Missouri Law Review

Volume 47
Issue 3 *Summer 1982*

Article 8

Summer 1982

Public Access Doctrine in Copyright Law--Building Officials & Code Administrators v. Code Technology, Inc (BOCA), The

Christine L. Hansen

THE PUBLIC ACCESS DOCTRINE IN COPYRIGHT LAW*

Building Officials & Code Administrators v. Code Technology, Inc. (BOCA)[1]

Building Officials and Code Administrators International (BOCA), a private, nonprofit organization, developed, copyrighted, and published a building code known as the "BOCA Basic Building Code/1978" (BOCA code). On the issuance of a license from BOCA, Massachusetts adopted a slightly modified version[2] of the BOCA code and distributed it officially as the "Commonwealth of Massachusetts State Building Code." BOCA published a book that included the Massachusetts building code and a notice that substantial portions of the book were copied with permission from BOCA copyrighted material. Code Technology, Inc. (CT) published and distributed its own edition of the state code, but did not obtain BOCA's permission to copy the state code or publish BOCA's claim of copyright protection.

In an action under the Federal Copyright Act of 1976[3] (1976 Act) for an injunction against infringement of BOCA's copyright, the United States District Court for the District of Massachusetts entered a preliminary injunction against CT.[4] The United States Court of Appeals for the First Circuit reversed, holding that BOCA's low probability of success on the merits did not justify preliminary relief.[5] The court indicated that the doctrine of public access,[6] as previously applied to statutes and judicial opinions, also

---

* This Casenote, in revised form, was submitted to the National Nathan Burkan Memorial Competition as the entry of the University of Missouri-Columbia School of Law.

1. 628 F.2d 730 (1st Cir. 1980).

2. Slight alterations do not impair the original copyright or create a new or original work by the copier. Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 361 (9th Cir. 1947); Schnapper v. Foley, 471 F. Supp. 426, 428 (D.D.C. 1979) (by implication); PPS, Inc. v. Jewelry Sales Representatives, Inc., 392 F. Supp. 375, 382 (S.D.N.Y. 1975) (by implication).

3. 17 U.S.C. §§ 101-810 (Supp. III 1979). U.S. CONST. art. I, §8, cl. 8 gives Congress the power to secure "for limited Times to Authors . . . exclusive Right to their . . . Writings" in order to provide an economic climate conducive to the creation and promotion of the arts for the public benefit. *See* Mazur v. Stein, 347 U.S. 201, 219 (1954).

4. 628 F.2d at 732.

5. *Id.* at 736.

6. The doctrine of public access provides that the access of the citizenry to statutes and judicial opinions should not be limited by the granting of a monopoly, in the form of a copyright, to any one individual. It also provides that the product of a private party's own intellectual labor is copyrightable if it is severable from the statute or judicial opinion. *See generally* 1 M. NIMMER, NIMMER ON COPYRIGHT § 5.06[C] (1981).

applied to state-promulgated administrative codes modeled on privately developed and copyrighted material.[7]

The issue presented in *BOCA* was one of first impression. The court of appeals relied heavily on the historical fundamentals of the public access doctrine and on the public's due process right of access to the law.[8] At a time when government publication reaches into every aspect of the written word, the court's expansion of the public access doctrine indicates a judicial move away from traditional protection of copyright interests and toward increased recognition of the interests of the public sector. Copyright protection could become dependent on whether the copyrighted material becomes part of a trial transcript, a federal informational pamphlet, or any other part of the public record.[9]

The doctrine of public access arose in seventeenth century England in cases that affirmed the King's copyright to all reports and acts of Parliament.[10] These cases sustained the proprietary interest of the King by reasoning that every sovereign has an interest in its own products, which interest arises from the nature of the products belonging to each and every citizen. Employing a similar rationale,[11] American courts in a series of nineteenth century cases[12] adopted the public access doctrine and held that only the product of a private party's own intellectual labor could be copyrighted.[13] Widespread acceptance of these cases and their interpretation of the public access doctrine is generally inferred; only two cases have addressed the copyrightability of statutes or opinions since the turn of the century.[14] The

---

7. 628 F.2d at 734-35. BOCA's additional arguments based on federal preemption under 17 U.S.C. § 301 (Supp. III 1979) and state and federal disclaimer under *id.* § 105 were summarily handled by the court. 628 F.2d at 735-36.

