



Institute For Policy Innovation

ISSUE BRIEF

WHAT'S "FAIR"?

WHY THOSE CONCERNED ABOUT COPYRIGHT FAIR USE NEED TO SAY WHAT THEY MEAN

by Lee A. Hollaar, Ph.D.

Synopsis: While many people in the copyright debate talk about "fair use," they seldom say which uses are of concern. But without specifics, it is hard to provide balanced exceptions to copyright protection. Congress should codify "fair use of necessity" and many instances of "economic fair use" so that people will know what is allowed, while reserving fair use primarily for the "transformative" or "productive" uses that reflect the goal of copyright.

The idea of the "fair use" of a copyrighted work plays a prominent role in the current discussions of the scope of copyright, particularly on the part of opponents to legislation such as the Digital Millennium Copyright Act.

But there is a vast misunderstanding of what fair use really is. From the very start, fair use has not been something definite, but instead shorthand for a very complex doctrine representing a large number of cases, much like "free speech" or "privacy." Justice Story's 1841 decision in what may be the very first fair use case¹ begins "This is one of those intricate and embarrassing questions, arising in the administration of civil justice, in which it is not, from the peculiar nature and character of

the controversy, easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases."

Even experienced copyright law judges have termed the doctrine "the most troublesome in the whole law of copyright" and have advised against resorting to it unless it is necessary.²

For that reason, those claiming that "fair use is hurt" by particular legislation, litigation, or technology need to say what they mean when they talk about fair use, identifying the types of use that will be affected and justifying why that use is fair. Without doing that, it is impossible for those proposing legislation to try to meaningfully consider fair use.



NONINFRINGEMENT, PERMISSIBLE, AND FAIR USES

The Copyright Act of 1976 gives copyright owners broad rights to their works. Unless there is some exception in the statutes, it is an infringement not only to reproduce the work, but also to distribute it, adapt it to another form, and perform or display it publicly.³ But while the rights granted are broad, there are still uses that are not infringing. You can sing copyrighted songs in the shower because it is not a public performance, or at least not intended to be, and nonpublic performances or displays are not included in the grant of rights to the copyright owner.

Permissible Uses. Congress has also stated a wide variety of exceptions in the copyright statutes.⁴ These are not “fair uses,” but rather permissible uses, and include:

- Reproductions in certain cases by libraries and archives. (Section 108.)
- The redistribution, with exceptions for sound recordings and computer software, of lawfully-made copies by the owner of the copy. (Section 109.)
- Performance or display of works in a class, church service, governmental body, or agricultural organization. (Section 110.)
- Playing a radio in a public section of a business. (Section 110(5).)
- Making copies or adapting computer software as needed to run on a machine, and making archive copies of computer software. (Section 117.)
- Taking pictures of an architectural work from a public place. (Section 120.)

Each of these exceptions pertain to particular classes of copyrighted works and have specific conditions that must be met. (Some read like the tax code.) And some limit other permissible activities. For example, Section 117, which permits adaptations of computer software, requires that the copyright owner authorize any transfers of the adaptations, contrary to the general “first sale” provisions of Section 109.

“Fair Use.” But Congress could not write every exception into the statutes, and even if it could, that would result in a law that was too confining. So, it put in a “safety valve” provision that provides a defense to copyright infringement based on a court’s evaluation of four factors.⁵ But in setting down those factors, Congress noted that:

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though in no case definitive or determinative, provide some gauge for balancing the equities. These criteria have been stated in various ways, but essentially they can all be reduced to the four standards which have been adopted in section 107.⁶

The four factors, along with a short indication of their nature, are:

- The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. “The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”⁷

- The nature of the copyrighted work. “In general, fair use is more likely to be found in factual works than in fictional works.”⁸
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole. “There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use. In some instances, copying a work wholesale has been held to be fair use, while in other cases taking only a tiny portion of the original work has been held unfair.”⁹
- The effect of the use upon the potential market for or value of the copyrighted work. This has been characterized as “undoubtedly the single most important element of fair use.”¹⁰

Each of the four factors listed above must be considered in determining fair use, but all four factors need not be met, nor must all four factors be weighted equally by the court. Often, the first two factors color the consideration of the others.

GOING BEYOND “TRANSFORMATIVE” USE

Originally, fair use was restricted to “productive” or “transformative” uses – those where a new work is created using a small portion of a previous work. In its last word on fair use, the Supreme Court noted the special nature of transformative works.

