

From *The Librarian's Guide to Intellectual Property in the Digital Age: Copyrights, Patents, and Trademarks* by Timothy Lee Wherry. Copyright © 2002 by the American Library Association. All rights reserved. Permission granted to reproduce for nonprofit, educational purposes. Check out the book at the [ALA Online Store \(www.alastore.ala.org\)](http://www.alastore.ala.org).

## Chapter 3

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# Fair Use

Within the current copyright law is a codified concept called “fair use” (Section 107). Fair use is a loophole in the copyright law that allows someone other than the copyright holder to copy and distribute copyrighted material under certain conditions without first obtaining permission. It has been said that fair use is the safety valve of copyright because without it, copyright’s constitutional purpose to promote learning, advance knowledge, and promote the progress of science would be useless. The law specifically allows fair use for such purposes as criticism, comment, news reporting, teaching, and scholarship or research. That being said, trying to decipher those purposes and conditions is a daunting and confusing task.

Fair use is the most important concept relating to intellectual property that educators and librarians are likely to face. Fair use is a significant issue for educators in that it is used daily in instruction but it is not clearly defined. Although fair use has been claimed for two hundred years in the United States, it has been spelled out in the law only since 1978. Before 1978, fair use evolved through a series of court decisions into a slippery and vague concept.

Fair use evolved as courts tried to balance the rights of copyright holders and society’s interest in making copies of a work, primarily for teaching and news reporting. If not for fair use, every time a librarian or teacher wanted to use copyrighted material for educational purposes, permission would have to be obtained from the copyright holder. Obviously, this was

not practical. Without fair use, the restrictions on copyright would severely limit the educational uses of *all* the material created by others. The goal of fair use is to avoid the rigid application of the copyright statute when it would stifle the very creativity the law was meant to foster.

Fair use is controversial in that it is a contradiction of the basic concept of copyright's five rights. Fair use provides the privilege of using an author's work without permission or payment. In 1978, the new copyright act spelled out fair use—but only after resistance. The copyright committee working on the new law felt that trying to nail down specific guidelines for fair use in an era of technological change was futile. This was prophetic given that it was 1976 and the explosion of digital technology was still ten years away. However, the law was passed with fair use guidelines and later, in 1998, the Digital Millennium Copyright Act (DMCA) refined fair use as applied to a digital environment (see the section on the DMCA in chapter 4.)

The codification of fair use is short and seemingly straightforward in the text of the law, but this still does not make its application any clearer than in the past. As stated in the preceding chapter, copyright grants privileges upon a work's creation if that work is fixed in a tangible form. The work does not need to bear the copyright symbol or be registered. Thus, virtually anything written or available on the Internet is copyrighted.

Four factors in the law help guide those who wish to utilize its fair use aspects. As these factors are explained here, bear in mind that although fair use is spelled out, it is still not clear. It is also very difficult to explain fair use because for every concept presented, there is an exception or an immediate response from the reader of "But what if . . . ?" The four guiding factors are:

1. *The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes*

The courts have found that the use of a copyrighted work for educational purposes is the most likely application of the fair use statute. Outside educational purposes, any *noncommercial* use is likely to be looked upon as fair use if that use is "transformative." A work is transformative if it is based on the copyrighted work but adds some new element or has a different character or serves a different purpose. An example of this would be a parody or a satire of an existing work. So, a *noncommercial* parody of a song would be fair use.

An example of fair use for educational purposes is a situation in which a professor makes a few copies of an article to be held on reserve in the library. The library already owns the material and is simply mak-

ing allowances for time constraints of the students. The professor could copy an article on a given topic for each member of a class if securing authorization would require an unreasonable length of time, and if the article was used one time only and was returned by each student after use. The professor could not use the article as part of the curriculum from semester to semester unless permission from the author was secured. In this example, one can see how the fair use statute seems to say that a given act is permitted, but then limits how permitted it is.