8. 628 F.2d at 732-35.

9. *See, e.g.*, H. ROSENFIELD, *The American Constitution, Free Inquiry, and the Law* in FAIR USE AND FREE INQUIRY 288-303 (1980).

10. For a survey of old English cases, see Banks & Bros. v. West Publishing Co., 27 F. 50, 58 (C.C.D. Minn. 1886).

11. In an historical discourse on American copyright law, the Supreme Court explained that the copyright holder had complete control over the property for the statutory period. Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932). *But cf.* Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405 (1907) (rights under patents).

12. *See, e.g.*, Banks v. Manchester, 128 U.S. 244 (1888); Wheaton v. Peters, 33 U.S. (8 Pet.) 223 (1834); Howell v. Miller, 91 F. 129 (6th Cir. 1898); Connecticut v. Gould, 34 F. 319 (N.D.N.Y. 1888); Banks & Bros. v. West Publishing Co., 27 F. 50 (C.C.D. Minn. 1886); *In re* Gould, 53 Conn. 415, 2 A. 886 (1885); Nash v. Lathrop, 142 Mass. 19, 6 N.E. 559 (1886).

13. *See* Callaghan v. Myers, 128 U.S. 617, 647 (1888); Howell v. Miller, 91 F. 129, 138 (6th Cir. 1898).

14. *See* West Publishing Co. v. Edward Thompson Co., 169 F. 833 (C.C.E.D.N.Y. 1909); State *ex rel.* Helena Allied Printing Council v. Mitchell, 105 Mont. 326, 74 P.2d 417 (1937).

public access doctrine has been expanded conservatively since then to include elementary legal words and phrases.[15]

The statutory incorporation of the public access doctrine is in section 7 of the Federal Copyright Act of 1909[16] (1909 Act) and section 105 of the 1976 Act.[17] The 1909 Act provided that "no copyright shall subsist in . . . any publication of the United States Government, or any reprint in whole or in part, thereof"[18] and qualified this with a saving clause intended to retain copyright protection for private works published by the government.[19] This rule was the first statutory expression of the public policy that any work produced and published[20] by the government must be accessible to the public and belongs in the public domain.

Two cases decided by the United States District Court for the Southern District of New York under the 1909 Act indicate that mere government publication will not negate private copyright protection.[21] In *Time, Inc. v. Bernard Geis Associates*,[22] the district court stated in dictum that the publication of privately copyrighted pictures in a government report does not affect the copyright holder's ownership.[23] In *Marvin Worth Productions v. Superior Films Corp.*,[24] the district court held that properly copyrighted material does not fall into the public domain by inclusion in legal transcripts or opinions.[25] The court also stated that the 1909 Act actually suggested a statutory policy of upholding copyright protection despite inclusion in legal transcripts.[26] In both cases, the district court had the opportunity, similar to the one in *BOCA*, to expand the public access doctrine, but did not feel that the argument of public access or domain was sufficient to alter the traditional judicial position of upholding copyright protection. Even the harshest critics of copyright law would not refuse copyright protection to James Joyce *merely* because he wrote a book that was the subject of litigation and, therefore, placed in the

15. *See* M.M. Business Forms Corp. v. Uarco, Inc., 472 F.2d 1137, 1140 (6th Cir. 1973) ("guarantee," "storage fee," and "chattel mortgage" are in public domain).

16. Act of Mar. 4, 1909, ch. 320, § 7, 35 Stat. 1077 (1909) (current version at 17 U.S.C. § 105 (Supp. III 1979)).

17. 17 U.S.C. § 105 (Supp. III 1979). *See also id.* §§ 107, 403.

