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Weaponizing Copyright?

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Consider these two seemingly different scenarios. In the first, a police officer, facing a provocateur recording him with a cell phone camera, pulls out his own phone and blasts a Taylor Swift song. In the second, a home owner, after discovering to her horror that her Martha's Vineyard residence was used as a set for pornographic videos, obtains a copyright registration for the home's decorative accessories and files an infringement suit in federal court. What do these two scenarios have in common? Both the police officer and the home owner are allegedly "weaponizing" copyright, using copyright to achieve "non-copyright" objectives. In both instances, a copyright for a work in the background has been seized upon as a vehicle to silence an opponent or to punish wrongdoing.

For those not steeped in copyright law, unpacking some of these issues begins with understanding the way the law treats "incidental" or "ambient" use of copyrighted works. Because a copyright attaches to original works of authorship immediately upon their creation in a tangible medium of expression, a copyright is relatively easy to obtain. And anyone wielding a copyright has significant reach because anyone else—whether intentionally or not—who reproduces, publicly displays, distributes, or creates derivatives of the work potentially infringes the copyright.

So what about the police officer jamming to Taylor Swift? Rather than weaponizing his own copyright, the officer is actually relying on *Taylor Swift's* copyright and social media's algorithms. This BBC story analyzes this phenomenon in more detail, but in short, the officer is hoping that any attempt by the provocateur to upload a "gotcha" video of her encounter with the officer will be blocked by the platform's algorithms designed to preclude copyrighted music from posting on the site. These algorithms do not distinguish between music that is an integral part of the uploaded video and music that is ambient.

This isn't a technical problem to be solved by the platform, but rather the platform's response to the law surrounding copyright. Because intent is not an element of copyright infringement, even unintentional posting of copyrighted music being played "in the background" can constitute infringement. And the platform, no less than the individual posting the copyrighted work, can be found liable for infringement in the absence of a license.

Although a platform can choose to override its algorithms in specific cases upon request, well-developed algorithms will block any video with copyrighted music. That includes ambient music played by someone in a crowd—or the confronted police officer's cellphone. Hence, more than weaponizing copyright, the officer is weaponizing platform algorithms designed to avoid

infringement.

Like the police officer, the homeowner with the unscrupulous tenant is seizing upon a copyright for "background" works. That homeowner was Leah Bassett who in 2014 leased her well-appointed home to Joshua Spafford while she traveled out of the country. *Bassett v. Jensen*, 459 F. Supp. 3d 293 (D. Mass. 2020). Unbeknownst to Bassett, Spafford, a photographer and camera man, had come to Martha's Vineyard to work for Monica Jensen, an "adult" film director who was directing pornographic films for a Quebec-based film distribution company. Although Spafford intended to use the home as his temporary residence, Jensen threatened to fire Spafford unless he allowed her to turn Bassett's home into the set for nine films.

After discovering the misuse of her home several months into the lease, Bassett ordered the film crews to vacate the premises. Bassett, an artist, subsequently sought three copyright registrations for three "unpublished" collections: one for 21 drawings, paintings and photographs; one for a collection of hand sewn slipcovers, pillows and wall hangings; and one for painted tabletops, a fireplace and items of pottery.

Basset had never offered these works for sale but had used them solely as decorative touches to her home in a manner she thought would be "warm and aesthetically pleasing." Making an artistic decision that proved fatal, Jensen kept these decorative touches in the background in her erotic films. By publishing Bassett's works, Jensen set herself up for Bassett's copyright claim.

When Bassett filed suit in federal court in 2018, along with breach of contract, trespass, infliction of emotional distress and other claims, Bassett included copyright infringement. The defendants, however, insisted that any use of Bassett's copyrighted works had been fair use and *de minimis*. After all, with all the action in the foreground of the films, did the display of Bassett's collages and pottery in the background really constitute copyright infringement?

Yes, it did. After holding that some of the works failed to clear the low originality bar for copyright protection (e.g., those slipcovers and pillows), the court's summary judgment opinion relied on Second Circuit precedent, *Ringgold v. Black Entertainment TV, Inc.,* 126 F.3d 70 (1997), to reject the defendants' arguments. Jensen's use of Bassett's work was neither *de minimis* nor fair use.

De minimis use forms part of a "substantial similarity" analysis. "Substantial similarity"—necessary for there to be actionable copying and thus considered before addressing a fair use defense—requires that any copying must be qualitatively and quantitatively sufficient. While the qualitative component distinguishes the copying of expression (which is actionable) from the copying of ideas (which is not), the quantitative component concerns the amount of the work that is copied. And in the case of visual works, the quantitative component concerns the observability of the copied work, including time, focus, lighting, camera angles, and prominence. After considering supplemental data on these points provided by Bassett at the court's request, the court rejected the defendants' *de minimis* argument.

Hoping to mount a successful fair use defense, Jensen argued that the purpose and character of her use of Bassett's copyrighted works was "incidental." But the Second Circuit rejected the "incidental" use argument over 20 years ago in *Ringgold,* noting that any set decoration is "incidental" to the scene and not used to encourage viewers to watch. If incidental use sufficed to preclude a claim of copyright infringement, fair use would extend to permit wholesale use of copyrighted works in movies and television.

Having failed to parry the copyright claim, the defendants in *Bassett* ultimately settled the case in

2021. Bassett's choice of the copyright "weapon" proved very effective at punishing the defendants for their misdeeds.

As Professor Cathay Y.N. Smith has observed, copyright is being increasingly used "to punish, erase, [and] suppress" by some and "to protect, preserve, and defend" by others. Smith and other academics and commentators have treated the subject extensively and grappled with the questions of whether copyright should serve to protect some copyright interests but not others and whether there is a fair way to manage the practice of copyright weaponization. The cases Smith and others examine go beyond those claiming infringement of background works, and the questions raised deserve consideration.

The reach of copyrights to protect even visual or musical works in the "background," however, does not warrant curtailment of copyrights. Likewise, the seeming shift from economic to non-economic objectives on the part of claimants does not necessitate an overhaul of copyright legislation. In reality, it seems, the primary shift has been the ease (and attendant frequency) with which infringing reproduction, display, and distribution of copyrighted works occurs by anyone with a cell phone. Rather than resulting in the abuse or "weaponization" of copyrights, this shift has simply resulted in the increasing availability of valid copyright infringement claims to savvy plaintiffs.

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