

Copyright For The Rest Of Us

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C O N N E X I O N S

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Chapter 1

Copyright Basics¹

Chapter 1: Copyright Basics

Our written, recorded, and broadcast world is surrounded by warnings about copyright. If you look in the opening pages of most books, you will find a warning like this:

“All rights reserved. No part of this book may be used or reproduced by any means, graphic, electronic, or mechanical, including photocopying, recording, taping, or by any information storage retrieval system without the written permission of the publisher except in the case of brief quotations embodied in critical articles and reviews”.

Even more familiar is the FBI warning at the start of most DVDs viewed by Americans today:

“All rights reserved. These DVDs are authorized for sale or rent only in the country where originally sold (i.e., only in the U.S. or only in Canada, respectively). Unauthorized reproduction, distribution, or exhibition violates federal laws with severe penalties and violates _____ Pictures Home Entertainment’s standard terms of trade”.

These statements inform the viewer that they must respect “all rights,” may not use or reproduce the contents, or endure “severe penalties”.

Just what are the “All rights” that are “reserved”? Can you reserve just any rights? Do you *have* any rights?

By the end of this chapter you should be able to answer:

- I. What is copyright?
- II. What can be copyrighted?
- III. What are the rights of the copyright owner?
- IV. What are the benefits of registering a copyright?
- V. How long does a copyright last?
- VI. What is the public domain?
- VII. What is copyright infringement?
- VIII. Are there limitations on the copyright owner?

I. What is Copyright?

Copyright is a right given to authors and inventors in the Constitution. It is “the exclusive right to their respective writings and discoveries.” (Article 1, Section 8 Constitutional Convention, 1790). The “exclusive right” means that the author, and the author alone, has the right to publish and distribute his work. The same clause includes inventors and their inventions. Many authors will authorize a publisher to print and distribute their work. To do this they must transfer their rights to reproduce and to distribute to the publisher, normally for a limited period of time. Likewise, an inventor *patents* her work, then sells patent rights to industries ready to use it.

¹This content is available online at <<http://cnx.org/content/m41215/1.6/>>.

Since 1790, in different acts of Congress, music, photography, movies, computer software, graphic arts, and boat hull designs have all been granted copyright protection. (U.S. Government)Both legislation and court cases have led to the development of several “doctrines,” or common practices, about copyright. In this chapter we will cover the most basic ones needed to understand the broad field of copyright law.

II. What can be copyrighted?

Any creation in a fixed medium that expresses a “modicum of creativity” (Holmes 1903, 239) is considered copyrighted at the moment of its creation. (U.S. Copyright Office 1992) Only a small amount of originality is required. If a student takes notes in class and does not write the instructor’s lecture down word for word, then his or her notes have sufficient creativity to qualify for copyright. An

artist of limited talent nevertheless may retain copyright in his or her works. Copyright is not a mark of quality, but of minimal creativity recorded in a fixed medium. (U.S. Copyright Office 1992) The limit of the “modicum of creativity” is expressed by the “Merger doctrine”. If there are only one or two ways an idea can be expressed, then it is not copyrightable. If it were, then its’ distribution could be limited by its owner.

A “fixed medium” is anything that can be returned to at a later time, which will display the same information or illustration as before. Paper, computer storage, stone or clay, paints, and a computerized piano keyboard’s recording system all are considered fixed medium. No registration or special symbols are needed to gain copyright; it is present as soon as the somewhat-original work is created. (U.S. Copyright Office 1992)

III. What are the rights of the copyright owner?

The copyright owner has six basic rights: to make copies, to distribute those copies; to make derivative works; to perform or display the work in public; and

to perform the work by means of a “digital audio transmission.” Any of these rights can be licensed to another person or a company such as a publisher.

Making copies refers to making any type of copy: a photocopy, a photograph, a hand-drawn copy that is indistinguishable or close to it; and computer copies of any sort. These actions count as infringement even if it can be shown that no one has viewed the work.

Distribution is placing the copyrighted work in a way that copies are available to many people. Placing the work on a public Internet site is one form of distribution. Making copies and selling them from a store, or giving them to your friends on a casual basis is another. All of these actions are forms of distribution.

Derivative works are new formats or types of works made from the original item. A novel could be rewritten as a movie; an event from a short story may become a poem or a song. A blog posting could lead to a reader creating a short story. The right to make or prevent derivative works belongs to the copyright owner.

