
- how important are the portions that are being posted;
- whether the original author already protested against these or similar transmissions; and
- whether the work itself needs to be downloaded to make the necessary point. Although one can be guilty of copyright infringement without having any intent to infringe or knowledge of infringing someone else's copyright, to the extent that the copyright owner can portray the transmitter/distributor as having malicious motives, it may be easier to convince the judge or jury of the infringement, which could result in enhanced penalties, such as an award of attorney's fees.

One set of copyright experts believe that the copyright laws need a major overhaul to address all of the new and difficult issues posed by the explosion in electronic publishing. Others believe that existing copyright law is equipped to deal with the issues and challenges presented by electronic publishing and commerce because the basic principles of the Copyright law are adaptable. The answer is probably somewhere in between. Regardless, the application of the fair use doctrine in any context will unfortunately remain one of the more perplexing and least predictable areas of the law. Think at least twice before you use someone else's copyrightable work of authorship.

*Roy S. Gordet is a San Francisco attorney who assisted the Foresight Institute in connection with the Scientific American controversy referred to in the article.*