

RELIGIOUS TECHNOLOGY CENTER, Plaintiff, v. ARNALDO PAGLIARINA LERMA, Defendant.

Civil Action No. 95-1107-A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA,
ALEXANDRIA DIVISION

1996 U.S. Dist. LEXIS 15454; 40 U.S.P.Q.2D (BNA) 1569; Copy L. Rep. (CCH) P27,623; 24
Media L. Rep. 2473

October 4, 1996, Decided
October 4, 1996, FILED

DISPOSITION: [*1] Summary judgment on the copyright claim is found in favor of plaintiff,
RTC, against defendant Lerma.

COUNSEL: For RELIGIOUS TECHNOLOGY CENTER, a California non-profit corporation,
plaintiff: Bruce B. McHale, Chamowitz & Chamowitz, Alexandria, VA. John Frederick
Sinclair, Cohen, Dunn & Sinclair, Alexandria, VA.

ARNALDO PAGLIARINI LERMA, an individual, defendant, [PRO SE], Arlington, VA.

JUDGES: Leonie M. Brinkerna, United States District Judge

OPINION BY: Leonie M. Brinkema

OPINION: MEMORANDUM OPINION ON RELIGIOUS TECHNOLOGY CENTER'S AND
ARNALDO P. LERMA' S MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on plaintiff Religious Technology Center's ("RTC")
Motion for Summary Judgment for Copyright Infringement Against Defendant Lerma
("Lerma"). Also under consideration is defendant Arnaldo P. Lerma's (Cross-)Motion for
Summary Judgment and/or to Dismiss. Both parties seek final resolution of the allegation
that Lerma infringed RTC's copyright when he copied to his computer and/or posted to the
Internet sections of sacred and properly copyrighted documents belonging to the Church of
Scientology.

Summary judgment is appropriate when the record shows that there is no genuine [*2] issue
as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R.
Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505
(1986). In ruling on such motions, the court must construe the facts and all inferences drawn
from those facts in favor of the non-moving party. Charbonnages de France v. Smith, 597
F.2d 406, 414 (4th Cir. 1979).

Based upon the arguments tendered in the briefs and at the hearing, as well as the mass of
evidence in this substantial record, the Court finds that Lerma infringed RTC's copyright and
that summary judgment should be entered in favor of RTC and against Lerma.

History of the Case

The dispute in this case surrounds Lerma's acquisition and publication on the Internet of texts that the Church of Scientology considers sacred and protects heavily from unauthorized disclosure. Founded by L. Ron Hubbard, the Scientology religion attempts to explain the origin of negative spiritual forces in the world and advances techniques for improving one's own spiritual well-being. Scientologists believe that most human problems can be traced to lingering spirits of an extraterrestrial [*3] people massacred by their ruler, Xenu, over 75 million years ago. These spirits attach themselves by "clusters" to individuals in the contemporary world, causing spiritual harm and negatively influencing the lives of their hosts.

The texts at issue, the "Advanced Technology" or the "Operating Thetan" Documents ("OT Documents"), were written by founder Hubbard and allegedly provide a detailed program for warding off these evil influences through the creation of "free zones." The OT Documents outline a process that must be executed precisely according to the procedures laid out by Hubbard and under the guidance of an assisting church official in order to be efficacious.

Church doctrine teaches that improper disclosure of the OT Documents, both to non-Scientologists and even to church members if done prematurely, prevents achievement of the desired effect. Unauthorized disclosure also risks further harm of global proportions. See *Religious Technology Center v. Lerma*, 908 F. Supp. 1353, 1358 (E.D.Va. 1995). Hubbard explicitly directed that the OT Documents be released only in strict accordance with his guidelines, and that they remain otherwise secret and secure.

Consequently, the [*4] church has charged RTC, the plaintiff in this case with securing the sacred texts and aggressively policing any breaches in security or unauthorized disclosures that may occur. RTC has enacted a comprehensive protection plan that includes locked vaults, numerous guards, key cards, and signed nondisclosure statements by all church members. RTC has also been relentless in tracking down suspected; offenders and vigorously pursuing legal remedies against them.

This litigation initially consisted of both trade secret and copyright infringement counts against multiple defendants, including Lerma, Digital Gateway Systems (Lerma's access provider to the Internet), The Washington Post (which published a story about the case which quoted fractions of the OT Documents), Marc Fisher (a Washington Post reporter), and Richard Leiby (a Washington Post reporter). However, the Court earlier dismissed the trade secrets count as to all defendants and the copyright infringement count as to the Washington Post and its reporters. RTC voluntarily dismissed its claims against Digital Gateway Systems. Therefore, the only issue remaining in the case is RTC's copyright infringement claim against defendant [*5] Lerma. Even that issue has been progressively honed, with RTC moving for summary judgment on only a subset of the copyrighted works originally contested in RTC's complaint. n1

-Footnotes-

n1 RTC initially alleged that Lerma infringed the copyright of multiple works from several different series or collections of the OT Documents. With its summary judgment motion, RTC now seeks a ruling only on materials excerpted from "OT II", "OT III", "Power", "NOTs",

and "the Sunshine Rundown," referred to all the in this motion as the "Works. " The Second Amended Complaint contained additional allegations regarding infringement of other materials from "OT I", "OT IV", "OT V", "OT VI", and "OT VIII", however these allegations are not included in RTC's instant Motion for Summary Judgment.

