



Jeff Geiger Counters

Do Lawyers Own Their Briefs (Tighty Whities Excluded)?

By: Jeffrey Hamilton Geiger. Friday, August 24th, 2012

Clients spend a great deal of money in the prosecution and defense of their claims. In doing so, lawyers prepare briefs outlining their client's legal positions. Who owns the brief? Under copyright law, absent an assignment of the work, the lawyer owns it. (Yes, the client can use it). Yet, for years online legal research services have offered the crafted briefs for "sale" in the sense that you can search an issue and download the briefs in a given case. Fair use?

When it is filed with the court, it is hard to argue that the brief is not a public record. But because it is in the public sphere, does that make it free game? Obviously, I cannot record a television show and sell it. But I can DVR it and watch it later.

Whether the use of the briefs constitutes a fair use requires an examination of the following non-exclusive factors:

- (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.

To test the proposition, an intellectual property lawyer is suing Westlaw in a **class action suit**, claiming that the online research provider is unlawfully asserting rights over his content as reported by **Above the Law**.

Here is an interesting corollary decision. In a sick case coming out of Maryland, William Bond asserted copyright infringement over a manifesto he wrote describing how he killed his father to death with a hammer. After murdering his father, he stuffed the body into the trunk of his father's car, drove it to an isolated location, and left the car there. Surprisingly, Bond objected to the use of "Self-Portrait of a Patricide: How I Got Away with Murder" during child custody proceedings and sued. After he lost in the district court and the court of

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appeals affirmed (***Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003)**) and the **supreme court** did not take the case. (As an aside, the court of appeals decision is well worth the read to see how crazy this matter was.)

In that case, the court concluded that the use was non-commercial and important in determining the merits of the child custody proceeding such that there was no copyright infringement. Here, the use is clearly commercial. Still, I welcome the ability to easily review briefs on matters I am researching. Obviously, I could randomly search physically or electronically courthouses for cases that are helpful and review the files but that helps no one on efficiency grounds.

It seems that a system is needed to acknowledge the work of the attorneys (who were ostensibly paid by their clients) and allow for general use. What do you think?

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