

Subject: [TUTORIAL:14] Copyright Tutorial
Date: Mon, 20 Mar 2000 15:58:22 -0500
From: "COPYRIGHT E-MAIL" <COPYRIGHT@alawash.org>
To: <tutorial@ala.org>

The ONLINE COPYRIGHT TUTORIAL
Message 11: Making Decisions About Fair Use
March 20, 2000

An Educational Service of the American Library Association
Office for Information Technology Policy

Prepared by
Kenneth D. Crews
Copyright Management Center
Indiana University-Purdue University at Indianapolis

<http://www.iupui.edu/~copyinfo/bio.html>

Message 11
MAKING DECISIONS ABOUT FAIR USE

We have taken a brief look at the four factors in the fair-use statute, and now you are wondering: Is my proposed activity within "Fair Use"?

Balancing the Factors

If you conclude that the work you intend to use in your project is protected by copyright law, you must then assess whether your proposed use is "fair" based on the four factors in the statute. If it is not within fair use, you generally must seek permission from the copyright owner, a process to be described in a later message. Consider again the four factors of fair use and their possible application to your needs. Keep in mind that all four factors-and other possible circumstances-work together in the fair-use equation. You need not satisfy all four factors; courts balance them to identify their overall leaning-in favor of or against fair use.

Be careful as well not to reach hasty conclusions, such as assuming that all academic uses are "fair" or that commercial uses cannot be fair use. Your use might well be a "favored purpose," such as nonprofit education, but the other three factors may lean against fair use and

outweigh the first factor. Let's take a closer look at the first factor.

Purpose and Character of the Use

Congress explicitly favored nonprofit educational uses over commercial uses. Copies used in education, but made or sold at monetary profit, may not be so strongly favored. Courts also favor uses that are "transformative" or that are not mere reproductions; fair use is more likely when the copyrighted work is "transformed" into something new or of new utility. Examples might be quotations incorporated into a paper, or perhaps pieces of a work mixed into a multimedia product for your own teaching needs or included in commentary or criticism of the original.

Transformative Purpose

In the recent decision of *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116 (C.D. Cal. 1999), the court found that a "thumbnail" image of a larger photograph could be a "transformative" use. The case involved a website that used an automated "crawler" to scour the Web for visual images and to index those images in thumbnail form. Users would view the thumbnail images with the website's search engine. The court held that the thumbnail image of a copyrighted photograph "is very different from the use for which the images were originally created." The thumbnail is a "transformative" use of the larger image.

A "transformative" purpose can be important in many fair-use analyses, but multiple copies of some works are specifically allowed for teaching purposes, even if not "transformative." The Supreme Court recently noted that possibility by focusing on these key words in the statute: fair use can apply to "multiple copies for classroom use." [See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 n.11 (1994)].

Remember, you still need to balance your findings here with the other three factors. The next message will examine those factors of fair use.

For Further Information

The text of the fair-use statute:
<http://www.iupui.edu/~copyinfo/sec107.html>

Consortium for Educational Technology in University Systems (CETUS). *Fair Use of Copyrighted Works: A Crucial Element in Educating America*. Seal Beach, CA: California State University Chancellor's Office, 1995. [Joint project of California State University, State University of New York, and City University of New York; the author of this tutorial also wrote much of this publication, so

you will find some similarities]. Available at:
<<http://www.cetus.org/fairindex.html>>.

Copyright 2000, Kenneth D. Crews

Disclaimer

This Online Copyright Tutorial is a service of the American Library Association and the American Association of Law Libraries. It is not legal advice. It is for information only and will not necessarily provide answers to the copyright issues that arise in any particular situation. Moreover, it does not address the many legal issues, other than copyright, that may also apply to a given situation. The content of these messages is principally the work of Kenneth D. Crews, Associate Professor of Law and of Library and Information Science at Indiana University. The views expressed in these messages are not necessarily the views of either ALA or AALL.

While Professor Crews and ALA and AALL have taken reasonable steps to assure that the information in these messages is accurate, we give no warranty of accuracy or completeness. In fact, you can be sure that the information presented here is far from complete. This tutorial is meant to be brief and easy to read; as a result it does not reflect the deep and technical details of the law. If you are seeking advice for your particular needs, you should consult a lawyer.