-End Footnotes-

Bases for Copyright Infringement

To establish copyright infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) unauthorized copying of constituent elements of the copyrighted work. *Feist Publications, [*6] Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 361, 113 L. Ed. 2d 358, 111 S. Ct. 1282 (1991). Copyright infringement occurs when there is "substantial unauthorized copying of protected materials from a copyrighted work." Harry G. Henn, *Henn on Copyright Law*, § 27.6 (1991).

The first element is effectively uncontested by Lerma. Filed in conjunction with RTC's motion for summary judgment was a set of exhibits (the "G-Series Exhibits") containing 33 comparisons of RTC's copyrighted works and the "copies" allegedly in Lerma's possession and/or posted by him to the Internet. Each of these exhibits includes the written segment allegedly copied by Lerma, the corresponding Hubbard original, a certificate of copyright registration, a certified photocopy of the masked work on file at the Copyright Office of the United States, and a full (i.e. unmasked) "translation" of that photocopy.

Lerma does not dispute that Hubbard followed the appropriate procedures in obtaining the maximum copyright protection of his original works and that these same Works have now been produced in the G-Series Exhibits with the appropriate validating documentation. Nor does he dispute that RTC [*7] properly owns the copyright interest in these Works.

The Idea/Expression Dichotomy

Lerma launches a collateral attack on the appropriateness of the copyright. Distinguishing between idea and expression, Lerma argues that material contained in the Works is "uncopyrightable." Copyright law promotes the advancement of human knowledge and thought by providing limited legal (and therefore economic) protection to an author's original expression. The author's temporary monopoly, however, does not include the ideas contained within his work. As stated by the Third Circuit, "the purpose of copyright law is to create the most efficient and productive balance between protection (incentive) and dissemination of information, to promote learning, culture and development." *Whelan Associates v. Jaslow Dental Laboratory*, 797 F.2d 1222, 1235 (3rd Cir. 1986). These intentions have spawned the idea/expression dichotomy in copyright law, protecting the latter while still permitting access to the former. "The [Copyright] Act is thus able to protect authors without impeding the public's access to that information which gives meaning to our society's highly valued freedom of expression." [*8] *Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 202 (2nd Cir. 1983).

This idea/expression distinction is codified under 17 U.S.C. @ 102(b) which states: In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form

in which it is described, explained, illustrated, or embodied in such work.

Courts have therefore held that wherever an author's expression of an idea is closely intertwined with the idea itself, the expression has "merged" with the idea and is therefore uncopyrightable. Under this "merger doctrine," where the author's ideas and procedures can be properly expressed in so few ways that "protection of the expression would effectively accord protection to the idea itself," *Kregos v. Associated Press*, 937 F.2d 700, 705 (2nd Cir. 1991), courts have found the expression not copyrightable. Copyrighting the expression in these instances would effectively prohibit discussion and analysis of the idea itself and grant the owner a monopoly on all uses of the very concept.

Lerma argues that this merger doctrine [*9] applies and that RTC's claim of copyright protection is therefore invalid. He also argues that Hubbard describes the OT Documents as primarily factual, and he insists that their contents must be followed exactly as written. Under the merger doctrine, even if Hubbard had followed all procedural requirements, the Works would still be uncopyrightable if protecting the expression would effectively grant a monopoly on the idea itself.

Despite this argument, the Court finds that merger of idea and expression has not occurred in this case. The ideas and concepts of the Scientology religion can be discussed independently of the OT documents. This has been amply demonstrated in the voluminous record accompanying the case and in all parties' numerous briefs. Indeed, theological musings on the sources of (and remedies for) spiritual harm have dominated discussion about religion for centuries. Whether achieved through animal spirits, witches, demons, curses, Satan, angels, or "body thetans," spiritual healing is clearly not a concept inherently tied to the OT Documents.

To the extent that the OT Documents supply a technique or "process" for achieving spiritual well-being, their copyright [*10] arguably violates a strictly literal reading of @ 102 (b). However, as RTC has argued, virtually all works convey to some extent ideas and processes that are uncopyrightable. See *Hr'g*, January 19, 1996, at 23 et seq. While such creations may contain "procedure[s], process[es], [or] system[s]", 17 U.S.C.A. @ 102(b), they are not thereby rendered de facto uncopyrightable. As an example, RTC cites programs which essentially describe a "process" but are nonetheless copyrightable. Other examples include cookbooks and automobile mechanics' repair manuals. Each of these documents purports to describe a precise method for achieving a desired end, whether it be the creation of a spinach souffle or the rebuilding of a defective carburetor. Hubbard's instructional directions for spiritual healing are no less-deserving of protection than the admittedly copyrightable "recipe" in a cookbook or copyrightable "repair steps" in a maintenance manual.

Lerma attempts to distinguish the Works from these examples because the Works require specific, precise repetition of the exact text. While a recipe, repair instructions, or a computer program may permit some variation, Hubbard claims [*11] that the Works provide the only correct method for reaching complete spiritual health. If not followed exactly, the process will fail. However, literary works such as a poem or haiku and musical works such as a symphonic score possess the same quality - the desired effect cannot be achieved without precise repetition. This does not make poems, haikus, and musical scores uncopyrightable, and it should likewise not preclude copyrightability of the Works. Denying copyright protection to RTC on this basis would rapidly destroy the protection and incentive for the

likes of Wagner and Brahms - an outcome that is most certainly contrary to the goals of copyright law.

The Court, therefore, finds the merger clause inapplicable to the Works.

Fair Use Defense

Lerma freely admits that he copied portions of the Works by downloading or scanning them into his computer and by posting segments of this material to the Internet. He argues that even if the works are copyrightable and copyrighted, this copying was lawful because it was "fair use."