Display or performance in public means that an artwork is made viewable to the public, or that a play, song, or movie is performed in a place the general public can access. (U.S. Copyright Office 1992) Some relatively private areas, such as a college dorm meeting room, at a church outside of services, or a business-dining hall, may seem as though they are not public, but they are. A person not known to the others may walk in at any time. (Note that some campuses define dorms as a “house” where you cannot expect a large number of strangers to congregate. On these campuses, a dorm is not public). (Univ. of Connecticut 2008)

To perform the work by means of a “*digital audio transmission*” generally means that the music or dramatic work is shared via the Internet or digital radio.

IV. What are the benefits of registering a copyright?

Once a creator has their creation saved in a “fixed medium,” they have the option to register it with the Copyright Office. Registration is done online at <http://www.copyright.gov/>². It requires a copy of the work to be registered and a fee of either \$35 or \$45. (U.S. Copyright Office 2010) If the creator plans to sell or

²<http://www.copyright.gov/>

distribute their item, or display it online, registering the copyright adds a level of security. It establishes that the owner cares about her creation, and it shows a level of knowledge about copyright. Persons who might be looking for materials to illegally copy and re-distribute are more likely to not use copyrighted items. However, registration is not required in order to put a copyright statement on a work. A creator may label their work “©2010 Tomas Garcia” without registration. The ultimate benefit of registering a work is that it is required if the owner wishes to sue an infringer for statutory damages. Without registration, the copyright owner may sue for actual damages. Which damages are greater is a matter of circumstances. In most cases, litigation is easier if the work is registered with the Copyright Office before the infringement occurs.

V. How long does copyright last?

Copyright protection lasts for the lifetime of the author plus seventy years. That means, for example, if a young person today were to register a novel or a song in 2011, that novel would be protected by copyright throughout his life. When he dies, for example in 2075, the copyright would pass to his heirs and be effective until the year 2150 (U.S. Copyright Office 1992). If a work was published prior to 1978, its’ copyright is governed by the 1909 Copyright Act. If so, its copyright lasts for 28 years, and may be renewed in order to gain 28 more years.

VI. What is the Public Domain?

When a copyright expires, or is given up by the owner, the work it was part of becomes *public domain*. (U.S. Copyright Office 1992) An item in public domain can be used, performed, or re-written, without permission, in any way possible. For example, Disney made a movie called “Treasure Planet” in 2002 that retold the story of *Treasure Island*, but based in the distant future, using space ships instead of sailing ships. (Clements and Musker 2002) The original *Treasure Island* was published in 1883; its copyright has expired. Other writers may wish to re-write *Treasure Island* their own way, or use only one character or scene from it; it is up to them. Likewise, thousands of other novels and other works are now in public domain. Many items in public domain can be found on the Project Gutenberg web site http://www.gutenberg.org/wiki/Main_Page³ (Project Gutenberg 2010) .

Ideas are not protected by copyright, only the unique way in which they are expressed. If you wish to quote an idea from another source, you only have to cite the source, not seek permission. Likewise, if you wish to use the idea to create a new resource or graph, you only need to cite where you found the idea. (U.S. Copyright Office 1992)

Most US Government office publications are public domain from the day of their creation. To see some, start searching at <http://www.gpoaccess.gov/>⁴ . In some cases, a writer or photographer hired by the government may negotiate to keep their copyright; these items are normally clearly labeled. For more information about government works and their copyright status, go to <http://www.usa.gov/copyright.shtml>⁵ (U.S. Government 2010)

Practical items are not protected by copyright. A practical item could be a lamp, or a pair of scissors, etc. If the items are decorated by a bit of artwork, the artwork itself could be copyrighted, but the item remains a practical item.

Titles, names, slogans, or short phrases are not sufficient to qualify for copyright protection. In some cases, a title may be protected by trademark. (U.S. Copyright Office 1992)

“Sweat of the brow” compilations do not qualify for copyright protection. These compilations, such as the phone book, are made with a lot of effort but little originality. Many examples can be found on the Internet: bibliographies, listings of collector’s items, locations of historical sites, and so forth. While it is frustrating for the creator of such a list to see it reproduced elsewhere, the list itself does not require enough originality to qualify for copyright protection.