The enquiry here may be guided by the examples given in the preamble to Section 107, looking to whether the use is for criticism, or comment, or news reporting, and the like. The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely “supersedes the objects” of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.” Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the

more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.¹¹

Economic Fair Use. Court decisions have started to find fair use when the entire work has been copied with little or no change, often based on an economic justification. In its *Betamax* decision,¹² the Supreme Court found that recording copyrighted TV shows for playback shortly after they were broadcast was a fair use. The fundamental difference between the opinion and the dissent was whether a work had to be transformative for it to be a fair use or not. The Court found that the complete copying, without change, of a broadcast television program for playback soon after it was recorded was a fair use, even though it was not transformative, because there was little or no harm to the copyright owners.¹³

In fact, the Court noted the district court’s determination that “It is not implausible that benefits could also accrue to plaintiffs, broadcasters, and advertisers, as the *Betamax* makes it possible for more persons to view their broadcasts.”¹⁴ But to avoid commercials with the *Betamax* recorder at issue, you had to either pause the recording or fast-forward over the recorded commercial. Both required viewing the commercial, perhaps with more concentration than when watching live TV so that the start of the next program segment was not missed. Since fair use determinations are very fact-specific, it is not clear whether the *Betamax* determination would hold for a recorder that automatically skips commercials. Certainly, it could no longer be said that benefits would accrue to the advertisers who are paying for the programming but whose commercials would not be seen.

Fair Use Of Necessity. In addition to “transformative fair use” and “economic fair use,” there can be “fair use of necessity,” particularly for works in digital form. Intermediate copies are made when the work is read from a disk into the computer’s memory so that it can be executed or be used as data by an executing program. Other intermediate copies are made in buffers as the work is being sent and received on a network, and in the memory of the routers that are used to pass the information along the network. The world of digital works encompasses countless intermediate copies as the

works are being seen, heard, or used. Congress recognized the need for making such copies when running a computer program,¹⁵ but not for digital works in general. Because those intermediate copies would violate the reproduction right,¹⁶ and because they are not addressed in a statutory permissible use, the only legal justification for such necessary copying is fair use.

When faced with the need to create an intermediate copy through disassembly of a computer program so that unprotected aspects of the program could be studied, two appellate courts found that the technical necessity of making the copies supports a finding of fair use.¹⁷

FAIR TODAY, UNFAIR TOMORROW

But when fair use is based on economic considerations, what is a fair use can change when the underlying economic factors change.

In *Williams & Wilkins v. U.S.*,¹⁸ the court found that the copying of medical articles by government libraries was a fair use, in part because of the difficulty in paying royalties to copyright owners whenever a copy is made. The court doubted that a viable license system “can be created without legislation,” and Congress didn’t seem inclined to create a new

compulsory licensing scheme. But four years later, publishers and others established the Copyright Clearance Center¹⁹ to provide a convenient way for those copying journal articles to pay a royalty, either on a per-copy basis or under a blanket license. So when the question of copying of articles was before a court again, the copying was no longer a fair use.

Though the publishers still have not established a conventional market for the direct sale and distribution of individual articles, they have created, primarily through the CCC, a workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying. ... [I]t is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier. This notion is not inherently troubling; it is sensible that a particular unauthorized use should be considered “more fair” when there is no ready market or means to pay for the use, while such an unauthorized use should be considered “less fair” when there is a ready market or means to pay for the use.²⁰

In other words, as transaction costs get lower and licensing becomes more convenient, non-transformative fair uses shrink.

Many people discussing the *Betamax* decision forget the fact-specific nature of fair use determinations, and read it as a general condoning of “time-shifting,” the viewing of a television program some time after it was broadcast. That is clearly not the case.²¹ Some even stretch the decision to claim a general right not only



to “time-shift,” but also to “space-shift.” Each new technology or changes in the market require a new evaluation of whether a use remains fair.

FAIR USE IS NOT CONVENIENT USE

Many people concerned with “restrictions on fair use” confuse fair use with convenience. But as the Second Circuit, a leading court with respect for fair use because of the many cases coming from the music and publishing industries in New York, noted:

The Appellants have provided no support for their premise that fair use of DVD movies is constitutionally required to be made by copying the original work in its original format. Their examples of the fair uses that they believe others will be prevented from making all involve copying in a digital format those portions of a DVD movie amenable to fair use, a copying that would enable the fair user to manipulate the digitally copied portions. One example is that of a school child who wishes to copy images from a DVD movie to insert into the student’s documentary film. We know of no authority for the proposition that fair use, as protected by the Copyright Act, much less the Constitution, guarantees copying by the optimum method or in the identical format of the original. ... Fair use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user’s preferred technique or in the format of the original.²²

Very few digital rights management systems prevent transformative fair use of a work, such as including quotes from a work in a criticism, comment, or news report. An authorized user can certainly read or watch the work (after all, that is the purpose for having the work) and can transcribe text from the work into the new, productive work, not much different from including something

that you found in a library book. It may not be as convenient as pointing, clicking, and pasting, and it might not have the same quality as from digital copying, but that shouldn’t lessen its transformative or productive expression.