In determining whether the use of a copyrighted work constitutes fair use, the Court must consider four factors:

1. the purpose [*12] 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.

17 U.S.C. @ 107. These four statutory factors may not be "treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578, 127 L. Ed. 2d 500, 114 S. Ct. 1164 (1994).

Lerma urges us, when conducting the fair use analysis, to evaluate his actions in the special context of modern communication on the Internet. He describes the unique characteristics of computer interaction and argues for special treatment under copyright law. While the Internet does present a truly revolutionary advance, neither Congress nor the courts have afforded it unique status under the fair use standard of @ 107. The law of copyright has evolved with technological change, with each new technological advancement [*13] creating complicated questions of copyright interpretation and application. Nevertheless, the new technologies - from television, to video cassette recorders, to digitized transmissions - have been made to fit within the overall scheme of copyright law and to serve the ends which copyright was intended to promote. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984). The Internet is no exception, and postings on it must be judged in reference to the already flexible considerations which fair use affords.

Purpose and Character of the Use: The first fair use factor is the purpose and character of the use made by the alleged infringer. 17 U.S.C. @ 107(1). Lerma posits that his use of the Works falls within several of the classic fair use categories listed in the first paragraph of @ 107, namely, that his copying and posting of the Works constitutes "criticism", "comment", "news reporting", and "scholarship." "There is a strong presumption that factor one favors the defendant if an allegedly infringing work fits the description of uses described in section

107." *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2nd [*14] Cir. 1991).

Lerma argues that his Internet posting of the Fishman Declaration originated from publication of information in a California court record that was open to the public and which the court refused to seal. Lerma asserts that he merely gathered that information like a news reporter and then published it on the Internet to unveil for the Internet community the "foibles" of Scientology in the same spirit of the modern news expose.

This analogy fails. The full record clearly shows that Lerma's motives, unlike those of news reporters, were not neutral and that his postings were not done primarily "for public benefit." *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2nd Cir. 1981). When judged in light of the degree of copying and the use to which the infringing material was ultimately put, Lerma stands in a position significantly different from the *Washington Post* and its employees earlier dismissed from this suit. Even if Lerma were a newspaper reporter, the mere fact that a copyrighted document was in a public court file in no respect destroys its copyright protection.

Lerma also describes himself as a dedicated researcher delving into the theory and scholarship of Scientology. [*15] He claims to be performing academic work of a "transformative" nature, providing materials which "add new value to public knowledge and understanding, thereby advancing the goals of copyright as set forth in the Constitution." Opp'n Br. at 24. That argument does not justify the wholesale copying and republication of copyrighted material. The degree of copying by Lerma, combined with the absence of commentary on most of his Internet postings, is inconsistent with the scholarship exception. Even assuming, *arguendo*, that Lerma's copying to his hard drive was done solely in the name of academic research, this does not end the fair use analysis. Such uses are only "presumptively" permissible; there is a limit to the extent of reproduction that can be undertaken even by the bona-fide researcher. See *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 17 (S.D.N.Y. 1992), *aff'd.*, 60 F.3d 913 (2nd Cir. 1994) (archival photocopying of scientific journals for internal use by for-profit research laboratory and is not fair use) See also *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983) ("Wholesale copying of copyrighted material precludes application of the fair use [*16] doctrine."), 3 *Nimmer @ 13.05[A] [3]* (1996) ("[Generally] it may not constitute a fair use if the entire work is reproduced").

Lerma argues that his "research" conducted via downloads from newsgroups on the Internet provides a particularly strong argument for fair use. Because news group output is by its nature ephemeral, Lerma asserts that saving such postings for later review is indistinguishable from the temporary storage on a VCR tape that was upheld by the Supreme Court in *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984) . Lerma's analogy fails because the "time-shifting" approved in *Sony* concerned the reproduction of television programs that were implicitly licensed at no charge to the viewer who then copied them for purposes of convenience. These critical factors are absent in the instant case. Lerma is not licensed to view or copy the Works, and his reproduction of the Works on his disc served purposes beyond convenience. The proper analogy of Lerma to *Sony* would be if the *Sony* defendant obtained an unauthorized copy of a television movie from a premium cable channel and then re-broadcast that [*17] movie on a public access channel, something that would be clearly prohibited.

It may be true that Lerma's intent in pos~ing the Works was not "commercial" in the

traditional sense. He was not in direct competition with the church, and he did not place a surcharge on, or receive any other "private commercial gain" from, the information contained within the Works. Under the fair use doctrine, commercial use of an allegedly infringing work is disfavored whereas noncommercial use is not. See *Sony Corp.*, 464 U.S. at 449. Nonetheless, while there is no evidence that Lerma has profited directly from the postings, this factor alone is not dispositive of the fair use issue.

"Though it is a significant factor, whether the profit element of the fair use calculus affects the ultimate determination of whether there is fair use depends on the totality of the factors considered; it is not itself controlling." *Rogers v. Reons*, 960 F.2d 301, 1309 (2nd Cir. 1992). In viewing the totality of factors discussed above, the Court finds that the noncommercial character of Lerma's copying and posting does not outweigh Lerma's nonneutral and non-scholarly motives in publishing the Works.

Nature [*18] of the Copyrighted work: The second factor for consideration under the fair use analysis is the nature of the copyrighted work. 17 U.S.C.A. § 107(2). "This factor calls for recognition that some works are closer to the core of intended protection than others, with the consequence that fair use is more difficult to establish when the former works are copied." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586, 127 L. Ed. 2d 500, 114 S. Ct. 1164 (1994).