## 2. *The nature of the copyrighted work*

The gist of this guideline concerns how the work is to be used. For example, a how-to book on woodworking contains plans that are to be copied and used by the reader. It is assumed that the reader is not going to take the book into the workshop and prop it open on the workbench. The physical nature of the work is significant in this guideline.

Nonfiction works have received more leeway in fair use than fiction in court cases involving fair use. The issue seems to be that nonfiction simply relates facts whereas fiction reflects true creative inspiration. A health workbook with tear-out pages for doing assignments would not be a good candidate for fair use if a teacher made copies of the consumable pages. An article from a textbook would be a good candidate for fair use. Audiovisual works or software are not good candidates for fair use.

## 3. *The amount and substantiality of the portion used in relation to the copyrighted work as a whole*

One hundred words taken from an encyclopedia for educational purposes may be fair use, but one hundred words taken from a children's book may not be. The guideline concerns not the volume of material alone, but what portion of the entire work the excerpt constitutes. Even though the amount of material used may be small, if it is deemed to constitute a significant part of the whole or is substantial in terms of importance, it is not permitted. So, how much is significant? The answer is not clear and, in many cases, the courts have had to decide how much is too much in a given situation. That is, even if a small amount of a short story is used, if it is considered the heart of the story, it is not permitted.

Some universities have tried to give rules of thumb concerning the amount of material that may be used under fair use guidelines. For example, Penn State University is very specific in its guidelines for fair

use of prose. Penn State's Copyright Clearance Center states that a complete article up to 2,500 words may be used, or an excerpt from any prose work of not more than 1,000 words or 10 percent of the work, whichever is less, but in any event a minimum of 500 words. If the material to be copied is poetry, only 250 words may be used for educational fair use; if it is a children's book, no more than 10 percent of the text may be used; and if it is an illustration, a diagram, a drawing, a cartoon, or a picture, only one per work is considered fair use.

4. *The effect of the use upon the potential market for or value of the copyrighted work*

This is perhaps the better-understood concept of fair use. If the use of a copyrighted article impacts significantly on the potential of that work to provide a monetary profit to its author, the use is infringement and not fair use. In educational settings, a professor would be permitted to make copies of a work for nonprofit use if *all four* fair use guidelines are followed. A professor could not make photocopies of a worksheet from a single purchased workbook for all the students in the class. This would be detrimental to the market potential of the original work.

Note that all four factors carry equal weight in determining fair use. That is, *all four* factors are considered in each case of determining fair use, not just one or two of the factors. If a professor uses copyrighted material for educational, nonprofit purposes, that does not mean the professor need not be concerned about the amount used.

These factors reflect the balancing act that fair use requires. No litmus test exists for uses that are to be considered fair under copyright law; however, educators and librarians can be somewhat confident because courts award damages on the proof that actual loss has occurred because of infringement. If no economic gain is realized, even though infringement may be proven, damage awards may not be given to the copyright holder. A court would rule that infringement occurred and that the action must stop, but would not monetarily punish the offender outside of legal costs.

Even so, some educators demonstrate a bifurcated approach to the fair use doctrine. On one hand, educators often try to excuse infringement when acquiring permission seems too time-consuming and difficult. On the other hand, educators often give up legal fair use in the face of perceived litigation.

Classroom use is not the only time educators confront the issue of fair use. Fair use is also a factor in professional education programs, fund-raising, and alumni activities. For librarians, fair use becomes an issue when

copyrighted material enters the interlibrary loan system, when material is placed on library reserve, or when articles are downloaded from full-text databases.

