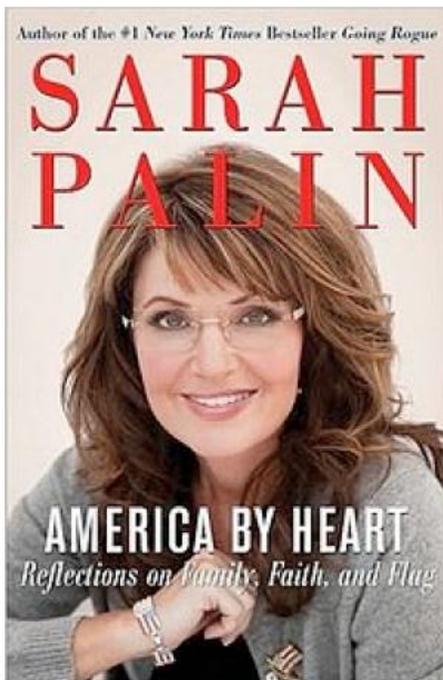


A Winthrop & Weinstine blog dedicated to bridging the gap between legal & marketing types.

[The Fair Use Defense to Nowhere](#)

Posted on November 24, 2010 by [Susan Perera](#)



Last Wednesday I [wrote](#) about the parody fair use defense to trademark infringement in connection with the Facebook v. Lamebook lawsuits. Since then another party has asserted the fair use defense, this time in regards to copyright infringement.

Last week the on-line news source, [Gawker](#), published images of more than 20 pages of Sarah Palin's not yet available book entitled "[America by Heart](#)."

After Palin tweeted about the illegality of the leak Gawker responded that Palin should familiarize herself with the copyright fair use defense. Apparently Gawker should have taken its own advice, because the Supreme Court ruling in a similar leak (of Gerald Ford's then-unpublished autobiography) held that the fair use defense did not apply. In that 1985 [Harper & Row](#) decision the Supreme Court held that the fair use defense was considerably weaker in the case of unpublished works.

So when does the fair use defense apply? Most often fair use is claimed in regards to commentary and parodies. Commentary or criticism of a work, that also contains limited quotations of that work, is generally protected by the fair use defense. As discussed last week, parodies that poke fun at literary works, or in that case a trademark, can also be protected under the fair use defense.

Maybe not unsurprisingly, the leaking of unpublished works doesn't seem to be all that uncommon. A similar leak occurred earlier this year in connection with President Bush's autobiography. So what are your thoughts on these media leaks and the rights of copyright owners?



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