18. Act of Mar. 4, 1909, ch. 320, § 7, 35 Stat. 1077 (1909).

19. *See id.*

20. The 1976 Act broadened the copyright exclusion to both published and unpublished works of the federal government. *See* 17 U.S.C. § 105 (Supp. III 1979) ("Copyright protection under this title is not available for any work of the United States Government . . . .").

21. For a discussion of these cases, see P. WITTENBERG, THE PROTECTION OF LITERARY PROPERTY 78-79 (1978).

22. 293 F. Supp. 130 (S.D.N.Y. 1968).

23. *Id.* at 134 (dictum).

24. 319 F. Supp. 1269 (S.D.N.Y. 1970).

25. *Id.* at 1271.

26. *Id.*

public record.[27] Yet, this is a reasonable extension of the *BOCA* court's reasoning for extending the public access doctrine to privately promulgated administrative regulations enacted into law and placed in the public record.

Privately created codes not prepared under a contract with the government but later adopted as law could be distinguished to allow some vestige of copyright protection for the private creator of the code. At least one case has held that material similar to BOCA's retained its copyright by maintaining an identity and use independent of its use by the government.[28] Also, it would be reasonable to look to the intent of the parties to the licensing agreement in *BOCA*. It is significant that Massachusetts accepted BOCA's licensing terms, which included copyright protection for BOCA and referral to BOCA of any potential buyers of the code. The state acted in a manner consistent with the position that BOCA was the sole, rightful publisher of the administrative code.

The *BOCA* court interpreted the language of the House Report on section 105 of the 1976 Act[29] as distinguishing adoption of privately copyrighted material into law from mere publication by the government.[30] The court continued by pointing out that section 105 of the 1976 Act[31] and section 7 of the 1909 Act[32] by their terms only applied to works of the federal, not state, government.[33] Thus, neither section could protect BOCA in this case.

The court in *BOCA* understandably was suspicious of the possible abuse of discretion by BOCA in disseminating the administrative regulations. Instead of reviving the public access doctrine, which dissolves copyright protection, the court could have applied the statutory doctrine of fair use,[34] which does not affect the copyright itself. Fair use is a privilege of others to use copyrighted material without the consent of the owner.[35] One of the major policies behind fair use is the public interest in the diffusion of information

---

27. *Id.*

28. *See* Schnapper v. Foley, 471 F. Supp. 426, 427-28 (D.D.C. 1979).

29. 628 F.2d at 735.

30. *Id.* (interpreting H.R. REP. NO. 1476, 94th Cong., 2d Sess. 60, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5673 ("[P]ublication or other use by the Government of a private work would not affect its copyright in any way.")). The report, however, did specify "publication *or other use*" by the government, which may include adoption into law as not affecting copyright protection. *See* A. LATMAN, THE COPYRIGHT LAW 44-45 (5th ed. 1979). *See also* Editorial Note, *Piracy in High Places—Government Publications and Copyright Law*, 24 GEO. WASH. L. REV. 423, 424 (1956) (discusses protection of copyright holder as against government).

31. 17 U.S.C. § 105 (Supp. III 1979).

32. Act of Mar. 4, 1909, ch. 320, § 7, 35 Stat. 1077 (1909) (current version at 17 U.S.C. § 105 (Supp. III 1979)).

33. 628 F.2d at 735.

34. *See generally* Note, *Right of Government Officials to Copyright Their Speeches and Publications*, 33 S. CAL. L. REV. 447 (1960).

