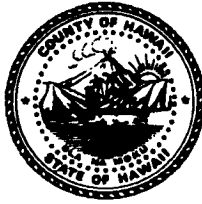


Harry Kim  
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**COUNTY OF HAWAII**  
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February 9, 2007

Mr. William Kenoi  
Executive Assistant  
Office of the Mayor  
25 Aupuni Street  
Hilo, Hawai'i 96720

Dear Mr. Kenoi:

Re: Posting of Newspaper Articles on the Healing Our Island Website

You requested a legal opinion regarding 1) whether the posting of newspaper articles related to the ice epidemic, and having website links to relevant newspaper articles, on the county's Healing Our Island ("HOI") website violated copyright law, and 2) the recommended procedure to follow in the future.

This written opinion is to memorialize our previous conversations and my email to you on October 19, 2006.

Background Provided by You of HOI Website:

HOI is the county's anti-drug website, created after receiving numerous requests from the community at the 2002 Hawai'i island Methamphetamine Summit. This website is maintained by E-World Fair. E-World Fair is funded by contract with the Hawai'i Community Foundation. The Hawai'i Community Foundation administers the Hawai'i Island Methamphetamine Initiative, which are funds provided by U.S. Senator Daniel K. Inouye through the Department of Justice and the Community Oriented Policing Services office.

The HOI website hosts information and applications for the HOI community grants, has links to all enforcement, treatment and prevention programs and services, an island-wide directory of services, and a calendar of community events around this issue. Until late August 2006, the website posted relevant methamphetamine, ice, anti-drug and substance abuse newspaper articles in Hawai'i.

On August 21, 2006, David Bock, the editor of the Hawai'i Tribune Herald informed HOI that HTH newspaper articles posted on the HOI website was an infringement of its copyright. After LeeAnn Hara of HOI explained HOI was a non-commercial venture and full credit is given to the writer and media source of each article, Mr. Bock said he would consider this and would recontact HOI. To date, Mr. Bock has not contacted HOI.

All newspaper articles and links to the Hawai'i Tribune Herald, West Hawai'i Today, Honolulu Advertiser and the Honolulu Star Bulletin have been removed from the HOI website.

Issues and Short Answers:

1. *Whether the posting of copyrighted newspaper articles on the HOI website, without consent from the copyright owner, is an infringement of copyright law?*

Probably not. A copyright owner has the right to reproduce or to authorize others to reproduce the work. However, this right is not an exclusive right and is subject to certain limitations. One limitation is the doctrine of "fair use," whereby various purposes for reproducing a work may be considered "fair," such as teaching, news reporting, comment, criticism, scholarship and research. HOI's posting of the newspaper articles may likely be considered "fair use."

2. *Whether providing a link to a newspaper's website is an infringement of copyright law?*

No. HOI providing a link to another website is not a violation of the copyright law, since no copying is involved. In addition, HOI did no distributing of copyrighted work because the "actual dissemination," transferring a file from one computer to another, is done by the newspaper website. Although HOI provides the link to the newspaper website, it is the newspaper's website that transfers the images/articles to a user's computer and HOI is not involved in the transfer.

3. *What is the procedure that should be followed in the future if HOI wants to a) post copyrighted newspaper articles on its website, or b) offer a link to a newspaper's website?*

a. Even if "fair use" is arguable, before using copyrighted material, the safest course is to always obtain permission from the copyright owner, preferably in writing. Acknowledging the source of the copyrighted material does not substitute for obtaining permission.

b. HOI can offer a link to a newspaper website. This is not a violation of copyright law because the mere offering of a link is neither copying nor distributing of a newspaper article.

I. Discussion:

A. Background of Copyright Law

Title 17, United States Code, Section 106, Exclusive Rights in Copyrighted Works, is known as The Copyright Act of 1976. It provides that the owner of a copyright has the exclusive rights to do and to authorize any of the following:

- 1) to reproduce the copyrighted work in copies or phonorecords;
- 2) to prepare derivative works based upon the copyrighted work;
- 3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
- 4) to perform the copyrighted work publicly (in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works);
- 5) to display the copyrighted work publicly (in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work); and
- 6) to perform the copyrighted work publicly by means of a digital audio transmission (in the case of sound recordings).

However, there are exceptions to the exclusive rights of the owner. While the copyright owner has the sole right to exercise these exclusive rights and to exclude others from exercising any such rights, these rights have various limitations listed in the statute. These exceptions are set forth in Sections 107 through 118 of the Copyright Act.

"Fair use" is one of the exceptions to the copyright owner's exclusive rights, which I believe would apply to the situation at hand. Title 17, United States Code, Section 107, Limitations on Exclusive Rights: Fair Use, referred to as the "fair use exception," contains a list of the various purposes for which the reproduction of a particular work may be considered "fair," such as criticism, comment, news reporting,

teaching, scholarship, or research. Section 107 also sets out four factors to be considered in determining whether or not a particular use is fair:

- 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.

All four factors must be considered together, and not in isolation, on a case-by-case basis. *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 114 S.Ct. 1164 (1994).

