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The Copyright & Fair Use Site

## How I Learned to Love FAIR USE...

### How I Learned to Love FAIR USE... or how to bring a \$300,000 lawsuit down to \$0 if you're a library, archive, or nonprofit educational institution

By Mary Minow, J.D., A.M.L.S.

When I give seminars to librarians on copyright, the most popular question is: "What happens if we get sued? How much money are we talking about?" Answer? In ever popular lawyer-speak, "It depends." The good news for libraries, archives, and nonprofit educational institutions, is that a good understanding and application of Fair Use can reduce your liability down to \$0. This article aims to help you evaluate a given situation involving the fair use of copyrighted materials.

"Fair Use?" , you say. "Absolutely. Everything we do is Fair Use. That is, we think it's fair." That kind of thinking won't go too far in court. Although Fair Use is the grayest area of copyright law (I always color my PowerPoint slides on Fair Use gray), 17 U.S.C. § 107 outlines criteria including four specific factors that courts weigh to determine if what you've done would *lawfully* be considered Fair Use.

#### Copyright Infringement

When considering whether or not you've infringed on someone's copyright, you'll first want to make the case that you are innocent of infringing which means you should look at sections of U.S. copyright law that directly protect libraries, archives and some educational institutions. See especially, [17 U.S.C. § 108](#) and [§ 110](#). If your use isn't covered (be sure to also look through other user exceptions from [§ 109 - § 122](#)), you'll want to look at Fair Use, the slipperiest defense in copyright law, [§ 107](#) .

#### **Q: Before we get to Fair Use, I'd like to know -- can I go to jail if I unintentionally infringe on someone's copyright?**

Only willful copyright infringement is a federal crime, punishable by imprisonment, fines or both. If you willfully copy or distribute by electronic or other means a work with a retail value of \$1,000 but less than \$2,500, you could be imprisoned up to one year and/or fined. See [§ 506](#). The terms go up if the infringement is greater.

The Digital Millennium Copyright Act added criminal penalties to persons who circumvent (loose definition: hackers) copyright protection systems or mess with copyright management information. Not only must your actions be willful, but there's a specific provision exempting nonprofit libraries, archives, and

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educational institutions from criminal liability. See [§ 1204](#). They may be accountable for civil remedies, although there's a particularly odd provision that allows them to hack copyright protection systems if done, "solely in order to make a good faith determination of whether to acquire a copy of that work..." See [§ 1201 \(d\)](#).

**Q: How much money could I be sued for in a civil copyright lawsuit?**

A: If the lawsuit is for a work that has been [registered](#) at the Copyright Office, the damages can be quite stiff. A copyright owner may elect to recover statutory damages under [§ 504](#), even if she can't show any lost profits. Statutory damages are amounts set by law. A copyright owner whose work was registered with the U. S. Copyright Office before the infringement (or within three months of publication) can elect to choose statutory damages or actual damages. Actual damages (also known as compensatory damages) are the dollar amount of any demonstrable loss suffered because of the infringement. Most copyright owners will choose statutory over actual damages because there is less to prove in order to obtain payment. If you're found to be an infringer (and don't have reasonable ground to believe your use was Fair Use), statutory damages are set by law at a minimum of **\$750** and a maximum of **\$30,000** per infringement, "as the court considers just." If the court finds that you've infringed on ten photographs that have registered copyrights, for example, you may be facing a \$300,000 lawsuit. If the copyright owner can prove that the infringement was committed willfully, the court has the discretion to increase the damages up to **\$150,000** per infringement. Further, the court may determine that the losing party must pay the winner's costs and attorneys fees, under [§ 505](#). On the other hand, if the infringer can prove that she was not aware and had no reason to believe the act was infringement, the court may reduce the award down to **\$200**.

If you work for a nonprofit educational institution, library, or archives and are acting within the scope of employment the court can bring the statutory damage award down to **\$0**, *even if you are found to be infringing copyright*. For this to happen, you must show that you believed and had reasonable grounds for believing that your use was Fair Use

**Fair Use**

**Q: What is Fair Use?**

Fair Use is codified in U.S. Copyright law at [17 U.S.C. § 107](#). It states that the Fair Use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright.