In opposing RTC's Motion for Summary Judgment, Lerma relies upon two aspects of the Works which favor his position: 1) the factual vs. the creative nature of the Works, and 2) their publication status.

The fair use defense is broader with respect to factual works than to creative or literary works. "The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 563, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985). Hubbard's works are difficult to classify in this respect and courts dealing with this issue have differed in their conclusion. As the Second Circuit stated in *New Era Publications Int'l v. Carol Publishing [*19] Group*, 904 F.2d 152, 158 (2nd Cir. 1990), cert. denied, 493 U.S. 1094, 107 L. Ed. 2d 1071, 110 S. Ct. 1168 (1990), "reasonable people can disagree over how to classify Hubbard's works." In the case at bar, however, RTC has characterized the Works as training materials, stressing their utility over their creativity. The Court has previously resolved this question by holding that the Works are "intended to be informational rather than creative" and that a broader fair use approach is therefore appropriate in this regard. *Religious Technology Center v. Lerma*, 908 F. Supp. 13621, 1367 (E.D.Va. 1995).

Lerma's second argument regarding the nature of the copyrighted Works pertains to their publication status. Courts have consistently found that "the scope of fair use is narrower with respect to unpublished works." *New Era Publications v. Carol Publishing Group*, 904 F.2d 152, 157 (2nd Cir. 1990) (quoting *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985)). The Works in question clearly have not been "published." RTC has not released these materials to the public and does not plan to release them. Nevertheless, [*20] Lerma insists that for purposes of a fair use analysis the term "publication" means "whether the work has been widely disseminated or is widely available, regardless of technical 'publication'." *Opp'n Br.* at 41 (citing *Harper & Row*, 471 U.S. at 555) (emphasis in original). Because much of the materials which he copied and

posted to the Internet were already available in an open court file or on the Internet, Lerma asserts that they are deserving of less protection because he has not usurped RTC's right to first publication.

Lerma's reliance upon the argument is not convincing. Although *Harper & Row* weighs the "de facto publication ... or dissemination" of a work in determining whether another's utilization of the material constitutes fair use, this only applies where the author has given "implied consent" through such action as performance or dissemination. 471 U.S. at 551. In those circumstances, the author has made the work publicly available and has implicitly invoked his right to first publication. The copyright owner is denied this opportunity when actions of a third party usurp the right to first publication, as happened both in *Harper & Row* and in this case. [*21] posting without the owner's consent cannot constitute a "first publication" under fair use principles.

Lerma also argues that the unpublished status of the Works is entitled to even less weight because the RTC never intends to publish them. He claims that the "central purpose of distinguishing between disseminated and undissemminated works is to preserve for the author the commercial value of the right to first publication." Opp'n Br. at 44. Relying on *Harper v. Row*, Lerma suggests that where a copyright owner intends never to exploit the right of first publication, the need to protect that right diminishes and the scope of fair use correspondingly expands.

Lerma misreads his authorities on this point. *Harper & Row* clearly recognizes that "the right of first publication encompasses [also] the choice whether to publish at all." 471 U.S. at 564. See also *Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2nd Cir. 1987) (Potential harm to value of plaintiff's works "is not lessened by the fact that their author has disavowed any intention to publish them during his lifetime ... he is entitled to protect his opportunity to sell his letters"). This approach is not illogical. [*22]

Thus, while the factual nature of the Works weighs in Lerma's favor, the unpublished nature of the Works and RTC's intention to keep the Works unpublished weigh against him. As held in *Harper & Row*, 471 U.S. at 564, "the fact that a work is unpublished is a critical element of its 'nature.'" Unpublished works "normally enjoy complete protection against copying any protected expression." *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2nd Cir. 1987). On balance, the second fair use factor tips in favor of RTC.

Amount and Substantiality of Copying: The third factor addresses the amount and substantiality of the portion copied by the defendant in relation to the copyrighted work as a whole. 17 U.S.C. @ 107(3). "There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use." *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2nd Cir. 1986). This factor has both quantitative and qualitative components, so that courts have found a use to be unfair where the quoted materials formed a substantial percentage of the copyrighted work or where the quoted material was "essentially the heart of" the copyrighted work. *New [*23] Era Publications v. Carol Publishing Group*, 904 F.2d 152, 158 (2nd Cir. 1990) (citations omitted).

The parties dispute whether the segments excerpted by Lerma represent "the heart of" the Works under the qualitative component. The Court is unable to evaluate this component

because many of the copyrighted materials are incomprehensible. However, because the quantitative analysis weighs so overwhelmingly in RTC's favor, it is not necessary to make this qualitative evaluation.

The 33 exhibits in RTC's G-Series Exhibits indicate extensive copying and posting. A majority of these 33 exhibits contain verbatim copying, as if Lerma obtained the copyrighted materials and summarily transferred them into cyberspace. In many cases, Lerma uploaded a complete, self-contained OT Document with a recognizable beginning, body, and end. Over two-thirds of the G-Series Exhibits represent virtually a total reproduction of the work on file at the Copyright Office.