35. Toksvig v. Bruce Publishing Co., 181 F.2d 664, 666 (7th Cir. 1950).

affecting "areas of universal concern,"[36] including the fine and practical arts, science, and history. The courts could have prevented possible abuse of the copyright without eliminating BOCA's copyright protection.[37]

Apart from the common law basis of public access is its constitutional basis in the first amendment protections of freedom of the press and freedom of speech.[38] One writer contends that freedom of the press "protects the right of reasonable access to copyrighted materials notwithstanding the copyright law."[39] Under this view, copyrights limit uncensored inquiry and assemblage of information. The balance between the statutory right of the individual copyright holder and the fundamental right of public access weighs in favor of public access. Proponents of this interpretation of the first amendment have become more adamant as the modern federal copyright statutes lengthen the periods of copyright protection[40] and expand the subject matter protected.[41] The other first amendment basis of the public access doctrine springs from freedom of speech. *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*[42] exemplifies this connection. In 1977, a Miami newspaper began publishing a television program book in competition with *TV Guide*, a nationally published program guide. As part of its promotional advertising, the newspaper ran television commercials that displayed and compared the two guides. In an action for a preliminary injunction, the *TV Guide* publisher argued that the display of its program guide on the commercial without its permission infringed its exclusive right to display under section 106 of the 1976 Act.[43] The court did not invoke the fair use doctrine because

36. Meeropol v. Nizer, 560 F.2d 1061, 1068 (2d Cir. 1977). For a complete discussion of the underlying policies of the fair use doctrine, see S. FRIED, *Fair Use and the New Act* in THE COMPLETE GUIDE TO THE NEW COPYRIGHT LAW 205-27 (1977).

37. The limitation of the fair use doctrine is in defining its boundaries. *See* Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901). *See also* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5678-79 (general background of fair use problem).

38. *See* U.S. CONST. amend. I. For a discussion of ninth amendment implications, *see also* H. ROSENFIELD, *supra* note 9, at 297.

39. H. ROSENFIELD, *supra* note 9, at 296.

40. *See* 17 U.S.C. § 302 (1976) (life of author plus 50 years); Act of July 8, 1870, ch. 230, § 87, 16 Stat. 212 (1870) (28 years with 14 year renewal right); Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436 (1831) (same); Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790) (14 years with 14 year renewal right).

41. *See* 17 U.S.C. § 301 (1976) (any original works of specific authorship); Act of July 8, 1870, ch. 230, § 86, 16 Stat. 212 (1870) (dramatic works, photographs, engravings, paintings, drawings, and various other works of art, in addition to items under 1831 Act); Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436 (1831) (musical compositions added to items under 1790 Act); Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790) (maps, charts, and books).

42. 445 F. Supp. 875 (S.D. Fla. 1978), *aff'd*, 626 F.2d 1171 (5th Cir. 1980).

43. 445 F. Supp. at 877 (citing 17 U.S.C. § 106 (Supp. III 1979)).

the defendant did not use *TV Guide* for the "purpose reasonably contemplated by plaintiff when plaintiff created TV Guide for public consumption."[44] The court concluded that the free speech interests of the first amendment would be best served by denying the request for equitable relief: "Both . . . [constitutional and copyright law] are oriented toward the preservation of an atmosphere conducive to the interchange of ideas."[45] The inference remains that neither the first amendment nor copyright law are absolutes; rather, they should be harmonized.

Together, the fair use doctrine and the first amendment obviate the need for a public access doctrine in copyright law. Fair use and the freedoms of press and speech limit a copyright holder's exclusive rights to publish, display, and withhold publication, instead of striking down the copyright entirely. This result comports with contemporary property attitudes. Very few critics of the copyright law advocate its repeal, yet the *BOCA* court's acceptance of CT's defense of public access in the sphere of public sector publications effects that result. Private organizations and interest groups perform a valuable public function by organizing, updating, and drafting regulations and codes that the state could not do as well, given the limits of political considerations and economic conditions. If it is the growing sentiment of the judiciary that the public be given ready access to privately promulgated works, legislation providing for compulsory licensing or compulsory assignment would be a better way of providing such access while simultaneously forewarning the author of the limitations of his copyright protection.

CHRISTINE L. HANSEN

---

44. 445 F. Supp. at 881. *Cf.* Keep Thomson Governor Committee v. Citizens for Gallen Committee, 199 U.S.P.Q. (BNA) 788 (D.N.H. Oct. 2, 1978) (upheld defendants' noncommercial use of plaintiff's campaign song as fair use as well as on first amendment basis).

45. 445 F. Supp. at 882.