Finally, items, which are not sufficiently original in ways other than “sweat of the brow” lists, do not qualify for copyright. A story that slavishly copies the characters, setting, and plot of other story, or a piece of artwork that reproduces another piece of art in another medium, does not qualify for copyright protection. (U.S. Copyright Office 1992)

³http://www.gutenberg.org/wiki/Main_Page

⁴<http://www.gpoaccess.gov/>

⁵<http://www.usa.gov/copyright.shtml>

VII. What is copyright infringement?

Infringement is the legal term for a person using one of the copyright owner's rights without permission. It is said that the person has infringed on the other's copyright. (U.S. Copyright Office 1992) Infringement can be a minor situation (copying two textbook chapters before the bookstore has additional copies available) or major (scanning the entire textbook and making it available on the Internet). Serious infringement cases will often lead to legal action. Cases are often settled out of court. In court, cases are often settled with *statutory damages*. "Statutory" means that the fine is determined by legal statute, not by the judge. Statutory fines for copyright infringement are "not less than \$750 or more than \$30,000 as the court considers just." (U.S. Government). The fine is calculated per incident of infringement. If 500 people accessed a scanned version of a textbook, then the fine for the person making it available will be (at a minimum) \$750 x \$500, or \$375,000.

VIII. Are there limitations on the copyright owner?

Copyright is not solely about the owner's rights. Fourteen sections (§107 – §121) of the Copyright Act provide many limitations on the owner's rights. Reviewing these sections shows that owning a copyright is not the same as owning a piece of property, such as a laptop or a car. There are many ways in which the public can make use of a copyrighted work. The most important of these is covered in the next chapter: Fair Use.

Online Resource:

Nolo's Plain English Law Dictionary <http://www.nolo.com/dictionary/home.html>⁶

U.S. Copyright Office <http://www.copyright.gov/>⁷

GLOSSARY, CHAPTER 1

Copyright: The creator's right to use a work they have created, as defined by Title 17 of the US Code.

Publisher: A company that creates and distributes copies of a work. May also be an independent person publishing content via the Internet.

Legislation: A bill passed by Congress that becomes a law.

Court case: A formal situation, presided over by a judge, in which legal issues are decided. Court cases normally have a plaintiff (who brings the complaint) and a defendant (who is accused of it), their lawyers, relevant witnesses, and potentially a jury.

Doctrine: A formal statement of how certain circumstances should be interpreted. For example, the "Doctrine of First Sale" states that once a copy of an item is sold, the former owner cannot control what is done with the copy.

Fixed Medium: A material on which words, sounds, or artistic creations can be fixed, and then referred to several times without a change in the creation. Paper, computer storage, stone, canvas & paint, etc., are "fixed mediums".

Modicum: A very small amount.

Public: A place where any member of the general public, unknown to the proprietor or other persons present, can be present.

Registration (in copyright): The recording of copyright ownership over a specific item with the Copyright Office.

Duration (in copyright): The fixed length of the copyright protection. Duration has changed many times since 1790.

Public Domain: Content (music, literature, art, photos, etc) that is not protected by copyright. Items in the public domain may be used and adapted by anyone, without permission.

Infringement: "The unauthorized violation of a copyright owners exclusive rights in a work." (Nolo's Plain English Law Dictionary (Hill 2009))

Statutory: Established by legislation and not by court decision. The fines in a typical copyright case are statutory, not judicial.

Limitation (in copyright): The copyright owner has six defined rights in their work, but sections 107-121 outline several significant limitations to the copyright owner's rights.

Scenario Exercises

⁶<http://www.nolo.com/dictionary/home.html>

⁷<http://www.copyright.gov/>

How to analyze a scenario (Chapter 1):

- 1) Consider the six rights of the copyright holder (reproduce, derivative works, distribute, perform, display, digital audio transmission). Which rights the person or persons in the scenario are using?
- 2) What requirements for copyright are met? (Fixed medium, originality, beyond *de minimis*?)
- 3) Can you make an argument for taking the risk of not considering copyright?
- 4) If not, then the user should get permission, find a different work to use, or use only a small portion of the work.