ADDRESSING FAIR USE

People still criticize the Digital Millennium Copyright Act (DMCA) anticircumvention provisions,²³ other proposed legislation, or digital rights management systems as restricting or eliminating “fair use.” But they seldom identify the particular fair use of concern or indicate whether they are talking about transformative fair use, economic fair use, or fair use



of necessity. Without knowing the nature of the fair use allegedly being hurt, it is impossible to assess whether their argument is valid or whether there are alternatives to lessen the impact of the restriction.

Too often, such arguments are made instead to try to piggyback some activity that people will recognize as improper, such as the copying of an entire movie, by arguing for something reasonable, like allowing a film critic to include snippets of a movie in a review.

Change a Fair Use To a Permissible Use. In the last Congress, Rep. Lofgren’s H.R. 4536 proposed adding a new permissible use to the copyright stat-

utes, addressing digital works much as Section 117 addresses computer programs, as well as extending the “first sale” doctrine of Section 109 to cover digital works.²⁴ There are problems with what she proposes,²⁵ but at least it was a starting point in removing technical necessities from fair use.²⁶

Her proposal shows the advantages of changing to a permissible use by requiring certain things to qualify for the exception. For example, her “digital first sale” required that the seller not retain a copy of the work after the sale, giving the public clear bounds on what is permissible and what isn’t, although it isn’t clear how that can be assured.

This is far better than justifying such activity under fair use, since unintended consequences can result from the interplay of fair use and the other exceptions in the copyright statutes. The Copyright Office has noted that because of the language of sections 107 and 109, “It appears that the language of the Copyright Act could lead a court to conclude that, by operation of section 109, copies of works made lawfully under the fair use doctrine may be freely distributed.”²⁷ In other words, if a recording of a television program is made because it is a fair use time-shifting under the *Betamax* decision, it might then be legally rented or sold under the first sale rules.

Or Change the Economics Of Use. For some uses, legislation may not be necessary, as we saw in the development of the Copyright Clearance Center, and how it addressed copying of journal articles by researchers.

For example, the concern about a film critic not being able to copy scenes of a movie into a review,

or instructor in a film class not being able to create a compilation disk of scenes for students, is often used to show of how the DMCA and the protection mechanism for DVDs blocks fair use.²⁸ But these are more restrictions on convenience, not on commenting on a movie or showing it to students. And convenience is not a part of fair use analysis.

To address such examples, as well as the parody or satirical movie trailers – such as “Brokeback to the Future” – that are clearly transformative uses of a



minimal part of a movie, the movie industry might follow the Copyright Clearance Center example and establish an organization that would provide clips of movies that could be used for such purposes, at a nominal royalty or perhaps gratis in some instances.

While this is not a solution that would have met the requirement of the Lofgren bill “to make publicly available the necessary means to make such noninfringing use without additional cost or burden,” it may provide a more attractive solution because it can limit misuse. The clips could be digitally watermarked so that any unauthorized copies could be traced back to their source. This would also prevent the assembling of a complete copy of a movie from

“fair use” snippets, since it would raise questions when there was a request for an uninteresting portion of a movie.

And it would make it much harder for a person to make a fair use argument for copying a movie or trafficking in a tool that decrypts movies, since there would now be a market solution for getting movie clips being circumvented by the purported “fair use.”

CONCLUSION

“Fair use” is a term tossed about in most copyright discussions today, but those using it seldom identify a particular use or indicate whether they are talking about transformative fair use, economic fair use, or fair use of necessity. Without knowing the nature of the fair use allegedly being hurt, it is impossible to assess whether their arguments are valid or whether there are alternatives to lessen the impact of the restrictions.

Those concerned about copyright “fair use” need to say what they mean, or else no meaningful discussion can take place and no solution to their concerns can be found.