The wholesale copying of copyrighted material often precludes the application of the fair use doctrine. *Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983) (citations omitted). Such blatant reproduction has been prohibited even in the [*24] context of educational instruction. See, e.g., *Wihtol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962) ("whatever may be the breadth of the doctrine of 'fair use', it is not conceivable to us that the copying of all, or substantially all, of a copyrighted song can be held to be a 'fair use' merely because the infringer had no intent to infringe"), *Encyclopaedia Britannica Educational Corp. v. Crooks*, 447 F. Supp. 243 (W.D.N.Y. 1978) (although defendants were involved in noncommercial educational copying of films to promote science and education, the taping of entire copyrighted films was too excessive for the fair use defense to apply).

Lerma opposes RTC's percentage calculations by arguing a different interpretation of what represents the "whole" copyrighted work as defined under @ 107(3). RTC has registered the OT Documents with the copyright office in batches as part of a series. Lerma argues that the "whole" work refers to the entire series listed on a registration certificate, while RTC argues that the term refers to each component of these copyrighted series. Thus, where RTC registered on one form the OT III collection of documents A, B, C, D, & E, Lerma asserts that [*25] all five documents constitute the "whole copyrighted work" for purposes of comparison, whereas RTC maintains that each subpart constitutes a "whole copyrighted work."

Whether or not the "whole copyrighted work" is viewed as the entire collection (as Lerma prefers) or as the individual works (as RTC prefers) is critical to the fair use assessment, and indeed may be the determining factor. Under RTC's interpretation, if Lerma copied document A in toto he performed a 100% copy. Under Lerma's interpretation, the same action amounts to copying only a small portion of a larger work. In this way Lerma maintains that he reproduced only 13 of 213 pages from OT II, 25 of 326 pages of OT III, 12 of 30 pages from "the Power," and 10 of 350 pages of the NOT's. Opp'n Br. at 47.

RTC's approach is supported by the Code of Federal Regulations, which states inter alia that the following shall be considered a "single work":

In the case of unpublished works: all copyrightable elements that are otherwise recognizable as self-contained works, and are combined in a single unpublished "collection."

37 C.F.R. @ 202.3(b) (3) (8). That subsection proceeds to list the factors to be used [*26] in determining whether a set of works can be considered a "collection," including:

- 1) are the elements assembled in an orderly form;
- 2) do they bear a single title identifying them as a whole;
- 3) is the copyright claimant the same in each of the elements and in the collection as a whole; and
- 4) are the elements by the same author.

Id. When judged by these factors, we find that the Works at issue in this case are combined in "collections" and that each subpart must be considered a "single work" for the purposes of fair use analysis.

Courts have followed this approach and found that components of a "collection" constitute single works for fair use purposes. In *Szabo v. Errisson*, 68 F.3d 940 (5th Cir. 1995), the court granted copyright protection to the component elements of a collection of recordings despite the fact that the elements were not individually listed on the copyright registration. RTC's claim is even stronger because it undertook an individualized listing. See also *Hustler Magazine v. Moral Majority*, 796 F.2d 1148, 1154 (9th Cir. 1986) ("each component of a composite work is capable of individual copyright protection and need not [*27] bear a separate copyright notice"); *American Geophysical Union v. Texaco*, 802 F. Supp. 1, 17. (S.D.N.Y. 1992) (each article within a copyrighted journal constituted a single work for fair use purposes).

Although Lerma did not post the entirety of OT II, OT III, NOT's, or Power, he did post the entirety of certain discrete subparts of these series. Under the Code of Federal Regulations and under case law, these subparts constitute single works and are the benchmark against which to compare Lerma's actions. Following this analysis, Lerma's infringement is clear.

As a final defense under this fair use factor, Lerma urges this Court to consider the Internet postings in their unique newsgroup context. Rather than viewing each individual posting in isolation, Lerma contends that each posting must be considered within the context of the ongoing dialogue he has conducted on the newsgroup. The qualitative analysis would then include the multiple communications posted before and after the alleged infringements, communications which are likely to contain greater commentary and analysis than the postings at issue.

This approach would permit a would-be infringer to participate in blatant [*28] theft of a copyright yet still escape punishment via the subsequent posting of subsequent commentary - a commentary that may not always be seen in tandem with the infringing work. Under this argument "cyberbandits" could easily cover their tracks.

The third fair use factor therefore weighs heavily against Lerma. His direct copying and posting of certain "single works" registered within collections, almost totally devoid of discussion and commentary, nearly are sufficient to preclude a fair use defense.

Effect on the Market of the Copyrighted Work: The fourth and final part of the fair use defense considers the effect which the allegedly infringing use had on the potential market for, or value of, the copyrighted work. 17 U.S.C.A. @ 107(4).

Courts have frequently identified this as the most important element of a fair use analysis. See, e.g., *Harper & Row*, 471 U.S. at 566; *New Era Publications v. Carol Pub. Group*, 904 F.2d 152, 159 (2nd Cir. 1990). However, the 1967 House Report cautions that it "must almost always be judged in conjunction with the other three criteria." *Marcus v. Rowley*, 695 Wash. 2d 1171, 1177 (9th Cir. 1983) (citing H.R. Rep. No.83, 90th Cong., [*29] 1st Sess. 33, 35 (1967)). Lerma correctly argues that any economic harm befalling the Church of Scientology as a result of legitimate commentary is permissible under the fair use doctrine. The Supreme Court found in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 592 (1994), that we must "distinguish between 'biting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it'" (brackets in original) (citation omitted). It is extremely difficult to address the issue of market impact in this case because it is unlikely that excerpts of the Works posted by Lerma thus far, although substantial, would provide a sufficient basis for would-be parishioners to defect from Scientology. However, RTC's inability to prove a decrease in Scientology enrollment does not justify Lerma's actions. "The mere absence of measurable pecuniary damage does not require a finding of fair use." *Marcus v. Rowley*, 695 F.2d 1171, 1177 (9th Cir. 1983).

