

BASICS OF COPYRIGHT LAW

WHAT IS A COPYRIGHT?

WHAT IS PROTECTED?

WHAT IS NOT PROTECTED?

WHAT IS FAIR USE?

Slides from a UH lecture

- Professor Payne
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WHAT IS COPYRIGHT?

“Legal right...grants the creator of an original work...exclusive rights...to its use and distribution...for a limited time...”

“Original Works of Authorship Fixed In Any Tangible Medium”

“No registration with Copyright Office required. You are the owner if you created it!”

EXCLUSIVE RIGHTS

FIVE EXCLUSIVE RIGHTS:

1. Reproduction,
2. Distribution,
3. Public Display,
4. Public Performance, And
5. The Creation Of Derivative Works.

HOW LONG IS WORK PROTECTED?

- Currently, your life PLUS 70 years
 - Rules different for works PRIOR to 1978 or Post 1977
- If in “public domain”, No More Protection
 - Public Domain:
 - It is a work of the United States government
 - It is simply facts or other non-protectable work
 - The copyright has expired

Timeline

- Copyright Act of 1790, the 14-year term was renewable for one additional 14-year term, if the author was alive at the end of the first 14 years. And it only applied to maps, charts and books.
- 1831 it was changed to 28 years with a 14 year renewal
- 1909 copyright duration became 28 years with a 28 year renewal equaling 56 years.
- In 1976, Congress authorized a major overhaul of the copyright system
 - Moment of creation
 - Author(s) life plus 70 years after death

WHAT IS PROTECTED?

- Literary works (all works expressed in writing both in print and digital form, however formally or informally recorded)
- Computer software (considered to be literary works)
- Pictorial, graphic and sculptural works (e.g., paintings, drawings, carvings, photographs, clothing designs, textiles)
- Architectural works (e.g., buildings themselves as well as blueprints, drawings, diagrams and models)
- Sound recordings (e.g., songs, music, spoken word, sounds and other recordings)
- Audiovisual works (e.g., live action movies, animation, television programs and videogames)
- Pantomimes and choreographic works (e.g., the art of imitating or acting out situations, and the composition of dance movements and patterns, including those accompanied by music)
- Dramatic works and accompanying music (e.g., plays and musicals)

WHAT IS NOT PROTECTED?

- Works that have not been fixed in a tangible medium of expression (not written, recorded or captured electronically)
- Titles, names, short phrases and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listings of ingredients or contents
- Ideas, procedures, methods, systems, processes, concepts, principles, discoveries or devices, as distinguished from a description, explanation or illustration
- Works consisting entirely of information that are natural or self-evident facts, containing no original authorship, such as the white pages of telephone books, standard calendars, height and weight charts, and tape measures and rulers
- Works created by the U.S. Government
- Works for which copyright has expired; works in the public domain

FAIR USE: 4 FACTORS

1. Purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. Nature of the copyrighted work;
3. Amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. Effect of the use upon the potential market for or value of the copyrighted work.

FAIR USE-WHAT TO CONSIDER

1. What is the purpose?
 - Parody, News report, Scholarship, Research, Criticism, Education, Comment
2. What is the nature?
 - To Educate, Published, Fact Based or False
3. What is the Amount?
 - Enough to Educate, Minimal Use, Minor to Importance of Work
4. What is the Effect?
 - Available License(s), Few Copies, Does not Impair Market, No Similar Products by Owner,

FACTOR 1: THE PURPOSE AND CHARACTER OF THE USE

- Nonprofit educational purposes are generally favored over commercial uses. Not all nonprofit educational uses are “fair.” A finding of fair use depends on an application of all four factors, not merely the purpose.
- Purposes: criticism, comment, news reporting, teaching, scholarship, or research. These activities are also common and important at the university.
- Courts favor uses that are “transformative,” or that are not merely reproductions. Fair use is more likely to be found when the copyrighted work is “transformed” into something new or of new utility, such as 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

FACTOR 2: THE NATURE OF THE COPYRIGHTED WORK

- How is work being used. Law gives wide scope of use, depending on the characteristics or attributes of the work. For example, the unpublished “nature” of a work, such as private correspondence or a manuscript, can weigh against a finding of fair use.
- Courts hold copyright owners should have the right to determine the circumstances of “first publication.” Use of a work that is commercially available specifically for the educational market is generally disfavored and is unlikely to be considered a fair use.
- Courts usually give greater protection to creative works; consequently, fair use applies more broadly to nonfiction, rather than fiction. Courts are usually more protective of art, music, poetry, feature films, and other creative works than they might be of nonfiction works.

FACTOR 3: THE AMOUNT OR SUBSTANTIALITY OF THE PORTION USED

- There are not exact quantity limits, generally the more you use, the less likely you are within fair use.
- “Amount” used is usually evaluated relative to the length of the entire original and in light of the amount needed to serve a proper objective. However, sometimes the exact “original” is not always obvious. A book chapter might be a relatively small portion of the book, but the same content might be published elsewhere as an article or essay and be considered the entire work in that context.
- “Amount” measured in qualitative terms. Courts have ruled that even uses of small amounts may be excessive if they take the “heart of the work.” For example, a short clip from a motion picture may usually be acceptable, but not if it encompasses the most extraordinary or creative elements of the film. Similarly, it might be acceptable to quote a relatively small portion of a magazine article, but not if what you are quoting is the journalistic “scoop.” On the other hand, in some contexts, such as critical comment or parody, copying an entire work may be acceptable, generally depending on how much is needed to achieve your purpose.
- Photographs and artwork often generate controversies, because a user usually needs the full image, or the full “amount,” and this may not be a fair use. On the other hand, a court has ruled that a “thumbnail” or low-resolution version of an image is a lesser “amount.” Such a version of an image might adequately serve educational or research purposes.

FACTOR 4: THE EFFECT OF USE ON POTENTIAL MARKET FOR OR VALUE OF WORK

- If you could have purchased or licensed the copyrighted work, this weighs against finding of fair use.
- Check the market to see if this is reasonably available for purchase or licensing. Work is reasonably available if you are losing a large portion of a book for sale at typical market price
- Effect is linked to purpose, ie research or scholarship (market effect may be difficult to prove); if commercial (then adverse market effect may be easier to prove)
- Occasional quotations or photocopies may have no adverse market effects, but reproductions of entire software works and videos can make direct inroads on the potential markets for those marks

FAIR USE-BALANCE TEST

- Evaluate, apply, and weigh in the balance:
 - the nature of the copyrighted work,
 - the amount or substantiality of the portion used,
 - and the potential impact of the use on the market or value of the work.
- This flexible approach to fair use is critical in order for the law to adapt to changing technologies and to meet innovative needs of higher education.
- Not all factors need to weigh either for or against fair use, but overall the factors will usually lean one direction or the other. Also, the relative importance of the factors is not always the same.