



Government Filings Made Publicly Available Through Government Web Sites May Maintain Copyright Protection

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Nowadays, nearly all filings to a federal court or an administrative agency, such as the USPTO or the SEC, are available to the general public through government web sites (e.g., PACER, EDGAR, TESS, PAIR, and others). Businesses (and lawyers) often wonder whether their submissions are protected by copyright or if copying another's publicly available document violates copyright law. In a matter of first impression, one court recently found that copying a work that is available to download and use through a government web site may constitute copyright infringement.

In *International Swaps & Derivatives Association, Inc. v. Socratek, LLC*, No. 09 CV 8033 (S.D.N.Y. May 4, 2010) (available at http://scholar.google.com/scholar_case?case=4142891894991151874&q), the Southern District of New York found that the mass resale of U.S. Securities and Exchange Commission ("SEC") filings that include copyrighted material and that are available through the EDGAR database¹ may violate the Copyright Act.

In this case, International Swaps and Derivatives Association, Inc. ("ISDA") created forms used in derivatives transactions and registered them with the Copyright Office.² Corporations often would submit the completed forms to the SEC, which would then make the filings publicly available online through EDGAR. Socratek aggregated documents available on EDGAR and resold them for a profit through its own web site. ISDA sued Socratek over this practice and moved for a preliminary injunction to stop Socratek's resale of filings that used ISDA's forms. Socratek filed a motion to dismiss ISDA's claims for failure to state a claim on the basis that the Securities and Exchange Act

¹ EDGAR, the Electronic Data Gathering, Analysis, and Retrieval system, automatically processes legally required submissions filed with the SEC. Not all required SEC filings are available through EDGAR. For more information, see <http://www.sec.gov/edgar/aboutedgar.htm>.

² The factual information on these forms clearly is not subject to copyright protection under the idea-expression dichotomy formulated in the seminal case *Baker v. Selden*, 101 U.S. 99 (1879). Nonetheless, even *Baker v. Selden* recognized that largely factual material can be protectable if its expression—for instance, the text and layout of the forms in *ISDA v. Socratek*—is duplicated. Indeed, such copying can infringe the author's protectable expression of an unprotectable idea.



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(the "Exchange Act") permitted Socratek's conduct and because the completed forms were not substantially similar to ISDA's copyrighted forms. The court denied both motions.

In denying the parties' motions, the court made findings that could significantly impact the protection offered to works that, by their nature, are available for use by the public. The court found that Socratek's argument, which was based upon language in the Exchange Act suggesting that documents available through EDGAR may be accessed and used without additional charge, could not defeat ISDA's copyright infringement claim because Socratek took the language out of context. Specifically, the court stated that, "[t]aken as a whole, the language Defendant relies upon appears to mean that [it] may use or resell the information 'without payment of additional fees or royalties' to the private contractor [that operates EDGAR]." Thus, the Exchange Act did not directly address whether the creation of EDGAR somehow abrogated copyright protection for works published through the system.

Additionally, because Socratek copied the entirety of ISDA's protected forms, which Socratek did not dispute, the court found that ISDA adequately pleaded a prima facie case of copyright infringement. That is, on the face of the complaint, there was a substantial similarity between ISDA's protected work and the material Socratek copied.

Nevertheless, the court denied ISDA's motion for preliminary injunction because the presumption of irreparable harm normally associated with the finding of a prima facie case of copyright infringement had been rebutted here. Specifically, the Court found an absence of irreparable harm because the forms had been publicly available through EDGAR for years and any member of the public could continue to access them through EDGAR, Lexis, or Westlaw. Moreover, the court found that "this injury can be sufficiently compensated with monetary relief" and "the fact that . . . EDGAR provides for the unfettered copying of documents filed with the SEC suggests that whether Socratek is liable for infringement is hardly an 'open-and-shut case.'"

ISDA acknowledged this interplay between its copyrighted form and its customers' use of the form in publicly available documents by explicitly stating that "Socratek is free to access EDGAR every time a customer orders a given transactional document utilizing an ISDA Master Agreement, to retrieve that particular document, and then to sell it to the customer." However, ISDA objected to Socratek's bulk copying and re-sale of SEC filings including this form because such copying would diminish the market for ISDA's forms – ISDA's potential customers could use the completed forms available from Socratek as models instead of purchasing ISDA's original forms.

The court also identified potential defenses available to Socratek when the parties address the merits of their claims, including fair use and implied license, which diminished ISDA's likelihood of success here at the preliminary injunction stage.

Ultimately, businesses and individuals should be careful when using materials potentially subject to copyright protection, even if they are publicly available. Although the Internet has made available to the public nearly everything that is written, this reality does not mean that copyright protection falls to the wayside.

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