Scenarios for “Copyright Basics”

- 1) Roommates Steve and Bruce have recently acquired some new music via the Internet. Their friend Paul comes to visit. Steve and Bruce play some of their new music for him. Without considering the potential legality of the downloaded music, has an infringement occurred when Paul heard the music?
- 2) Paul is musically talented. He is inspired by a portion of a song he heard at Steve & Bruce’s place. He creates a new song using some of the chord sequences in it, along with his own words. Has Paul infringed on the copyright of the original song? If so, when and by doing what is he infringing?
- 3) Paul plays “his” new song for a group of friends gathered in a park a few days later. He has not written down the music or chord sequences. By performing this song in public, is Paul infringing?
- 4) An art major, Susan, creates a painting outside of class, using paint, canvas, brushes, and the studio provided by her university. More than one of her professors made comments as she worked on it. Susan entered the final painting in a contest. It raised a problem for Susan: does the copyright on the painting belong to her, or to her university?
- 5) If a professor put a former student’s work online for current students to read (in a password-protected site), but does not get the former student’s permission, is the professor infringing on the former student’s copyright?
- 6) Andra is writing a novel, and part way through she realizes that one of her characters is very similar to a character in *To Kill a Mockingbird*, a book she has enjoyed reading. Should Andra re-write the character (quite a lot of work), write to the Harper Lee estate for permission, or continue writing her novel as is?
- 7) Andra writes a second novel. Both are published, but neither sells many copies. After a few years, she learns that a High School drama teacher has re-written it for her students’ performance. Has copyright infringement taken place?
- 8) Pat has been writing a blog for several months. When she writes about a news event, she links to the story in a newspaper and copies the first few sentences. Is this an infringing use of the newspaper’s content?
- 9) Ben is preparing to publish a book. Three of the chapters begin with a complete short poem used as an epigram. Ben did not write the poems, and did not seek permission for their use. Would including these poems in the book be considered copyright infringement?

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⁸<http://www.nolo.com/dictionary/>

⁹http://www.gutenberg.org/wiki/Main_Page

¹⁰<http://www.law.uconn.edu/student-bar-association/budgeting-and-spending-guide-student-organizations/movie-night-license-infor>

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U.S. Code Title 17: Copyright.

¹²<http://www.copyright.gov/eco/>

¹³<http://www.usa.gov/copyright.shtml>

Chapter 2

Fair Use¹

Chapter 2: Fair Use

Samira has always been a talented guitar player and a painter of (usually) creative pictures. She was delighted to find that, in a busy tourist district, she could earn a living as a sidewalk musician. One day, she used a portion of her earnings to visit a large museum of modern art. A painting there inspired her, and that night she painted it onto her guitar case. She had to change a few minor details, but she and her friends thought that the new setting was excellent. The following morning, while taking the subway to her favorite street corner, she heard an angry call: “Hey! That’s my painting! You can’t just put it on your guitar case!” Samira turned and answered, “Yes I can! It’s Fair Use!”

Who is right in this situation?

By the end of this chapter, you should be able to answer:

- I. What is “Fair Use”?
- II. What sorts of uses are eligible for Fair Use?
- III. What are the four factors of Fair Use, and how are they used?
- IV. How is it that one situation can receive multiple Fair Use interpretations?
- V. What are some important considerations in Fair Use analysis?
- VI. Why is it that some major players in the copyright world disagree about the role of Fair Use?

What is Fair Use?

§ 107. Limitations on exclusive rights: Fair use

“Notwithstanding the provisions of sections 106² and 106A³, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” (U.S. Copyright Office)

¹This content is available online at <<http://cnx.org/content/m41216/1.3/>>.

²http://www.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000106---000-.html

³http://www.law.cornell.edu/uscode/html/uscode17/usc_sec_17_00000106---A000-.html

The doctrine of “Fair Use” states that certain uses of copyrighted works do not require permission from the owner. However, Fair Use does not provide specifics, such as exactly how many seconds of a song, or what percentage of a book or a painting. Also, even if Fair Use applies, people are not allowed to distribute copies at will.

II. What sorts of uses can be considered Fair Use?

The Fair Use section indicates that uses “such as criticism comment or news reporting. . .” are not considered infringing. However, that does not mean that any use of copyrighted materials when writing criticism, comments, or news is automatically “Fair.” See the four factors. If a reporter wrote a news story about a controversial song and included the entire song (not just the most controversial lines) it could be considered an infringing use of the song. However, the news writer could argue that the whole song was needed in order to give the full effect, and that their article would not convey its meaning without it. Such factors are key to interpreting Fair Use. Some uses are allowed; some are not. Furthermore, in many situations, both sides are often able to develop a convincing argument. People using copyrighted works are expected to take the time to analyze their use and make a reasonable decision. (U.S. Copyright Office)

Fair Use is not a right such as the “right to vote” or “right to free speech.” Fair Use is a legal defense, for use when a person is accused of infringement. It means that the case is not settled based solely on whether there was an infringement, but on the judge’s consideration of the defendant’s Fair Use claim.