ENDNOTES

1. *Folsom v. Marsh* (9 F.Cas. 342, C.C.D. Mass. 1841).
2. *Dellar v. Goldwyn*, 104 F.2d 661, 662 (2d Cir. 1939).
3. 17 U.S.C. § 106.
4. See 17 U.S.C. § 108-122.
5. See 17 U.S.C. § 107.
6. H.R. Rep. No. 94-1478, at 65.
7. *Harper & Row v. Nation*, 471 U.S. 539, 562 (1985).
8. *Stewart v. Abend*, 485 U.S. 207, 237 (1990).
9. *Maxtone-Graham v. Burtshaell*, 803 F.2d 1253, 1263 (2d Cir. 1986), citations omitted.
10. *Harper & Row v. Nation*, 471 U.S. 539, 567 (1985).
11. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 578-579 (1994), the “2 Live Crew” case.
12. *Sony v. Universal City Studios*, 464 U.S. 417 (1984). The movie studios claimed that Sony was a contributory infringer because it supplied the Betamax VCR used to make infringing copies of TV shows. The Court held that because there were substantial noninfringing uses for the VCR, including recording permitted by some shows’ copyright owners and fair use “time-shifting,” and Sony had not intentionally induced any users’ infringements, it was not liable as a contributory infringer.
13. The Court held that “noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.” 464 U.S. at 450.
14. 464 U.S. at 454.
15. See 17 U.S.C. § 117.
16. See *MAI v. Peak*, 991 F.2d 511 (9th Cir. 1993).
17. “When the nature of a work requires intermediate copying to understand the ideas and processes in a copyrighted work, that nature supports a fair use for intermediate copying.” *Anari v. Nintendo*, 975 F.2d 832, 843 (Fed. Cir. 1992); “We conclude that where disassembly is the only way to gain

access to the ideas and functional elements embodied in a copyrighted computer program and where there is a legitimate reason for seeking such access, disassembly is a fair use of the copyrighted work, as a matter of law.” *Sega v. Accolade*, 977 F.2d 1510, 1527-1528 (9th Cir. 1992).

18. 487 F.2d 1345 (Ct. Cl. 1973).
19. <http://www.copyright.com>.
20. *American Geophysical Union v. Texaco*, 60 F.3d 913, 930-931 (2d Cir. 1993) (citations omitted).
21. Justice Brennan, one of the five justices in the majority, felt that “library building” of shows was different from time-shifting, and would not be a fair use. While the dissent discusses librarying, the opinion only mentions it in footnote 39, which refers to a nonexistent section of the opinion. See Lee Hollaar, “Sony Revisited: A new look at contributory copyright infringement,” <http://digital-law-online.info/papers/lah/sony-revisited.htm>.
22. *Universal City Studios v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001).
23. 17 U.S.C. § 1201.
24. Other bills just use “fair use” as an excuse for making other changes to the copyright laws. For example, in the last Congress Rep. Boucher’s H.R. 1201 proposed “fair use amendments” that would not affect what is a permissible use, but would permit circumvention to access a work if the use is noninfringing, making the circumvention-to-access provisions of Section 1201(a) redundant in light of the circumvention-to-infringe provisions of Section 1201(b). Rep. Boucher has recently introduced the latest version of his bill, also numbered H.R. 1201. While titled the “FAIR USE Act” (for “Freedom and Innovation Revitalizing U.S. Entrepreneurship Act of 2007”), it also does not address permissible uses of copyrighted works, but does add new exceptions to the DMCA whether the use is fair or not.
25. It continued the problem with the archive privilege of Section 117, requiring that all copies be “destroyed or rendered permanently inaccessible in the event that continued possession of the work should cease to be rightful.” Section 117 applies only to an “owner of a particular copy,” and therefore may not apply if the work is licensed. And having one set of rules for computer programs and another for their data is likely to cause confusion and problems, especially if the two sections diverge in later amendments.
26. Unfortunately, it also confused fair use with convenience (“DMCA failed to give consumers the technical means to make fair uses of encrypted copyrighted works”) and then allowed any circumvention of a digital rights management system to make a noninfringing use of a work, such as copying a portion of a movie into a commentary on the movie, if “the copyright owner fails to make publicly available the necessary means to make such noninfringing use without additional cost or burden.” That represents a considerable expansion of fair use which, as noted above, “has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user’s preferred technique or in the format of the original.” And since it is not possible to construct a device or computer program that can determine whether a use is fair or not, what it likely does is open the door for unfair uses.
27. U.S. Copyright Office, *DMCA Section 104 Report*, August 2001, page 155, <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.
28. In its latest round of DMCA exemption rulemaking, the Copyright Office provided that it would not be a violation to circumvention the access controls for “Audiovisual works included in the educational library of a college or university’s film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors,” although it continues to be a DMCA violation to traffic in circumvention tools even for such purposes, or to circumvent when a copyright infringement results. For information about the rulemaking, see <http://www.copyright.gov/1201/>.

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