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The ONLINE COPYRIGHT TUTORIAL
Message 10: Fair Use: What Exactly Is It?
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<http://www.iupui.edu/~copyinfo/bio.html>

Message 10
FAIR USE: WHAT EXACTLY IS IT?

Fair use is both an opportunity and a source of confusion. Fair use is an essential balance to the wide range of rights that copyright law grants, and it stirs deep dissension over its meaning and role. Recall that even simple quoting can constitute an unlawful "reproduction" of the original work. Yet most often it is not unlawful; fair use can rescue many infringements and turn them into proper uses-but only within limits.

The Circumstances of Each Case

Nearly everyone will disagree on what is "fair," and no one has a definitive, legally binding "answer" to most fair-use questions. In fact, Congress deliberately created a flexible fair-use statute that gives no exact parameters. Fair use depends on the circumstances of each case.

The law offers four factors to evaluate and to balance in any determination of fair use:

- (1) the purpose of the use, including a non-profit educational purpose;
- (2) the nature of the copyrighted work;
- (3) the amount of the copying; and
- (4) the effect of the copying on the potential market for, or value of, the original work.

In applying the factors, many of us might agree that most short quotations from published works in a scholarly publication are fair use. On the other hand, the greater the excerpt quoted, for example, the less likely it will be "fair." These examples are relatively easy to grasp, but difficult questions surround more complex cases involving innovative uses of distinctive materials, such as standardized survey instruments, videotapes, or computer software.

A Case about Video Production

Let's look at one recent example. In *Higgins v. Detroit Educational Broadcasting Foundation*, 4 F. Supp. 2d 701 (E.D. Mich. 1998), the court allowed as fair use the incorporation of short pieces of a musical work into the background of a video production that was broadcast on a local PBS affiliate and sold in limited copies to educational institutions. The court looked sympathetically on the educational and public-service "purpose" of the production. The defendant used a brief "amount"-only about thirty-five seconds of a popular song-and only in the background of the opening scenes. A song is generally a creative work, so that "nature" tipped in favor of stronger protection and against fair use. The song was not actively licensed for such uses, so the use had no adverse "market effect." Three of the four factors weighed in favor of fair use, and the court ruled accordingly. The next several messages will look much more closely at this factor-by-factor analysis of fair use.

Academic Needs and No Answers

Possible "fair use" examples are innumerable. Many uses require a fresh application of the four factors, and they may never produce easy or absolute answers. Courts have provided little guidance for most educational needs. The fair use of materials in scholarly endeavors is rarely the subject of judicial decisions; the litigation costs and attorneys' fees are prohibitive. Yet courts are not insensitive to academic needs, and the fair-use statute acknowledges the importance of educational uses. Some rulings have recognized that the growth of scholarship depends on using previous works, particularly in writing biographies or history.

The next several messages will detail the meaning of the four factors and will summarize a few court cases that demonstrate what the factors mean when applied to situations relevant to education.

For further information

Fair use is the subject of numerous misconceptions and myths. The best place to begin a clear understanding of fair use is the statute itself (United States Code, Title 17, Section 107). You might be surprised to learn that the fair-use statute takes only a minute to read, and it is an

act of Congress in simple, clear language. Take a minute to read the statute, available at:
<http://www.iupui.edu/~copyinfo/sec107.html>

Secondary Sources

Crews, Kenneth D. Copyright, Fair Use, and the Challenges for Universities: Promoting the Progress of Higher Education. Chicago: University of Chicago Press, 1993. [In a shameless act of self-promotion by the principal author of this tutorial, this book is available for purchase from The University of Chicago Press, 1-800-621-2736 or <<http://www.press.uchicago.edu/cgi-bin/hfs.cgi/00/12367.ctl>>.]

Crews, Kenneth D. Copyright Law and Graduate Research: New Media, New Rights, and Your New Dissertation. Ann Arbor, MI: UMI Company, 1996. Available at: <<http://www.umi.com/hp/Support/DServices/copyright/>>. [I am happy to report that a 2000 edition of this work is complete and will soon be available from UMI.]

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