Thinking of Fair Use as a defense and not a right can make it seem like something to be very cautious with, or to use only when you are really certain it is fair. However, daily life and common uses of copyrighted works are rarely certain. The average person is allowed to make a Fair Use analysis and rely on it with a comfortable amount of certainty.

According to the first paragraph of §107, making copies “for purposes such as **criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research**, is not an infringement of copyright.” If you are making one of these uses, and not making copies way in excess of what you actually need, then your uses are probably fair. (U.S. Copyright Office)

Uses such as “scholarship or research” do not have to be driven by your teachers or professors. You may, on your own, have pursued a long-term study of the lyrics of songs by the band “Nirvana”. For your own research, you may copy the lyrics and interpretations available in music libraries or on the Internet. You may even copy articles other people have written about these lyrics. However, these copies should not be used for performance or a new publication (if copied entirely).

What are the Four Factors of Fair Use?

For most people, the “heart” of Fair Use lies in the four factors. The four factors are not a trial of balance (“Well, I’ve got 1 and 3 covered, so I can forget 2 and 4”). They are all to be considered when determining a Fair Use. If any one of the factors is abused, then the use is not fair. Some considerations for each factor are:

Purpose: Educational use weighs in favor of fair use and commercial use weighs against fair use.

Nature: Factual works are given less protection than creative works.

Amount: Generally, a large amount weighs against fair use, whereas a small amount would be considered fair use. There is no magic number or percentage

Market Effect: If the intended use would negatively impact sales of the work, then the use would generally weigh against fair use.

To apply the factors, you should take your situation and consider each factor. To help get a measure for each factor, assign each one a number from 1 to 5. If the factor is strong, give it a five. If the use just doesn’t qualify, give it a zero. Simply speaking, the closer the score is to 20, the stronger the action is to Fair Use. Nevertheless, interpreting each factor can be tricky.

Using the number system to score a use for “Fair Use” is not part of the law, and is not foolproof. It is simply a way to think about the strength of each of the four factors. It can help you make a decision, and sometimes not.

Here’s an example of a Fair Use debate. A High School teacher would like to post an article from Time Magazine on the bulletin board in the hallway by the door to her classroom. Students tend to gather there during longer breaks. The article is related to her subject, but not required reading. Is the posting a Fair

Use?

Factor 1: Purpose. The use of the article is educational, but weak. Why? It is not directly part of a class activity or assignment. (Rating: 2)

Factor 2: Nature. Although we don't know what the article is about, it did come from a news magazine. We can assume it is factual. This factor is strong. (Rating:5)

Factor 3: Amount. The teacher posted the entire article. Normally this would count against Fair Use. However, if she can show that part of the article would make no sense without the rest, she has at least some argument for using the entire article. Still, this factor is weak. (Rating: 1)

Factor 4: Market effect. Does posting this article in a High School hallway prevent a significant number of students from purchasing their own copies of *Time Magazine*? If she asked them to, would they? Generally speaking, we can assume that those students who do purchase *Time* regularly would not stop doing so because one article was made available in their school hallway. (Rating: 4)

Take the four ratings: 2, 5, 1, and 4, (=12) and consider them for a moment. This is not clearly a "Fair" use, but not clearly unfair as well. Furthermore, you can assume that the teacher will take down the article in a reasonable period of time.

An alternative system:

A checklist for using Fair Use is available at <http://copyright.columbia.edu/copyright/files/2009/10/fairusechecklist.pdf>⁴

Using this checklist is just as uncertain as using the point system to evaluate Fair Use. You must judge how "heavy," or significant, each factor of the use is and

not take every criteria to be equal. Both systems are helpful, but not absolute evaluators for Fair Use.

What are some important considerations in Fair Use analysis?

