

The Doctrine of Fair Use

by Roman KELTNER

This essay is based on the papers of

- **Thomas G. Field, Jr., Copyright on the Internet, cited 14.02.2001,**
[URL:http://www.fplc.edu/tfield/copynet.htm](http://www.fplc.edu/tfield/copynet.htm)
- **Georgia Harper, Fair Use of Copyrighted Materials, cited 14.02.2001,**
[URL:http://www.utsystem.edu/ogc/intellectualproperty/copypol2.htm](http://www.utsystem.edu/ogc/intellectualproperty/copypol2.htm)
- **Bruce A. Lehman and Ronald H. Brown, Intellectual Property and the National Information Infrastructure, cited 14.02.2001,**
[URL:http://www.uspto.gov/web/offices/com/doc/ipnii/](http://www.uspto.gov/web/offices/com/doc/ipnii/)

FAIR USE DOCTRINE

The most significant and, perhaps, unclear of the limitations on a copyright owner's exclusive rights is the doctrine of fair use. Fair use is an affirmative defense to any action for copyright infringement. It is potentially available with respect to all unauthorized uses of works in all media. If it is proven, then the use may continue without any obligation on the user's part to seek the permission of the copyright owner, pay royalties, or the like. The doctrine of fair use is rooted in some 200 years of judicial decisions and is, in general, most likely to be found when a user incorporates some of a pre-existing work into a new work of authorship. It is thus widely accepted, for example, that quotation from a book or play by a reviewer, or the capturing of copyrighted music in a television news broadcast is fair use. As one moves away from such favored uses into the area of uses that are -- for practical purposes -- competitive with the copyright owner's exploitation of the work, the ease of analysis shrinks (as the number of litigated cases grows).

Before examining the doctrine developed by the courts, it is useful to examine the statutory language concerning fair use.

Section 107 of the U.S. Copyright Act (an U.S. Code) provides:

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 --

(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.

It is clear that courts must evaluate all four factors in determining whether a particular use is fair, but may also take into account countless "extra" factors, when appropriate.

THE PURPOSE AND CHARACTER OF THE USE

FACTOR 1: What is the character of the use?

- Nonprofit
- Educational
- Personal
- Criticism
- Commentary
- Newsreporting
- Parody
- Otherwise "transformative" use
- Commercial

The first factor contrasts "commercial" uses with "nonprofit educational" uses. For example, "mere reproduction" has fared very badly in court under the Copyright Act, even in actual and ostensible educational contexts. Commercial uses that involve no "transformation" by users will likely always be infringing, while nonprofit educational transformative uses will likely often be fair. Between these extremes, courts will have to engage in the same type of fact-intensive analysis that typifies fair use litigation and frustrates those who seek "bright lines" clearly separating the lawful from the infringing.

So if we look on the graph/chart: Uses on the left tend to tip the balance in favor of fair use. The use on the right tends to tip the balance in favor of the copyright owner - in favor of seeking permission. The uses in the middle, if they apply, are very beneficial: they add weight to the tipping force of uses on the left; they subtract weight from the tipping force of a use on the right.

THE NATURE OF THE COPYRIGHTED WORK

FACTOR 2: What is the nature of the work to be used?

- Fact
- Published
- A mixture of fact and imaginative
- Imaginative
- Unpublished

This second factor tends to play a smaller role than the first in fair use litigation. Courts have held that it weighs in the copyright owner's favor when works of fiction and unpublished works are copied, and in defendant's favor when factual works and published works are copied.

Again, uses on the left tip the balance in favor of fair use. Uses on the right tip the balance in favor of seeking permission. But here, uses in the middle tend to have little effect on the balance.

THE AMOUNT AND SUBSTANTIALITY OF THE PORTION USED

FACTOR 3: How much of the work will you use?

- Small amount
- More than a small amount

This is probably the least important factor, given that the taking of even a small amount -- if it is considered the "heart" of the work -- can lead to a finding of infringement. This includes a determination of not just quantitative, but also qualitative substantiality. In any event, whatever the use, generally it may not constitute a fair use if the entire work is reproduced.

The general rule holds true (uses on the left tip the balance in favor of fair use; uses on the right tip the balance in favor of asking for permission), but if the first factor weighed in favor of fair use, you can use more of a work than if it weighed in favor of seeking permission. Anonprofit use of a whole work will weigh somewhat against fair use. A commercial use of a whole work would weigh significantly against fair use.

THE EFFECT OF THE USE

FACTOR 4: If this kind of use were widespread, what effect would it have on the market for the original or for permissions?

- After evaluation of the first three factors, the proposed use is tipping towards fair use
- Original is out of print or otherwise unavailable
- No ready market for permission
- Copyright owner is unidentifiable
- Competes with (takes away sales from) the original
- Avoids payment for permission (royalties) in an established permissions market

Courts have repeatedly identified this as the most important of the four factors. It is important to recall that it weighs against a defendant not only when a current market exists for a particular use, but also when a potential market could be exploited by the copyright owner. Harm in either market will, in most instances, render a use unfair.

circumstances, it weighs nothing! It depends on what happened with the first three factors.

Here's why:

This factor poses a "circular reasoning" problem: we do the fair use analysis *to find out whether we might owe the copyright owner some money for a particular use*. But this fourth factor asks, "Is the owner losing money because of this use?"

In practical terms, if a use would be a fair use except for the fact that it deprives the copyright owner of some royalties, that deprivation alone is not sufficient to convert the otherwise fair use to an infringing one. On the other hand, if one could conclude that a use was unfair after reviewing the first 3 factors, then it does not break the logic rules to take lost royalties into account. This means that if a use is tipping the balance in favor of fair use after the first three factors, the fourth factor should not affect the results, even if there is a market for permissions, even if the owner would lose money because of the use.

On the other hand, if a use is tipping the balance in favor of asking for permission one need not "assume" it's not fair, the first 3 factors show that it's not. Add to that an active permissions market and the fourth factor will decisively tip the balance. Forget fair use. Get permission.

The facts in the middle illustrate circumstances that probably cause the fourth factor to have little or no effect.

It is reasonable to expect that courts would approach claims of fair use in the context of the NII just as they do in "traditional" environments. But on the other hand, it may be that technological means of tracking transactions and licensing will lead to reduced application and scope of fair use.

Most people think that the fair use test is difficult. Actually, it's not so much difficult as it is uncertain - susceptible to multiple interpretations. Two people can review the same facts about a proposed use and come to different conclusions about its fairness. That's because one must make many judgments in the course of weighing and balancing the facts.

Attorneys read the "judgments of judges" to learn how to make judgments ourselves, but judges see things differently (one from another) too. Because "reasonable minds can disagree" about fair use, perhaps it is unrealistic to try to predict what a judge would think about a proposed use. But that's just what this test is about.