The potential for economic harm to RTC must also be considered. "To negate fair use one need only show that if the 'challenged use should become widespread, it would adversely affect the potential market for the copyrighted [*30] work'." *Harper & Row*, 471 U.S. at 568 (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. at 451). RTC correctly notes that a substantial expansion of Lerma's current activities presents an identifiable risk of harming RTC. In *Bridge Publications, Inc. v. Vien*, 827 F. Supp. 629, 633 (S.D.Cal. 1993), the court found such a risk in another case involving the Church of Scientology. In *Vien*, unpermitted copying of RTC's literary works and sound recordings was held to violate copyright law in part because the copies fulfilled the demand for the original works and diminished or prejudiced their potential sale. *Id.* at 636. The infringer in *Vien* actually competed with the Church of Scientology. RTC argues that Lerma poses some competitive risk to RTC, supports this argument with a communication which states that the "public are [sic] encouraged to use a workable technology ... The complete works of all clearing practitioners are made available to all with desire and courage to apply them. Franchises flourish ..."Ex. 8 to Fifth Lerma Decl.

Overall, however, RTC in this case are far too speculative. RTC is unable to present specific, identifiable [*31] evidence of the effect that Lerma's postings have had or could have on the Church of Scientology, and cannot establish that Lerma is operating as a direct competitor of the church. Thus, the Court finds that the fourth fair-use factor tips slightly in Lerma's favor.

Fair Use Summary: Based upon the four statutory factors listed in @ 107 for evaluating the fair use defense, the Court finds that Lerma's copying and posting of the Works does not constitute fair use.

Misuse of Copyright

Lerma next argues that even if his copying and publications on the Internet are not protected by the fair use defense, this Court should nevertheless grant summary judgment in his favor because RTC has misused its copyright. The misuse of copyright doctrine is an affirmative defense to copyright infringement. Its goal is to prevent the owner of a copyright from

improperly utilizing the legal rights granted to it under the copyright laws. Lerma is correct that "[a] successful defense of misuse of copyright bars a culpable plaintiff from prevailing on an action for infringement of the misused copyright. ' *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 972 (4th Cir. 1990). [*3]

Lerma argues two bases for his misuse claim. First, he questions the bona fides of RTC's copyright infringement law suit, arguing that RTC's true objective was the impoundment of Lerma's computer-related material. Lerma maintains that RTC exercised its options under the Copyright Act as a mere pretense for gaining access to his computer files, thereby allowing them to "romp through" his personal materials and investigate and intimidate other RTC critics. Second, Lerma alleges that RTC utilizes its copyrights in the litigation process generally "as a means to harass, burden, and punish Mr. Lerma for his criticism of Scientology."

Even assuming arguendo that such motivations were part of RTC's litigation strategy, that does not constitute misuse of copyright. Misuse of copyright applies where the copyright owner tries to extend the copyright beyond its intended reach, thereby augmenting the physical scope of copyright protection. It typically arises in situations where it is alleged that the copyright owner projected his unique rights in a work onto other, unrelated products or services. See e.g., *Lasercomb*, 911 F.2d 970 (4th Cir. 1990) (defense of misuse upheld against [*33] plaintiff who attempted to extend control of its lawfully copyrighted material through the use of a 99-year licensing agreement); *Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680 (4th Cir. 1992) (alleged misuse of copyright by premising availability of computer programs on defendant's use of plaintiff's computer repair services); *Electronic Data Systems v. Computer Associates*, 802 F. Supp. 1463 (N.D.Tex. 1992) (alleged misuse by tying the purchase of copyrighted software to other products); *United Tel. Co. of Mo. v. Johnson Pub. Co., Inc.*, 855 F.2d 604 (8th Cir. 1988) (alleged misuse by requiring that plaintiff purchase entire customer list rather than the copyrighted subset requested by plaintiff). As these cases demonstrate, misuse is somewhat analogous to the prohibition against "tying" in patent law. Because copyright is intended to protect only those works containing the requisite indicia of creativity and originality, casting the shadow of its virtual monopoly onto other unprotected works would constitute a "misuse."

The defense of misuse of copyright has also arisen in circumstances where the plaintiff attempted to restrain defendant from using material [*34] over which the plaintiff itself had no rights, *Qad. Inc. v. ALN Associates, Inc.*, 770 F. Supp. 1261 (N.D.Ill. 1991), where the plaintiff distributed the copyright in an allegedly discriminatory manner, *Supermarket of Homes, Inc. v. San Fernando Valley Board of Realtors*, 786 F.2d 1400 (9th Cir. 1986), or where the copyright owner refused to supply a list of copyrighted songs as requested by the defendant, *Tempo Music, Inc. v. Myers*, 407 F.2d 503 (4th Cir. 1969). In each of these cases, the misuse concerns the wrongful use of the copyright powers themselves in ways violative of the Constitution or public policy. In other words, the proponent of the misuse defense must effectively argue that the plaintiff is asserting its copyrights in an improper or offensive manner not intended by the copyright laws. Such a misuse is quite distinct from the legitimate invocation of one's copyright even though prompted by ulterior motives. To misuse a copyright, therefore, the copyright owner must use the copyright in an impermissible way by "extending his monopoly or otherwise violating the public policy underlying copyright law." *National Cable Television v. Broadcast Music, Inc.*, 772 [*35] F. Supp. 614, 652 (D.D.C. 1991).

