

Subject: [TUTORIAL:15] Copyright Tutorial
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The ONLINE COPYRIGHT TUTORIAL
Message 12: Three More Factors of Fair Use
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<http://www.iupui.edu/~copyinfo/bio.html>

Message 12
THREE MORE FACTORS OF FAIR USE

Remember that fair use depends on a balancing of four factors set forth in the statute. Take another look at Section 107 of the Copyright Act:
<http://www.iupui.edu/~copyinfo/sec107.html>

The previous message summarized the first factor-the purpose of the use.

This message will summarize the remaining three factors.

Factor Two:
The Nature of the Copyrighted Work

This factor examines characteristics of the work being used. What are the qualities or attributes of the book you are copying, the Web pages you are downloading, or the music you are performing? Many characteristics of a work can affect the application of fair use. For example, several recent court decisions have concluded that the unpublished "nature" of historical correspondence can weigh against fair use. The court reasoned that copyright owners should have the right to determine the circumstances of "first publication." The authorities are split, however, on whether a published work that is currently out of print should receive special treatment. (Note that "out of print" is not the same as "no longer protected by copyright.")

Courts more readily favor the fair use of nonfiction rather than fiction or other "more creative" works. A creative audiovisual work or software

program may generally be less appropriate for fair use than might a published sociology text. In the Higgins case described in the previous message, the court found that a musical work is "creative" and tipped this factor against fair use.

Factor Three:

The Amount and Substantiality of the Portion Used

Amount is measured both quantitatively and qualitatively. No exact measures of allowable quantity exist in the law. Rules about word counts and percentages have no place in the law of fair use. At best, they are interpretations intended to streamline decisions about fair use. If you accept such standards, your task of evaluating a situation may be eased, but you sacrifice the law's flexibility in return.

Quantity must be evaluated relative to the length of the entire original and the amount needed to serve a proper objective. Amount must also be viewed in light of the "nature" of the work being used; some works are given greater protection, while other works are meant for future users to build upon.

Sometimes you need to use an entire work, a fact that generally works against fair use. One court has ruled that a journal article alone is an entire work, and copying of an entire work at least in a commercial setting weighs heavily against fair use [American Geophysical Union v. Texaco Inc., 60 F.3d 913 (1994)].

Pictures generate serious controversies regarding this factor, because a user nearly always wants the full image or the entire "amount." One court cautioned that even the use of fleeting images of artistic works in the background of a television production might be a small "amount," but still not outweigh other factors against fair use [Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70 (2d Cir. 1997)]. On the other hand, the Kelly case mentioned in Message 11 noted that a low-resolution "thumbnail" image might be important for swaying the "amount" and "effect" factors toward fair use.

Motion pictures are also problematic because even short clips may borrow the most extraordinary or creative elements. One may reproduce only a small portion of any work but still take "the heart of the work," such as the crucial chariot race from "Ben Hur."

What might we conclude about "amount"? Shorter excerpts from works are more likely to be fair than longer pieces. Keep the amount consistent with the educational purpose you may have identified with respect to the first factor. Bear in mind that even if you are copying the "whole article" or digitizing the "heart" of the work, this factor is only one of four factors.

Factor Four:

The Effect of the Use on the Market for or Value of the Original

Effect on the market is perhaps more complicated than the other three factors. Some courts have called it the most important factor, although such statements are often difficult to validate. This factor fundamentally means that if you make a use for which a purchase of an

original theoretically should have occurred-regardless of your personal willingness or ability to pay for such purchase-then this factor may weigh against fair use. Occasional quotations or photocopies may have no significant adverse market effects, but reproductions of software and videotapes can make direct inroads on potential sales of those works.

The "effect" factor is closely linked to your "purpose." If your purpose is research or scholarship, market effect may be difficult to prove. If your purpose is commercial, then market harm is presumed. More works, however, are being marketed for the academic community, leading to arguments that even educational uses have direct adverse market consequences.

In the next messages, we will see how courts have applied these factors in actual decisions.

For Further Information

Crews, Kenneth D. "Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright." *Arizona State Law Journal* 31 (Spring 1999): 1-93.

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