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Abstract: This article considers the continued viability of the Fair Use Doctrine in the digital environment. Fair use is described and applied to a typical public library function. The importance of well-crafted license agreements that include user allowances like fair use will be necessary to ensure library users' right to use digital resources as they use print resources.

Understanding and Protecting Fair Use

The threat of digital piracy — peer-to-peer file sharing and the unauthorized downloading of motion pictures are the most publicized threats — has led the recording and motion picture industry to propose that technological control mechanisms be employed to control unauthorized copying. Piracy can be controlled to a certain extent by technology — everything from password protection to hardware solutions built into electronic equipment can limit unauthorized copying. The trouble is that this same technology can also eliminate the ability of users to exercise copyright exemptions, such as fair use, in the digital environment. So, some say fair use is dead. I disagree. Fair use exists, but now more than ever, the public needs to exercise fair use rights to demonstrate their value. It is true — use it or lose it. Fair use is an essential element of the copyright law and without it, many of the activities library users engage in and have enjoyed in the analog world could be criminal acts. Librarians represent the public interest, so we must know and value copyright exemptions like fair use. Sounds like the perfect time for a fair use refresher!

Fair use (Section 107 of Title 17, the Copyright Law of the United States) allows a user to exercise a copyright without the prior permission of the copyright holder. It says that under certain

conditions, copying, distributing or exercising any exclusive right of copyright is not an infringement. One does not have to ask permission to photocopy an article from a periodical in the library, for example. One does not have to sign a license or pay a fee to quote from a work. Fair use is important because if copyright is too broad and restrictive, the goal of copyright – to enhance learning through the broad dissemination of creative works — cannot be achieved.

Fair use is determined by considering four factors outlined in Section 107 of the copyright law:

- “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.”

Fair use and the four factors were developed in “common law” or the interpretation of law that develops over time through court decisions. When infringement cases were brought to trial, judges ruled that some of these infringements seemed justified or fair because of specific characteristics particular to the case. These characteristics eventually were categorized as the four factors of fair use.

Each factor is considered by the court, and in some instances, courts have placed more emphasis on one factor than the others. Many argue that the fourth factor – the effect on the market — is the most important. If copyright provides a monetary incentive to create, then only the copyright

holder should collect any monetary rewards. In fact, for the period of time that copyright lasts, only the copyright holder can sell the copyrighted work. Because the selling of “intellectual property” has become an important growth industry, one might argue that the fourth factor is more important than ever. However, the copyright law does not suggest this.

Fair Use in Action

Consider a typical public library activity – story time. Story time is an infringement of copyright without fair use. The librarian is publicly performing a copyrighted work without the prior permission of the copyright holder. A public performance — “to perform or display [the work] at a place open to the public or at any place where a substantial number of persons outside of a normal circle of friends and its social acquaintances is gathered” — is an exclusive right of the copyright holder. Librarians do not seek prior permission from the copyright holder because, with the story time situation, the unauthorized use is justified.

Using the Four Factors

The purpose of story time is not for profit. The law distinguishes libraries that serve educational institutions from public libraries, so we cannot argue that story time is educational (unless it is part of an established school curriculum). Children are entertained at story time but we also know that children learn about books and develop reading skills. In terms of the first factor, the purpose of the use clearly leans toward fair use.

The nature of the publication being used for story time is most likely a children's book - a published, fictional work perhaps with pictures or illustrations. The law considers works with a high level of creativity (poems, novels, art, graphics, videos, story books) as having more protection than works that are non-fictional in nature (including journal articles, research publications, documentaries). Another consideration regarding "nature of the publication," is the fact that the children's book is published. Published works are protected by copyright, but unpublished works are considered "more protectable" — the idea being that the copyright holder should have the right to determine when a work will first be made available to the public. To a certain extent, the fact that the work is published leans (but not very far) towards a fair use reading. By now you can clearly see that the second factor of fair use - the nature of the publication - is not clear cut. This is part of the ambiguity of fair use that for many is frustrating.

The amount of the publication used during story time is, in general, the entire story. The entire publication is used, that leans against fair use. However, can a story be told in any other way if not from beginning to end? Again, not a clear cut fair vs. unfair use.

Finally, by reading the story to children, are librarians cheating the copyright holder out of profits? No, in fact, the library has purchased the book and may purchase another copy if the book is extremely popular with children. Because their children's interest has been peaked, parents may buy more children's books for their home.

