

To Clear Or Not To Clear - Is There Incidental Use On The Internet?

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Generally, a motion picture or television program is immediately recognized by its title or talent but rarely, if ever, by its set dressings or props. However, without these essential, yet frequently overlooked elements, the willing suspension of disbelief demanded of the viewing public would be difficult to achieve. While case law exists providing guidelines that producers of more conventional audio-visual works can use to determine when, and if, clearance of set dressing and props is necessary or prudent, how are internet content providers to predict the manner in which analogous "background" uses will be treated in their medium?¹

The Copyright Act, 17 U.S.C. § 101 *et seq.*, grants an owner of copyright certain exclusive rights (§§ 106(1)-(3) and (5) give a copyright owner the sole right to make and distribute copies and derivative works of the copyrighted work, and to display the work publicly). In the absence of defenses, unauthorized exploitation of these exclusive rights will generally give rise to a claim of infringement. In the entertainment industry, these claims have often taken the form of lawsuits brought by owners of protected works alleging that their works have appeared without permission in motion pictures and television productions.² In those cases where defendants have prevailed, courts have found that the use complained of was incidental and therefore not actionable. This conclusion has been reached in cases where the protected work is observable during the course of an allegedly infringing audiovisual work for only a short period of time,³ or where the focus, lighting, or camera angle contributes to the relative obscurity of the work in the scene.⁴

The breadth and ease of distribution of content on the internet, and the ability of end-users to download the content, manipulate the content to create derivative works and to create extremely high quality digital reproductions of the original work raise questions as to whether the legal analysis applied to rights clearances in the conventional audio-visual media should be utilized to determine the need for rights clearances on the internet. Does the end-user's ability to download, pause or "zoom in" on an element that would otherwise be regarded as "background" mandate a different set of rights clearance rules? Should the availability, use or nonuse of so-called "view-only" technology factor into the analysis? Is the end-user's ability to pause or stop on a particular element merely analogous to the pause button on a home video machine or is it qualitatively different because of the ability to then "zoom" in on the element, a function which is not yet available on the standard home VCR? If the element is out of focus or not well lit on the site, does the fact that the end-user might have the technological ability to "clean it up" change the analysis?

If an item is prominently featured or integral to the overall site or page on which it is visible, using the general guidelines employed for the conventional media of motion pictures and television, clearance should be obtained unless the item is in the public domain. However, if under the conventional analysis clearance would not be required for a television or film use, it cannot be assumed that the same would be true of an internet use. In determining whether clearance of rights is necessary, the content provider should also consider whether, in light of the technological capabilities of the internet, the proposed use creates risks of harm for the copyright owner of the underlying material that differ in degree, scope or kind from the risks conventionally associated with an unauthorized television or motion picture use. If the proposed use gives rise to any such additional risks of harm for the copyright owner,⁵ the content provider must give serious consideration to whether these additional risks would transform the proposed use from an incidental use into an infringing use so as to warrant obtaining a license, if one can be procured. Moreover, because of the accessibility of the internet in foreign countries, the underlying rights owner may claim that its foreign copyrights are being violated. This claim, in turn, requires research into the availability of the incidental use defense under the copyright laws of the applicable foreign jurisdictions.⁶

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Footnotes

1. While set and prop clearance issues may also involve principles of trademark and unfair competition law, doctrines of privacy and publicity and state laws protecting artist's rights, this article will address only copyright standards for the finding of a permissible incidental use.

2. *Faith Ringgold v. Black Entertainment Television, Inc., Home Box Office, Inc.*, 126 F.3d 70 (2nd Cir. 1997); *Jackson v. Warner Bros. Inc.*, 44 U.S.P.Q.2d 1603 (E.D.Mich. 1997); *Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409 (S.D.N.Y. 1997); *Monster Communications, Inc. v. Turner Broadcasting System, Inc.*, 935 F. Supp. 490 (S.D.N.Y. 1996); *Woods v. Universal City Studios Inc.*, 920 F. Supp. 62 (S.D.N.Y. 1996); *Amsinck v. Columbia Pictures Industries, Inc.*, 862 F. Supp. 1044 (S.D.N.Y. 1994); *Mura v. Columbia Broadcasting System, Inc.*, 245 F. Supp. 587, 590 (S.D.N.Y. 1965).

3. *Jackson*, *supra* note 3, at 1605 (plaintiff's lithographs, used as props in the motion picture "Made In America," appeared on camera for no more than 60 seconds); *Amsinck*, *supra* note 3, at 1050 (fair use defense not precluded where copyrighted mobile was visible over a total of 96 seconds in motion picture "The Hand That Rocks The Cradle"); *Mura*, *supra* note 3, at 590 (fair use of copyrighted puppets found where puppets appeared for approximately 35 seconds in a live telecast of the "Captain Kangaroo" show).

4. *Sandoval*, *supra* note 3, at 414 (use of plaintiff's photographs in the motion picture "Seven" held to be fair use, where photos appear in approximately ten camera shots ranging from one to six seconds in duration, and are partially obstructed and out of focus).

5. In fact, the same issues may arise with respect to digital television.

6. An analysis of which foreign copyright laws are likely to apply is beyond the scope of this article.

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