## II. Consideration of the Four "Fair Use" Factors in HOI's Posting of Newspaper Articles

### A. Factor #1: Purpose and character of use, including whether such use is of a commercial nature or is for nonprofit educational purposes

Factor #1 recognizes the commercial or nonprofit character of an activity. While not conclusive with respect to fair use, this factor should be weighed along with the other factors in fair use decisions. When the use of copyrighted material relates to issues of public concern, the scope of the fair use doctrine is wider, and "courts are free to consider the public benefit resulting from a particular use, notwithstanding the fact that the alleged copyright infringer may gain commercially." *Sega Enterprises Ltd. v. Accolade, Inc.* 977 F.2d 1510 (9<sup>th</sup> Cir.1992).

In this instant HOI case, the website posted relevant newspaper articles about methamphetamine, ice, anti-drug and substance abuse news in Hawai'i. Neither HOI nor the county received any monetary gain from the postings. Because substance abuse issues are matters of public concern, the posting of the newspaper articles were to inform and educate the public, and there was no monetary gain involved, it is likely this factor #1 weighs in favor of the county's "fair use" of the copyrighted newspaper articles.

B. Factor #2: The nature of the copyrighted work

The copyrighted works at issue here are newspaper articles published in the Hawai'i Tribune Herald. These articles were previously published in the newspaper, are for public consumption, and are available without charge to the public on the newspaper's website. Thus, HOI's posting of the newspaper articles mirrors the goals of the newspaper, which is to keep the public informed and updated about current issues. HOI's postings actually further publicized the Hawai'i Tribune Herald coverage of the drug epidemic. Thus, because the newspaper articles are for public consumption and continue to be readily accessible at no cost to the general public, this factor #2 also weighs in favor of the county's "fair use" of the newspaper articles.

C. Factor #3: The amount and substantiality of the portion used in relation to the copyrighted work as a whole

"In analyzing the amount and substantiality factor, [a] court must consider not only the quantity of the materials used, but their quality and importance, too." *SCQuARE Intern., Ltd. V. BBDO Atlanta, Inc.*, 455 F.Supp.2d 1347, 1363 (N.D.Ga.Atlanta.Div. 2006) HOI posted substance and anti-drug newspaper articles, which constituted the entirety of each work. Thus, it appears factor #3 weighs against the county's fair use of the newspaper articles.

D. Factor #4: Effect of the use upon the potential market for, or value of, the copyrighted work.

Although the fair use statute does not indicate how much weight is given to each of the four factors, courts have generally placed the most emphasis on this fourth factor. *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003), cert. denied, 124 S.Ct. 103, 157 L.Ed.2d 38 (U.S. 2003).

HOI's posting of the Hawai'i Tribune Herald's newspaper articles likely would not affect the value of the copyrighted work. The newspaper had already published these articles. The monetary gain from newspaper purchasers and subscribers already occurred on the date the newspaper was published and sold. These articles are currently available to the general public at no cost on the newspaper's website. Thus, along with factors #1 and #2, factor #4 weighs in favor of the county's posting of the newspaper articles, and supports the county's "fair use" of the newspaper articles.

### III. Providing Link to a Newspaper's Website is not a Copyright Infringement

HOI's website provided links to county and state newspaper websites. Providing a link is not a direct copyright infringement because there is no copying nor public distribution involved.

#### A. No Copying Involved

Traditional "hyperlinking" transports the user directly from one website to another linked-to website, in this instance from HOI's website to the Hawai'i Tribune Herald's website. The Hawai'i Tribune Herald's website is where the relevant ice epidemic article is stored and served/displayed directly to the user; HOI neither stores nor serves the article to the user.

Merely to index the web so that users can more readily find the information they seek should not constitute direct infringement [of copyright law]. *Perfect 10 v. Google, Inc*, 416 F.Supp.2d 828 (2006).

#### B. No Public Distribution done

By providing links to newspapers, HOI did not do any "distribution." "A distribution of a copyrighted work requires an "actual dissemination" of copies. See, *In re Napster, Inc. Copyright Litigation*, 377 F.Supp.2d 796, 802-804 (N.D.Cal.2005). In the internet context, an actual dissemination means the transfer of a file from one computer to another." *Perfect 10 v. Google, Inc*, 416 F.Supp.2d 828, 844 (2006).

In this instant HOI case, HOI provided links to the newspaper websites, but it is the newspaper websites that transfer the ice epidemic articles to a user's computer. Because HOI is not involved in the transfer, HOI has not actually disseminated nor distributed the newspaper articles, and therefore has not infringed on the newspapers' distribution rights.

### IV. Recommendation for Future Use of Copyrighted Material

#### A. Posting of Relevant Newspaper Articles

Acknowledgement of the source of the copyrighted materials is not a substitute for obtaining permission. Even if "fair use" is arguable, before copyrighted material is reproduced, permission should be obtained from the copyright owner. It is recommended that any permission be obtained in writing, in the event the permission is either questioned or needs to be confirmed

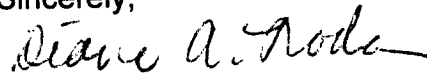
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B. Providing a Link to Newspaper Websites

HOI's website can provide a link to the newspaper website article. A link that transport the user directly to the linked-to page does not violate any exclusive right under copyright, because no copying nor distributing is involved.

I hope this summary of the copyright law, the fair use exception, and website linking is sufficient to address your concerns. For your convenience, if you wish to request permission from the newspapers to post relevant ice epidemic articles, I have drafted and attached a letter for you. Please feel free to contact me at 961-8304 x114 if you have any questions or further work requests.

Sincerely,



DIANE A. NODA  
Deputy Corporation Counsel

DAN:fc  
Enc.

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