Lerma fails to make such a showing. This is not a case where RTC attempted to assert copyrights it did not own, or where RTC attempted to tie its copyrights to other products. Lerma's infringement is unmistakable, and RTC's opposition is sound.

Having determined that Lerma has violated RTC's rights to the Works, and having rejected the defenses of fair use and misuse, the Court finds that Lerma has infringed RTC's copyright interest in the Works by posting the G-Series Exhibits.

Damages and Remedies

The Court will now preliminarily address the appropriate remedy for Lerma's infringements. The basis for monetary damages in an infringement action is set forth in 17 U.S.C. @ 594. That section enables a copyright owner to seek either "actual damages and any additional profits of the infringer" or "statutory damages." 17 U.S.C. @ 504(a).

Actual damages and profits are not readily ascertainable in this case because of a number of factors, including that Lerma was not selling the infringed material, that he is not a direct competitor of the Church of Scientology, and that RTC is unable to show lost profits or fewer parishioners with any [*36] degree of certainty. The Court need not determine actual damages, however, because RTC has indicated its intention to seek only the "statutory minimum damages afforded by the Copyright Act." n2

-Footnotes-

n2 See Plaintiff RTC's Motion for Summary Judgment for Copyright Infringement Against Defendant Lerma at 46, n. 40.

-End Footnotes-

In determining a final statutory award, the Court must answer three questions: n3 1) to what degree do the relevant postings (from the G-Series Exhibits) infringe RTC's copyrights; 2) how many acts of infringement occurred and 3) to what extent was the infringement willful.

-Footnotes-

n3 The Court initially indicated to the parties that it would entertain supplemental briefing on all damages and remedies issues following the issuance of this Memorandum Opinion. Upon further analysis, the Court no longer requires additional argument regarding statutory damages. Supplemental briefs pertaining solely to the award of attorney's fees shall be submitted within 11 days of this Memorandum Opinion.

-End Footnotes-

[*37]

To What Extent do the Works Infringe - The Court has reviewed in detail the allegedly infringing Works submitted by RTC in conjunction with its summary judgment motion. Without exception, each of the 33 binders tendere as the G-Series Exhibits demonstrates

infringement of the RTC's copyright in the documents at issue.

None of the exhibits can be considered fair use under the analysis outlined above. Lerma's copies typically consist of verbatim copying wholly devoid of criticism or other commentary. Lerma often reproduces the exact text of the copyrighted work so that the two versions are virtually indistinguishable. Some indicia of his direct copying include identical use of titles, subheadings, section markers, quotation marks, capitalization, hyphenation and underlining.

In addition to these grammatical similarities, Lerma's postings often reveal identical numbering and lettering schemes to separate the text. See, e.g., RTC Exs. G-17 & G-18. At times the copying goes so far as to reproduce the actual visual layout of the copyrighted text, so that the division of characters and their placement into similar columns matches that of the copyrighted Work. See, e.g., [*38] RTC Ex. G-18. Many exhibits include Lerma's blatant reproduction of L. Ron Hubbard's authorship line. See, e.g., RTC's Exs. G-26, Gt27, & G-28)

Several of the disputed Works include hand-drawn illustrations which are not produced in Lerma's copies. See, e.g., RTC Exs. G-13, G-21 & G-22. These illustrations are omitted from Lerma's versions of the document, omissions which make his infringement even more glaring because much of Lerma's verbatim text refers to the illustrations that are absent. Other omissions which the Court finds particularly troubling occur in verbatim copies of certain RTC "bulletins" where Lerma appears to have transferred everything except the "Confidential" heading and the copyright markers. See, e.g., RTC Exs. G-26 through G-30.

The amount and substantiality of the relevant sections of the RTC and Lerma documents also support a finding of infringement. In the vast majority of exhibits, 100% of Lerma's document is simply a direct copy of 100% of RTC's copyrighted document. See, e.g., RTC Exs. G-1 through G-13, G-17 through G-19, G-26 through G-30, & G-32 through G-33. When there are slight variances, they appeared to be typographical errors [*39] or insignificant word substitutions. In a few cases, the excerpted section of the copyrighted work was significantly less than a total copy, but that section nonetheless constituted the entirety of Lerma's reproduction. See, e.g., RTC Exs. G-14, G-15, G-16, & G-20. If 60% of an RTC copyrighted document is copied to form 100% of a Lerma document, without any change or commentary whatsoever, this still does not constitute fair use.

Number of Infringing Acts - Although each of the 33 binders contained in RTC's G-Series Exhibits are infringing, this does not necessarily indicate 33 acts of infringement. The Copyright Act clearly states that for purposes of calculating statutory damages for copyright infringement, "all the parts of a compilation or derivative work constitute one work." 17 U.S.C. @ 54 (1996).

Each of the 33 exhibits in this case arise from one of five different compilations filed with the Copyright Office of the United States. Exhibits G-1 through G-15 arise from the copyright registration entitled "OT III SERIES" (Copyright Registration Number TXu 290-496, Jan. 30, 1987); Exhibits G-16 through G-25 arise from the copyright registration entitled "OT II SERIES" [*40] (Copyright Registration Number TXu 303-388, September 17, 1987); Exhibits G-26 through G-29 arise from the copyright registration entitled "NED FOR OTS SERIES" (Copyright Registration Number TXu 257-326, November 10, 1986; Exhibit G-30 arises from the copyright entitled "HCO BULLETIN OF 1 NOVEMBER 1981 THE SUNSHINE RUNDOWN, INSTRUCTION" (Copyright Registration Number TXu 303-384, September 1,

1987); and Exhibits G-31 through G-33 arise from the copyright registration entitled "POWER SERIES" (Copyright Registration Number TXu 303-386, September 1, 1987).

