

Fair Use of Copyrighted Works

Copyright Information

Permission is hereby granted to reproduce and distribute copies of this publication for nonprofit educational purposes, provided that copies are distributed with all files unaltered, that the source is credited, and that this copyright notice is included on each copy. This permission is in addition to rights granted under Sections 107, 108, and other provisions of the U.S. Copyright Act.

This is an electronic version (PDF) of the pamphlet, Fair Use of Copyrighted Works.

To simplify management of this project, the copyright to this work is held by the Trustees of CSU for the benefit of CSU, SUNY and CUNY.

Fair Use of Copyrighted Works *A Crucial Element in Educating America*

This document contains the Fair Use of Copyrighted Works, a pamphlet published by CETUS. It was put together by the Working Group on Ownership, Legal Rights of Use and Fair Use of the CSU-SUNY-CUNY Joint Committee. It also contains links to fair-use guidelines and other resources that are intended to promote a fuller understanding and appreciation of copyright laws.

Fair Use of Copyrighted Works

Contents

- Introduction
- The Imperative for University Action on Copyright
- University Guidelines for Intellectual Property
- Fair Use and the Pursuit of Higher Education: A Statement of Principle
- Fair Use: Overview and Meaning for Higher Education
- Illustrative Scenarios
- Obtaining Permissions
- A Listserve Opportunity
- Working Group

Fair Use and Copyright: Places to look for more information

- [Copyright Act](#)
- [Copyright Clearance Center \(CCC\) Copyright Statement](#)
- [CCC Online Copyright Information](#)
- [Copyright: Coalition for Networked Information](#)
- [Copyright Registration](#)
- [Multimedia Law Handbook: A Practical Guide for Developers and Publishers](#)
- [Copyright Office Home Page](#)

The overall effort, of which this pamphlet is a part, is being advanced by CETUS (Consortium for Educational Technology for University Systems), which is comprised of California State University, State University of New York, and the City University of New York.

Fair Use: Introduction

Introduction

The Chief Executives of the California State University (CSU), the State University of New York (SUNY), and the City University of New York (CUNY) have identified copyright and intellectual property as central issues that will increasingly affect the future of American public higher education. Further, they have agreed to work together on these important educational issues in an effort to assist higher education across the nation. This pamphlet summarizes the initial results of the CSU-SUNY-CUNY Work Group on Ownership, Legal Rights of Use and Fair Use.

This pamphlet addresses three important points. First, higher education will benefit by the formation of a national alliance focused on fair use. Second, the effectiveness of higher education requires a thorough understanding of the fair-use doctrine. Finally, faculty, in particular, necessarily apply the fair-use doctrine as they perform their work.

The CSU-SUNY-CUNY systems of higher education actively seek alliances with other colleges, universities, professional associations, government agencies, and private companies engaged in advancing the educational opportunity to further an understanding of intellectual property rights and the critical role of fair use in teaching, learning, and scholarship. Primarily, we must uphold the principles of fair use for the long-term vitality of our nation.

The Imperative for University Action on Copyright

Copyright is at a critical juncture, and universities have an extraordinary opportunity to influence the development of the law and related practices as they affect higher education. If universities fail to provide initiative on copyright issues, other parties will exert their influence to shape the law for purposes which do not necessarily advance teaching, learning, and scholarship.

The latest developments in copyright law are a direct response to changing educational needs and innovative technologies. New technology allows digital conversion of images and text, creation of multimedia composite works, transmission of data to remote locations, and teaching students far beyond the campus bounds. These activities are often central to innovative and effective scholarship; they also are imperative to the exchange of ideas and to the success of America's commitment to mass higher education in a democratic society.

Several recent events dramatize the fluid state of copyright law, the opportunity for change, and the fragility of the university's interest in safeguarding fair use for the innovative deployment of essential information resources.

Erosion of Fair Use

A series of court rulings threatens the application of fair use to such common pursuits as photocopying for research, teaching, learning, scholarship, and even quoting from historical manuscripts. The reasoning in these cases will no doubt extend to newer technologies. More materials are farther from the reach of faculty, librarians, and students, and the availability of those materials for study increasingly will be subject to payment of a license fee.

The NII Task Force

The federal government has established the National Information Infrastructure (NII) Task Force, which has examined the application of copyright law to digital storage and communication of information resources. The Task Force issued a report in September 1995 which includes proposals for revision of the Copyright Act as applied to the "information superhighway." On the whole, those proposals would likely strengthen the rights of copyright owners without commensurate allowance of fair use.

Copyright Revision Bills

Other interest groups are expected to submit independent proposals for copyright revision. When these proposals do not further the university's academic mission, universities are obliged to actively oppose such bills. Accordingly, universities must support legislation which promotes the fair use of copyrighted works.