When we examine all of the factors together, I would argue that story time is a lawful, although unauthorized, activity. (Woe is the day when librarians would have to ask permission or pay a fee to read a storybook to children!) Hopefully, this example illustrates the kinds of considerations one

must take when making a fair use decision. One should also note that fair use is not a strict formula. The decision is based, to an extent, on one's own judgment, and reasonable people will disagree about the same fair use situation.

Of course, we rarely have the time to consider the four factors when a copyright issue comes up. Luckily, many library activities — story time and story boards, book displays, a reasonable degree of photocopying — have become normalized. In other words, the activities are so broadly practiced that they have become lawful activities, though when examined closely, all involve using a copyright without authorization. Our behavior influences the law and its interpretation. If everyone started to request permission to make a book display, eventually that activity would become an infringement. (Lesson: Do not ask for permission unless you have to.)

Copyright “Guidelines”

Many libraries use “copyright guidelines” to make decisions about fair use. These guidelines, developed by representatives from various stakeholder groups like motion pictures companies, publishers, and authors attempt to *quantify* fair use activities. Stakeholders have written numerous documents of this kind including guidelines for photocopying, music, multimedia, interlibrary loan, and library reserves. The guidelines, while handy cues, are problematic for various reasons. First of all, they are not included in the copyright law. Fair use *is* included in the law, so when an infringement case comes before a judge, that judge will consider the fair use factors, not the guidelines. Some guidelines were developed at the urging of Congress so they have some legal value, but case law indicates that judges rely on fair use when they evaluate infringement cases.

Second, the guidelines were designed to represent the *minimum* amount considered fair.

Unfortunately, libraries have implemented the guidelines as if they were *maximums*, resulting in librarians refusing to photocopy more than 10% of a book regardless of the situation. Third, librarians have been led to believe that the guidelines will provide a “safe harbor” from copyright litigation. The truth is that a copyright holder may choose to sue a library for infringement for any reason. (Don’t fret. It is highly unlikely that a library would be sued, but they *could* be whether you use guidelines or not.) Finally, by choosing guidelines over fair use, librarians are establishing a new norm that suggests, “we do not need fair use, the guidelines are sufficient.” Eventually, fair use will lose its meaning and worth, and guidelines will be considered law, perhaps even finding their way into the statute. It is not in the best interest of the public to forfeit fair use, especially when we have no idea how necessary fair use may be in this time of rapid technological change.

Fair Use in the Digital Environment

Fair use applies to digital materials in the same way as analog materials, that is, if the work in question is acquired through a sale. Nearly all digital works are rented and not owned by the library. We license materials with contract law (state law) and the copyright statute does not apply. Digital resources acquired through license agreements can be used only in ways that the contract stipulates. One cannot guarantee fair use exists unless a savvy contract negotiator is able to get “fair use language” in the contract, such as “reasonable copying.” Bottom line, the contract describes what the library and its users can do with a digital work, and that contract may not include fair use.

Fortunately, the vendors who license material to libraries are familiar with our needs – libraries are sometimes their sole customers. We pay a premium for each database, often based on the size of

the community or on the number of computers that the library owns. Thus far, our library users, if authorized, do not face technological measures that block access to works that the library has licensed. This is not the case with materials marketed directly to the consumers, in particular, recordings and motion pictures in digital formats. CDs now come with copy-protection technology that prevents one from listening to the CD on some electronics equipment, such as personal computers running operating systems other than Microsoft.

Will fair use of library resources follow the anti-copying trend of CDs? The answer depends on us. We must continue to value and use fair use. We must include fair use exemptions in our licensing contracts, and if necessary, refuse to agree to overly restrictive contract terms. We must promote the need for fair use to legislators and other decision makers. We represent the public and their right to information. Understanding copyright law and fair use is one way to represent the public. This should be a goal of all librarians. My hope is to help you better understand copyright and how it can affect the free flow of information that is so important (but often taken for granted) to society in future articles in *Public Libraries*. If you have suggestions for future copyright topics, let me know by contacting me via e-mail at crussell@alawash.org. Type “public libraries and copyright” in the subject line of your message. I cannot respond to individual questions, but your concerns will point me in the right direction for future topics in *Public Libraries*.