If multiple but distinct works are collected and filed together at the Copyright Office under the same registration, they are to be considered a single work for the purposes of damages. This principle is demonstrated in *Stokes Seeds Ltd. v. Geo. W. Park Seed Co., Inc.*, 783 F. Supp. 104 (W.D.N.Y. 1991), where each copying of multiple photographs appearing in a seed company's seedling reference book did not constitute a distinct infringing transaction. Instead, the court viewed the work as a compilation constituting "one work" and therefore "justifying a single award of statutory damages." *Id.* at p. 107. For the purpose of the [*41] damage calculation, the infringing documents at issue in this summary judgment motion similarly constitute five works, not thirty-three.

Because statutory damages are to be calculated according to the number of works infringed and not the number of infringements, *Walt Disney C. v. Powell*, 283 U.S. App. D.C. 111, 897 F.2d 565, 569 (D.C.Cir. 1990), the Court will find only five instances of infringement for the purposes of calculating damages.

Willfulness

This court declines to impose increased statutory damages for a willful violation. "An infringement is 'willful' if the infringer knows that its conduct is an infringement or if the infringer has acted in reckless disregard of the copyright owner's right." *Video Views, Inc. v. Studio 21 Ltd.*, 925 F.2d 1010, 1020 (7th Cir. 1991), cert denied, 502 U.S. 861, 116 L. Ed. 2d 143, 112 S. Ct. 181 (1991), cited in *Superior Form Builders, Inc. v. Chase Taxidermy Supply Co.*, 74 F.3d 488, 496 (4th Cir. 1988). See also *Microsoft Corp. v. Grey Computer*, 910 F. Supp. 1077 (D.Md. 1995).

Lerma's actions do not match those of infringers in cases where courts have found willful violations. In determining whether an infringement [*42] was willful, the court in *Superior Form Builders* considered the infringer's history of infringement noting that "the record supports the conclusion that Dan Chase Taxidermy became the largest taxidermy supplier in the country by consistently and deliberately copying competitors' forms in disregard of the copyright laws." 74 F.3d at 497. The defendant also falsified a copyright on his product, a mannequin, and was previously sued at least three times for copyright infringement. 74 F.3d at 497. Finally, the court stressed that Chase had represented in his product catalogs that his products were copyrighted and had therefore taken an inconsistent position at trial that the mannequins were not copyrightable. In contrast, Lerma has no history of copyright infringement and he made no representation that he owned the copyright to the Works.

Damages Calculated - For each instance of non-willful infringement, the Copyright Act enables the Court to award statutory damages of "not less than \$ 500 or more than \$ 20,000 as the court consider just." 17 U.S.C. @ 504(c) (1) (1996). In light of the five instances of infringement which occurred in this case, because the penalty is being [*43] assessed against an individual of limited means who has already expended considerable sums in this litigation, and because RTC has indicated its express desire to seek only the statutory minimum, provided its copyrights are protected, n4 the Court intends to award the statutory minimum of \$ 500 for each infringement, for a total statutory award of \$ 2,500 in favor of RTC and against defendant Lerma, unless the RTC convinces the Court to do otherwise.

-Footnotes-

n4 See Plaintiff RTC's Motion for Summary Judgment for Copyright Infringement Against Defendant Lerma, p. 46, n. 40.

-End Footnotes-

Conclusion

For the above-stated reasons, summary judgment on the copyright claim is found in favor of plaintiff, RTC, against defendant Lerma.

The Clerk is directed to forward copies of this Memorandum Opinion to counsel of record and to defendant, pro se.

Entered this 4th day of October, 1996.

Leonie M. Brinkerna
United States District Judge

Alexandria, Virginia

ORDER

On January 19, 1996, this Court granted [*44] summary judgment to the plaintiff on its copyright infringement claim. That ruling was made orally, in open court, with the Court advising the parties that it would explain its reasons in a written opinion and thereafter give the parties an opportunity to address remedies. The time in which to appeal the summary judgment ruling was stayed until the written opinion and damages decisions were issued. The written opinion has now been issued, thus the remaining matter to be addressed is remedies.

The Court is hereby advising the parties, consistent with what it has previously stated, that it does not intend to impose heavy financial damages on the defendant. Unless RTC convinces the Court to the contrary, it will not make a finding of willful infringement in this case. Moreover, unless convinced to the contrary, for purposes of the damage calculation the Court intends to find five instances of violation, specifically one violation for the illegal copying of each of the five works discussed in the Memorandum Opinion. Because RTC has previously indicated it seeks only the statutory minimum damages provided its copyrights are respected, these conclusions would lead to total monetary damages [*45] of \$ 2,500.

Defendant is apparently suffering financial hardship and is no longer represented by counsel. Therefore, unless convinced to the contrart, the Court does not plan to award attorneys' fees or the costs of litigation against the defendant.

Lastly, RTC seeks injunctive relief in this action, to which the Court believes defendant does not object. The parties should try to agree to the language of such injunction.

In order to resolve these final issues, it is hereby

ORDERED that RTC file by October 21, 1996, any position on the damages and injunction issues. Defendant will have fifteen (15) days to response to RTC.

The Clerk is directed to forward copies of this Order to counsel of record and to defendant, pro se.

Entered this 4th day of October, 1996

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia