

A citizen's legal guide to fair use in copyright law

By New Media Rights on Mon, 11/05/2007 – 14:40

[Citizen's Guide to Fair Use](#)

Don't forget to also check out our interactive educational tool the Fair Use App (launched July 2015).

Fair use means that, despite the many restrictions of copyright law, there are certain circumstances where you can use content and no permission is necessary. Fair use is absolutely critical to many common daily uses of content, for example quoting other websites on your blog or podcast. Fair use is in many ways a safe harbor, a balance to what is an increasingly inflexible copyright system designed for and by established content companies. Content companies are daily using the fear of lawsuits to squelch the exercise of your fair use rights.

This guide is dedicating to encouraging you to use your fair use rights, because these rights are granted in federal law and rooted in the U.S. Constitution.

The most important aspect of fair use is that no permission is necessary from the original content creator, which means if you use the content in certain ways, no time or money needs to be spent tracking down the original creator.

For those of you creating a blog post, a parody video, a podcast, or any other new piece of content, this means that there will be times you can jump straight into creating your new work, and that work can make use of a pre-existing work.

While reading this guide, if you're creating a piece of content to be shared on the Internet, try to keep the

following in mind:

While nothing can completely shield you from getting sued, understanding your fair use rights empowers you to explore the boundaries of your rights.

Legally speaking

While Fair Use is technically a defense one can raise when accused of copyright infringement, this “defense” carves out important exceptions that help grease the wheels of creativity.

The Fair Use section of U.S. Copyright law, Section 107, reads as follows

“...the fair use of a copyrighted work... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”

So right off the bat the law gives you indication that some uses are more likely to be fair use: teaching, news reporting, criticism, scholarship, research.

The section then cites four key factors to determine if a particular use is “fair use.” This is the test for whether a use is a fair use.

- The purpose and character of the use
- The nature of the original content
- The amount & substantiality of the original content taken – both quantitatively & qualitatively
- The effect on the market for the original

The purpose and character of the use

Is it commercial or noncommercial? If the use is noncommercial, it is simply more likely to be considered a fair use.

Public interest: Is it for a non-profit educational purpose? If so, it is at more likely to be a fair use.

The conduct of the person using the content can be at issue here: if you did something like steal the content it can matter.

Is it Transformative or Superceding?

Does the use transform the original work or does it simply replace the original work.

Transformative means uses that don't simply replace the original. such as taking a song from a legally purchased cd and ripping it for personal use on your mp3 player, or photocopying an article from a book or magazine you purchased so that you can take it to the library, this favors fair use.

Superceding means uses that simply replace the original, and favors a finding against fair use.

Note that if there is a clear licensing mechanism, this can weigh against a finding of fair use

Nature of the original content:

Is it Fact or Fiction? Fictional works simply get more protection than factual works. This has a lot to do with the fact that basic facts and ideas are not protected by copyright law. So it's more likely that your use is "fair use" if you're basing a new work off of a work of non-fiction(news reporting, a biography), rather than a work of fiction.

Is it Published or Unpublished? Unpublished gets more protection than published b/c of the right to control first publication.(Harper-no public figure exception to copyright law)

Amount taken: Did your use of the work take a lot or a little? Think both in terms of quantitatively how much you used and qualitatively how important to the work was what you took. In terms of quantity, did you simply quote one paragraph of someone's eight paragraph blog post(likely fair use), or are you reproducing their rss feed in its entirety, with no commentary, on your website(likely not fair use). Qualitatively important? Amount and substantiality of portion

used in relation to copyrighted work as a whole.

The market effect: Along with transformativeness this is one of the most important issues when fair use cases reach the courts, and is closely tied to the first factor, purpose of use.

So is your use a direct substitution for the original content – In other words, can people buy, download, or view the original content from you rather than the creator of the original content? This means even though you love the latest song from your favorite band, you can't simply post the file on your blog or website in its entirety for the world to download, even if you're not doing it for money.

The market for derivative works – even if your new work doesn't compete directly with the work you are using (you made a rap version of my country song), you may have deprived me of the opportunity to sell the song to another rap performer and thereby make money from it.

Three important caveats

1. Acknowledgments are not a defense, and do not make a use a "Fair Use". This is a myth. Please don't join some creators who have the erroneous belief that an acknowledgment somehow makes using some content a "fair use." It may be considered by a court, but is not a clear defense.

2. Disclaimers are not a legal shield either. Another point of confusion is whether an upfront disclaimer that denies any association between the content (your blog, podcast, video, image, etc.) and the copyrighted material can protect the new creator or user from liability. For example, assume you make a video podcast of the American Idol television show. Even if you include an upfront disclaimer stating "This podcast is not associated with or endorsed by Fox Television, " it will not, shield you from a claim of copyright infringement, or act as a clear defense to such a claim either.

3. Not making money doesn't necessarily make it a fair use. As we learned in the test above, the fact that a use is noncommercial, and you aren't making any money off of the use of content, doesn't mean you are protected from a claim of copyright infringement. So if you copy and distribute Spiderman 3 on Bittorrent, simply not demanding any money for it does not

Enough Legalese, let's apply Fair Use to the real (and virtual) world

Blogging

Example 1: You have a blog about the war in Iraq. You write a new blog post offering your own opinion on some of the latest events, and in that post you quote one paragraph of an Associated Press article that was a total of 8 paragraphs. Conclusion: This is almost surely a fair use. This is one of the most common applications of fair use, quoting a portion of a work. The factors weighing heavily in favor of fair use include.

There is not much taken of the original article. People who visit your blog cannot simply read the Associated Press article on your blog, therefore doesn't replace the original market (readers buying a newspaper or visiting a website).

Not only did you not take very much from the original article, but the quote also is only a portion of your own blog post. Your blog post could also be argued to fit into the protected area of news reporting,

The nature of the content in the Associated Press article is facts, not fiction, and thus generally is less protected than, say, a chapter of Harry Potter.

Example 2: Again, you have a blog about the war in Iraq. This time, you really liked today's article in the New York Times, and think your readers should see this article. You begin the blog post by stating that "the NY times ran a really good

article today talking about what is going on in Southern Iraq,” and after another sentence or two, you copy 7 of the eight paragraphs to complete your blog post. However, you provide a large link over to the New York Times original article, clearly attributing the content to the New York times and identifying the journalist who wrote the article. Conclusion: This is likely NOT a fair use. Even though it may be non-commercial, related to news reporting, and largely based on facts, your blog post would likely be considered copyright infringement. In this case a visitor to your blog basically gets the New York Times article in its entirety. So it could be argued your blog post can replace some of the market for the article, as visitors to your blog don't really need to visit the New York times to read the article. The article(seven of eight paragraphs) is printed almost in its entirety without much commentary or criticism.

Podcasting

Excerpt of examples from the ccWiki Podcasting Legal Guide (Attribution: © 2006 Colette Vogeles of Vogeles & Associates, Mia Garlick of Creative Commons and the Berkman Center Clinical Program in Cyberlaw. This Guide was produced as part of the Non-Residential Fellowship Program of the Center for Internet & Society at Stanford Law School.)

Example 1: A book group organized by a high school teacher podcasts its meeting discussing J.D. Salinger's Catcher In The Rye. The members discuss the book, read short portions of it aloud, and criticize and comment on the author's style, the storylines, and the like. The podcast is posted on the book group's blog site, which is hosted by the high school. The site includes no advertising and generates no revenue. Conclusion: This would likely be a fair use.

Example 2: A podcaster uses the copyrighted music of pianist George Winston for the intros and outros of her podcast that is about yoga and meditation. The podcast has nothing to do

with commenting or critiquing the music played. Conclusion: This is likely not a fair use.

Example 3: A 10-minute podcast includes a group of music fans discussing a recent copyrighted article in Rolling Stone magazine about a new band.

One fan reads 4 paragraphs of the 6-paragraph article and comments on its analysis of the band. Another fan plays a 1-minute segment of the band's copyrighted song, which is 2 minutes in length. The fan then discusses the music as it compares to other music in the genre. The fans post the podcast on a fan website where advertising is sold, and the fans receive revenue for their podcast.

Conclusion: This commentary/criticism by the fans in response to the article and song suggests a "fair use", but the commercial/profit aspect of the site where the podcast is being distributed raises concern, as does the amount of the article and song taken in comparison to their overall length. Any negative effect on Rolling Stone magazine's market or the band's market for its music could cut against the fair use argument, though the podcasters might argue that the podcast promotes the Rolling Stone magazine article and band's song, and that it is not a replacement for either (of course, this would likely be costly and difficult to prove in a trial setting). Given the flexible application of the fair use doctrine, and that the burden lies on the podcaster to prove fair use, podcasters in this situation could be found to infringe.