The amount of the work vs. the Heart of the work: When analyzing factor 3, or the amount of the work used, a very small percentage of the work can be interpreted to weigh against Fair Use if it is the "heart of the work". Of course, different people can disagree about "the heart," but when there clearly is one, it is *not* eligible for Fair Use copying. A very notable use of this doctrine is in the publication of President Ford's memoirs. *The Nation* magazine acquired a significant portion of them prior to their formal publication. *The Nation* then published only 300 words from the memoirs dealing with Ford's pardon of President Nixon. The article was built around these core words, and was not written as historical reporting (Greenhouse 1985, 1). As this was the most significant event of Ford's presidency, it was considered the "heart of the work" and *The Nation* was found guilty of copyright infringement. (Note that there were other factors that also led to the decision; it was not solely a "heart of the work" case).

People analyzing Fair Use cases should also be aware of the concept of "**Transformative**" uses. A transformative use goes beyond the original use, or is significantly different from the original use, or allows the reader to see the item or story or event in a completely different way, and for a different purpose. An example is found in the *Bill Graham Archives v. Dorling Kindersley Ltd*, 448 F.3d 605 (2d Cir. 2006) case, in which a book about the band The Grateful Dead included small reproductions of all of the band's concert posters. The posters were displayed in a timeline and demonstrated the changes in the band's publicity over the years. The owner of the posters sued, claiming it was an infringing use because the posters were reproduced in full and for a commercial publication. (Factors 3 and 4) The judge in this case ruled that the use of the posters was transformative; the original use had been for each poster to be displayed separately in order to encourage attendance at a concert. (Patry, William F., and Dannay, Richard 2006) The new use presented them together in order to show the history of the band. It was transformative. In this case, the commercial publication of the book was not an issue.

Another consideration when analyzing Fair Use – or other uses of copyrighted materials – is **risk tolerance**. An organization, a business, or an individual will each have a different level of how much they wish to risk a lawsuit. Some will consider it a low possibility and be willing to take higher risks; others will consider *any* possibility an intolerable risk and avoid all potential infringements. When considering a potential use of Fair Use, consider your own level of risk tolerance. Then, if you are working for a school or other institution, consider their level of risk tolerance. A low level of risk tolerance will lead you to claim fewer "Fair Use" uses.

⁴<http://copyright.columbia.edu/copyright/files/2009/10/fairusechecklist.pdf>

Why is it that some major players in the copyright world disagree about the role of Fair Use?

Major content owners, or those who own copyrighted material that is actively earning money for them, rarely see Fair Use in a positive light. For an example, the Copyright Alliance provides the following definition on their web site:

Q: Is Fair Use a Right? A: No. There is no right to make “fair use” of a work. An individual does not have the “right” to make use of another’s copyright work. If that were the case, someone might be able to publish excerpts from your private letters against your wishes or break into your house in order to get a copy of a valuable photograph under the guise that they had a “right” to get a copy of your copyrighted work to make a fair use of it. Fair use only arises when someone already has a copy of a copyrighted work and makes copies, distributes, performs, alters, or displays that work and the copyright owner subsequently challenges that use of the work as being an infringement. In that case, the person could raise a defense of fair use. (Copyright Alliance 2008)

Meanwhile, a significant number of lawyers, university faculty, artists, and other people believe that many copyright owners take their claims too far, and are focused on the analog or paper-based world for their assumptions.

But even before works enter the public domain, the public is free to make "fair uses" of copyrighted works.

By carving out a space for creative uses of music, literature, movies, and so on, even while the works are protected by copyright, fair use helps to reduce a tension between copyright law and the First Amendment’s guarantee of freedom of expression. The Supreme Court has described fair use as "the guarantee of breathing space for new expression within the confines of Copyright law." (Electronic Frontier Foundation)

Note the difference between these two writers. One asserts their Fair Use only comes into play when a person has been challenged as an infringer, while the other writes about “carving out a space for creative uses of music, literature, movies, and so on. . .” This is the most common stance between these two schools of thought on copyright. One is very legalistic, quick to quote laws, and accepts only minimal use by anyone other than the copyright owner. The other argues for creativity both in real life and in interpreting copyright laws. Both sides actively submit bills to Congress to further their interpretations; some examples

will be provided in a later chapter. Neither group has a formalized name, but those that favor stronger copyright enforcement are often called “The content industry” or “Copyright enforcers.” The side favoring more freedom is often called “The Copyfight”. Because there is intentional flexibility built into the Fair Use law, both sides are can be considered correct in their interpretation. Which side you favor is an individual decision.