## **FAIR USE ISSUES FOR LIBRARIANS**

In the current environment, librarians are faced with myriad issues concerning materials that are digitized. The best way to explain fair use for librarians is to look at specific examples of situations in which librarians may find themselves. There are several important points to keep in mind. The first point is that although fair use is involved in many library copyright situations, licensing and contract law also come into play because many of the digital products libraries use are purchased through a contractual agreement with a vendor. The second important point is that the Digital Millennium Copyright Act (DMCA) affects librarians if the library is acting as an Internet service provider (ISP). An ISP is an entity that provides the technology that allows users to exchange information electronically or to share files. America Online (AOL), for example, is an ISP. The best way to determine if a library is an ISP is to look at the URL (uniform resource locator). If the Web address is the library itself, the library is the ISP. If the library is only one location on a university or community domain, the library is not the ISP.

### **The Fair Use List of Factors**

The chart shown in figure 3.1 may assist librarians and educators in making decisions on whether fair use is permissible in a given situation. This list may be used for any consideration of fair use, whether it involves digital media or other formats. The list may be considered a balance sheet in that the selection of one favorable item or one unfavorable item does not in itself permit or exclude fair use, but rather points to the pros and cons of a given situation. The final decision still rests in the hands of the educator or librarian.

### **Passing into the Public Domain**

The one sure way to determine whether a work can be used under fair use guidelines is to determine whether the copyright on the work has expired. This is referred to as *passing into the public domain*. Two issues must be considered when determining whether a work is in the public domain.

**FIGURE 3.1**

Fair Use Factors

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**Fair Use Would Be Permitted If the Purpose Is:**

- Educational
- Nonprofit
- News
- Criticism
- Parody or Satire
- “Transformative”

**Fair Use Would Not Be Permitted If the Purpose Is:**

- Commercial
- For Profit
- For Entertainment

**Fair Use Would Be Permitted If the Nature of the Work Is:**

- Published
- Nonfiction

**Fair Use Would Not Be Permitted If the Nature of the Work Is:**

- Unpublished
- Creative (e.g., music or film)
- Fiction

**Fair Use Would Be Permitted If the Amount Used Is:**

- Small
- Central to the work

**Fair Use Would Not Be Permitted If the Amount Used Is:**

- Large
- Not central to the work

**Fair Use Would Be Permitted If:**

- The work is lawfully acquired (i.e., purchased)
- There is no way to obtain permission
- Few copies are available
- There is no impact on profit
- No similar product is available

**Fair Use Would Not Be Permitted If:**

- Numerous copies are made
  - There is repeated use
  - The profit of the copyrighted work is affected
  - The work is easily licensed
  - The work is available on the Internet
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First, although a work is very old, the copyright date on the work itself must be checked. For example, *Tom Sawyer* was published in 1869. Clearly there should be no copyright protection on this work because it is over 130 years old. But there is. Publishers can release a reedited version of a work or a version that is annotated or in paperback or one that has text that makes it different from the original. In this way the reedited or changed book can be copyrighted again with all the contents, including the text that was in the original publication, protected by a new copyright.

The second issue involves determining which of the several copyright laws the work falls under. There have been several major copyright acts in the United States in the past century, each with different periods of protection. The problem is to determine which of the protection periods applies to the work in hand. To make this determination a bit easier, figure 3.2 lists protection periods for works created under each copyright law.

**FIGURE 3.2**

## Copyright Protection Periods

**If the work was created:**

Before 1923

**The term of protection is:**

In the public domain

**If the work was created:**

1923–1963

**The term of protection is:**

28 years plus renewal for 47 years (plus another 20 years provided by the Sonny Bono Act of 1998) making total protection time 95 years. If not renewed, protection expires after 28 years.

(continued)

**FIGURE 3.2**

Copyright Protection Periods (continued)

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**If the work was created:**

1964–1977

**The term of protection is:**

28 years plus renewal for 67 years

**If the work was created:**

1978 and after

**The term of protection is:**

The life of the author plus 70 years. If a work has multiple authors, the protection under the most recent law (1976) is the life of the longest-living author plus 70 years. If the author is anonymous, or if the work is made for hire, the 1976 law protects the work for 95 years from the year of first publication or 120 years from the year of creation, whichever expires first.

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