The bad news is that even after careful consideration whenever you try to figure out if what you want to do is Fair Use you will most likely still be left with a giant gray area. The good news is that with some study of the four nonexclusive factors which form a framework to make your evaluations, your good faith effort may help enormously if you get sued.

The law lists four nonexclusive factors to consider in determining whether a use is Fair Use:

**FACTOR ONE: PURPOSE and Character of the Use**

Conditions Which Tend Toward Finding Fair Use

+ Use is for nonprofit educational purposes

Note: Although it is quite helpful to be a nonprofit library, archives or educational institution, the purpose of the use should also be nonprofit educational.

+ Use is to create a new work with a different purpose (called "transformative use")

Note: Of special interest to libraries, archives and educational institutions is a recent 9th Circuit decision that found this factor in favor of an operator of a visual search engine. Arriba-Soft was sued by a professional photographer whose photographs were copied (in thumbnail form). The court said that the search engine was designed to "catalog and improve access to images on the Internet," and was thus considered a "transformative use" (i.e., it adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.) Further, the thumbnail form made it unlikely that users would enlarge the images for the original, artistic purpose because of the low quality. *Kelly v. Arriba-Soft*, 03 C.D.O.S 5888 (9<sup>th</sup> Cir. 2003).

Conditions Which Tend Against Finding of Fair Use

- Use is of a commercial nature

- Use is not transformative

**FACTOR TWO: NATURE of the Copyrighted Work**

Conditions Which Tend Toward Finding Fair Use

+ The work has a thin or weak copyright

Note: Reference works, science, other works that are primarily factual have elements that are not copyrightable.

+ The work has already been published

Conditions Which Tend Against Finding of Fair Use

- The work has a strong copyright

Note: Highly creative works, such as poetry, fiction, and art are really pure expression, and as such enjoy greater protection.

- The work is unpublished

Note: This surprises some librarians, who keep rich local history files, filled with unpublished letters, photographs etc. Yet copyright law favors the right of the copyright owners (including heirs) to make the decision whether or not to publish their work.

### **FACTOR THREE: AMOUNT and Substantiality of portion used in relation to the copyrighted work as a whole**

#### Conditions Which Tend Toward Finding Fair Use

- + The smaller the amount copied the better

Note: This is measured in proportion to the size of the original. This was easier to measure in the print world than online.

- + Portion used is not "the heart of the work"

Note: A classic example here is taking the key moment from the I Love Lucy episode where Lucy is trying, in vain, to keep up with a fast moving chocolate candy conveyer belt.

#### Conditions Which Tend Against Finding of Fair Use

- The more that is taken—either in proportional size or importance—the more difficult it is to claim fair use.

### **FACTOR FOUR: MARKET Effect (Including Potential Effect) on Value of Copyrighted Work**

#### Conditions Which Tend Toward Finding Fair Use

- + There isn't a significant effect (including potential effect) on the market for the original work

Note: If you can demonstrate that your use doesn't deprive the copyright owner of income, you're more likely to persuade a judge regarding this factor.

#### Conditions Which Tend Against Finding of Fair Use

- There is a market for the work

Note: A 1994 Supreme Court decision says that the market factor is only one of the four factors, and not more important. The reality is that courts often weigh this factor much more heavily than the other three so beware if your use undermines an existing or potential market for the work.

### **Memory Trick to remember the Fair Use Factors: PNAM**

Purpose

Nature

Amount

Market

### Q: How will I know if what I'm doing is Fair Use?

Get sued and get a court to determine your case. Sadly, unless your facts match perfectly with a previous court case in your jurisdiction, this is what you need to do. Remember, though, that if you work for a nonprofit educational institution, library, or archives and are acting within the scope of employment, your statutory damages could go down to \$0. You must show that you believed and had reasonable grounds for believing that your use was Fair Use. Keep track of your analyses, item by item. A handy way to do this is to use the [Fair Use Checklist](#) developed by Kenneth Crews at the Copyright Management Center of Indiana University.

### Q: How do I find out more about how to handle a lawsuit against me?

Most copyright owners will send a "cease and desist" letter to you before filing a lawsuit. A new joint project of the Electronic Frontier Foundation and Harvard, Stanford, Berkeley, University of San Francisco, and University of Maine law school clinics, [Chilling Effects Clearinghouse](#), is incredibly helpful in understanding these letters and their legal terminology. Samples of real "cease and desist letters" are posted.

