Some Comments on Today's Thomson Reuters v. Ross Copyright Ruling

February 11, 2025 · by Eric Goldman · in Copyright

[A surprising ruling from Judge Bibas (sitting as a district court judge by designation) in the Thompson Reuters v. Ross case, because he reverses himself on numerous points (all in favor of the copyright owner). I sent the following comments to a reporter.]

I have multiple problems with the ruling:

1) I disagree that individual headnotes each can be copyrightable. The headnotes are often just a sentence or two, which ordinarily is too short to merit copyright protection. The authors' creativity here is further constrained by the headnote format, which seeks to be as faithful and accurate to the source material as possible. The degree of permissible variation among independent creators of headnotes would be quite small; most of the creativity can only come from introducing wider gaps in the accuracy of the headnote summarization. Either this means the works shouldn't clear the copyright bar or should be constrained by the merger doctrine.

(Note 1: the court's analogy to chiseling marble is wholly unpersuasive because sculptors have a wide range of freedom to express themselves, while summarizers of court opinions do not. To the extent the court is saying that there's an individual copyright that comes from picking and choosing the interesting quotes out of a court opinion, I vigorously disagree).

(Note 2: I don't have a problem with saying that a collection of headnotes may be subject to a compilation copyright, but I'm not sure if Ross copied the selection/arrangement/coordination of the headnote collections.)

2) We cannot evaluate the accuracy of the court's substantial similarity determinations because the appendix is sealed. I worry that the judge's standards for the degree of impermissible similarities are too expansive given the initial copyrightability concerns. We will only find out when the court unseals the appendix.

3) The court summarily rejects the merger defense, which deserved a

lot more consideration because it casts a huge shadow over the similarities the court identified in the sealed appendix.

4) I disagree with the court's application of the fair use transformative standard. First, the court ignores cases that applied the transformativeness standard to content indexing–most importantly, the Google Books ruling–and instead bizarrely focused on cases involving software code.

Also, I don't see how the court can say there was no "transformation" when Ross' outputs included none of the allegedly infringing material. It's impossible to be more transformative than that.

5) I disagree with the court's assessment of the fourth factor. Though Ross has the burden to establish the fair use defense, the copyright owner should bear the burden to show that it had a non-hypothetical licensing market for training AI systems that Ross' activities allegedly undercut. (Otherwise, what evidence could Ross use to disprove the future possibility of a market that doesn't exist today?)

6) In addition to disagreeing with the court's analysis of individual factors, I disagree with the court's overall balancing of the fair use factors. It held that factors 2 and 3 favored Ross and factors 1 and 4 favored the copyright owners. That sounds like a close case. The court provides no rationale for why this "tie" breaks for the copyright owner other than to say that factor 2 isn't often important to fair use. Here, I would argue that factor 2 is critical because it provides the necessary breathing room for copying of fact-like materials that somehow clear the copyrightability bar. The court was wrong to discount factor 2 in this case.

Given these problems, I think Ross has many fruitful angles to explore on appeal. I imagine both sides will eventually appeal the case.