What about Samira?

In the opening scenario, a street musician named Samira copied a modern painting onto her guitar case. The artist sees her guitar case and accuses her of copyright infringement. Samira claims fair use. Who is right?

First step: Is it possible to interpret Samira’s use of the painting as criticism, comment, news reporting, teaching, scholarship, or research? For this question, the answer is “no”.

First factor: Purpose. What is Samira’s purpose in decorating her guitar case? We can argue that anything Samira does to attract passersby is a commercial purpose. The more attractive her guitar case, the more potential tips she can earn. (Rating: 1)

Is it transformative? Moving the painting from a museum to a guitar case is a new placement, but still not a truly different purpose. The painting attracts attention and inspires thought in either location.

Second Factor: Nature of the work. The modern art painting is definitely creative. (Rating: 0)

Third Factor: Amount of the work. Samira copied a significant portion of the painting, enabling her guitar case to be easily recognized by another person familiar with the painting. (Rating: 1)

Fourth Factor: Impact on the market for the painting. Limited; museums will still wish to display this painting and collectors should still be willing to purchase it. However, Samira did bypass the *permissions market*; she could have sought and paid for permission to make her copy. In this way, she is impacting the permissions market for the painting. (Rating: 2)

Samira's use of the painting fails all four factors of Fair Use. If you consider points (a total of 4), her case is still weak. If she is lucky, the artist will accept Samira's promise to re-paint the guitar case and not pursue damages in court.

Conclusion: The Law

Average citizens such as Samira can look up the law on copyright; the next chapter explains how.

GLOSSARY, CHAPTER 2

Analog: Items from before the digital era. For example, paper, round clocks, phonograph records and cassette tapes, photocopiers, VHS tapes, etc.

Analyze: To study a situation by considering all of its parts separately, then putting them together.

Criticism: The practice of evaluating and analyzing literature, music, or art.

Fair Use: A legal doctrine that outlines some uses of copyrighted works, which do not require permission from the owner.

Four Factors: The purpose of the new work; the nature of the work being used; the amount of the work used; and the effect of the use on the market for the original work.

Heart of the work: The most significant or important part of a work.

Legal right: ability a person has due to legal definition. For example, it is legally defined that an adult citizen of the United States will have the right to vote.

Market effect: An activity that negatively affects the market for a work, either on the open market, or the business-to-business market, or on the market for permissions. Essentially, if money is being lost, then the other factors need to be considered strongly before "Fair Use" can be claimed.

Transformative use: A use that adds something new, re-purposes the work, or allows the work to be seen in a new and different way. (Hoffman 2006)

How to analyze a scenario

Consider the six rights of the copyright holder (reproduce, derivative works, distribute, perform, display, digital audio transmission). Which rights are being used by the person or persons in the scenario?

What requirements for copyright are met? (Fixed medium, originality, beyond *de minimis*?)

Can Fair Use (or any other part of the copyright law) be used to justify this use?

Can you make an argument for taking the risk of not worrying about copyright?

If not, then the user should get permission, find a different work to use, or adjust their needs so that only a small portion of the work is being used.

Scenarios

A significant portion of an episode from a humorous TV show is posted on YouTube. Is this a copyright infringement?

A student has created a web page with lyrics from her 30 most favorite songs, juxtaposed with her own original artwork. A password or any other form of protection does not protect the web site. Is the content on this web site infringing on copyright? If so, whose? Would a password affect the infringement status of the site? And does the number of songs affect the infringement status?

A student has collected the flyers from events on his campus for four years as a means of documenting his college years. Now he is scanning the flyers. Is a copyright infringement taking place? Why or why not?

Dave is making a pamphlet for a social club he is involved with. The club is not part of his schoolwork; anyone is welcome to attend. In the pamphlet he quotes two lines from a song from his favorite band paired with a picture he took of the band that is not related to the song. Dave wrote to the band for permission, but was denied. Believing that his use is Fair, he decides to use the two lines anyway. Is this copyright infringement?

A manager has provided her 35 employees with a copy of a 4-page article about workplace safety. The copies were made on the company photocopier, no permission fee was paid, but the company subscribes to the journal. The article was provided to educate the workers on an important issue. Has a copyright infringement taken place? Why or why not?

The Cindy stories (Scenarios 6-9) Note in these scenarios how one act, by Cindy, leads to several more acts by her friends.

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