Another important note is to check your institution's insurance policy to make sure it adequately covers copyright lawsuits. If it does, be sure to contact your insurance company before spending money on attorneys. In a recent New York case, a sunglass company paid some legal fees to a law firm it had hired to litigate a patent infringement case. Its insurance company would have paid the fees if it had been approached initially, but would not pay after the fact. [Darby & Darby v. VSI](#), 701 N.Y.S.2d 50 (2000). For an overview of how to handle a copyright infringement lawsuit against you, including insurance, see Mark H. Miller's [Copyright Infringement: What It Is; What to Do If You're Accused of It](#) (Jackson Walker LLP: 2000).

Fair use Summary		
	LIKELY YES	LIKELY NO
PURPOSE	Nonprofit Create work + with new purpose	Commercial work has same purpose as original
NATURE	Reference, Nonfiction Published +	Fiction, Art Music  Unpublished
AMOUNT	Small amt (relative to whole original) +	Complete work Heart of work

## MARKET

Doesn't hurt  
market of Original +

Hurts market or  
potential market of  
original

Note: Attribution—that is giving credit to the copyright owner—will not relieve you of a claim of infringement.

## More Resources

The very best sites for libraries, archives and nonprofit educational institutions on fair use:

Kenneth Crews, [Copyright Management Center of Indiana University](#)

<http://www.copyright.iupui.edu/fairuse.htm>

\*\*\*\*See especially its [Fair Use Checklist](#) that you can use to evaluate each item and then keep on file to protect yourself at <http://www.copyright.iupui.edu/checklist.htm>\*\*\*\*

Georgia Harper, University of Texas Copyright Crash Course: [Fair Use](#)

<http://www.utsystem.edu/ogc/intellectualproperty/copypol2.htm>

United States Copyright Office.

<http://www.copyright.gov/circs/circ21/pdf>

Circular 21 Reproductions of Copyrighted Works by Educators and Librarians includes excerpts from H.R. Rep. No. 94-1476, and some discussion of S. Rep. No. 94-473, noting that the codification of Sect. 107 is intended to offer guidance to users, but the "endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." The Circular also reprints the Classroom Guidelines (also found [here](#)), noting that the purpose of the guidelines "is to state the minimum and not the maximum standards of educational fair use..." at <http://www.copyright.gov/circs/circ21.pdf>

## APPENDIX

[17 U.S.C. § 107 Limitations on exclusive rights: Fair use](#)

Notwithstanding the provisions of sections [106](#) and [106A](#), 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:

the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

the nature of the copyrighted work;

the amount and substantiality of the portion used in relation to the copyrighted work as a whole;

and 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.

<sup>1</sup>Also, everybody seems to throw the term "Fair Use" around casually at parties. With a little learning, you can be the only one there to use it correctly. This might even help you land your next job.

<sup>2</sup>A jury recently awarded a photographer \$400,000 from the nonprofit National Geographic Society when it digitized four photographs for its, "108 Years of National Geographic on CD-ROM" collection, *Greenberg v. National Geographic Society*, U.S. District Court, Miami FL (March 2003). See American Society of Media Photographers, Inc. <http://www.asmp.org/news/spec2003/greenberg.shtml> National Geographic says it will appeal the decision, which was already on remand from an 11<sup>th</sup> Circuit opinion in favor of the photographer. *Greenberg v. National Geographic Society*, 244 F.3d 1267 (11th Cir. 2001).

<sup>3</sup> Snippets like this license for small fortunes. If you happen to find someone else has blatantly posted it on the Internet, **stop and turn away**. These works are strongly protected by copyright and the fact that you are not the original thief has no bearing.

<sup>4</sup> [Campbell v. Acuff-Rose Music, 510 US 569 \(1994\)](#).

<sup>5</sup> Okay, maybe that's not the world's best memory trick, but it's worked for me and some folks I've shared it with for years. Maybe you can gussy it up, like "Please, Not Another Muffin!" One workshop participant changed the "M" to and "E", did a little rearranging and suggested **PANE - purpose, amount, nature and economic impact**. Then you can tell yourself that Fair Use analysis is a PANE. If it is, it's a muddy pane.

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