License Agreements

Based on recent court rulings and on the common means for marketing electronic information resources, universities will acquire an increasing amount of material pursuant to license agreements. Our successful use of these new resources will depend on a thorough grasp of the law as well as the ability to negotiate fair contracts. Universities must be prepared to negotiate license and contract terms which are in the best interests of the educational process.

Redefining Ownership

Universities today face the need to redefine the ownership of copyrighted works created by faculty and staff. Too often, this issue can become mired in conflict and rooted in simplistic all-or-nothing proposals. By refocusing this pattern of debate and by bringing a fresh perspective to these issues, universities have the opportunity to creatively address ownership. Creative approaches are more likely to serve the interests of all the parties who are associated with the educational process.

University Guidelines for Intellectual Property

The management and administration of matters related to university contracts, policies, and guidelines which bear on the creation, ownership, storage, and use of intellectual properties should:

- Foster the creation of the best possible quality new intellectual properties so as to further the academic mission of higher education.
- Foster the dissemination of new knowledge and the maintenance of high academic standards.
- Provide incentive for university faculty, staff, and students to fully participate in the use and creation of intellectual properties.
- Recognize that newly created intellectual properties in a university setting come in a wide variety of old and new types and arise in a wide variety of specific contexts. Nonetheless, strong mutual interests are shared among the university, the faculty, the staff, and the students in the appropriate allocation of the ownership rights associated with such intellectual properties.
- Support the concept that the ownership of intellectual property rights is not necessarily an "all-or-nothing" proposition. Rather, the set of rights that belongs to the owners of intellectual properties may be allocated so as to optimally support the mutual interests of the university, faculty, staff, and students.
- Foster within the university community the continued collective and individual ability to access, acquire, and store information and works, to help scholars and students in the proper use and citation of the works of others, and to maintain coordination and contact with the world of publishers and other information providers.

- Appropriately adapt university contracts, policies, and guidelines so as to address the challenges and opportunities presented as technologies and cultures continue to evolve and affect the practices of higher education.

Fair Use and Higher Education: A Statement of Principle

The Need to Address Fair Use

It is urgent, timely, and in the best interests of higher education that our universities raise a coordinated voice to address the topic that is known as the "fair use" of copyrighted works. The fair-use doctrine is under debate now in several different forums -- locally, nationally, and internationally. The debate involves both public and proprietary interests. It arises because of the changing dynamic between the broad sweep of "intellectual properties" and the deployment of powerful and rapidly evolving communications techniques and infrastructures. These developments already have demonstrated their significant consequences for higher education and will have more pervasive effects in the future. Thus, we advance this statement of educational principle.

The Legal Framework of Fair Use

Fair use today is embodied in Section 107 of the U.S. Copyright Act and it exempts limited uses of materials from infringement liabilities. As detailed in Section 4 of this pamphlet, the full text of the fair-use statute makes clear that the right of fair use is specifically applicable to teaching, research, and scholarship, and that its scope depends on the four statutory factors. These four factors are open to diverse interpretations; the law offers virtually no details for determining which activities may be safely allowed.

The Statement of Principle

The law's flexibility is an opportunity and a challenge. It is an opportunity to expand and apply the fair-use doctrine to diverse and changing requirements in an effort to be fair to all parties. It is also a challenge to apply fair use amidst relative uncertainty, and new interpretations often do not favor educational needs. The four principles stated below serve to focus attention on these needs.

Higher education's legitimate right to use copyrighted works must be protected.

The fundamental mission of higher education is to advance and disseminate knowledge. This mission is realized through the use of various information formats, learning environments, and modes of delivery without unreasonable copyright restrictions. The goals and objectives that we set in order to accomplish our mission require the ability to explore, analyze, and exchange information. The effectiveness of our work depends on our right to make creative and balanced fair use of copyrighted works.

To succeed, all members of the college and university community must have reliable access to a wide variety of materials for teaching, learning, scholarship, and personal study. The materials also need to be stored and retrieved across the full range of the ever-richer diversity of useful electronic and traditional formats.

Fair use in the electronic era must allow those processes when and where they are needed, without burden of myriad negotiated transactions, and consistent with the constitutional objective that copyright "promote the progress of science."

Freedom of access to information, regardless of its format, is essential for the creative and learning processes. (emphasis added)

Higher education must make use of the full range of means for accessing and utilizing various works which are protected by copyright law in both electronic environments and in traditional environments. Fair use is a

historically important doctrine which is essential to fulfilling our higher education objectives. Fair use allows the academy to respond to the dynamic nature of the educational process and to the evolving formats of information resources. Fair use allows an otherwise rigid copyright system to respond to the fluctuating volume of available information and to the changing demands for its use. Fair use allows all members of the university community to sample the broadest possible range of ideas, to build new works upon the old, and to facilitate equal access to copyrighted works within the reasonable limits of the law.

Higher education's right of fair use in the electronic era must continue unencumbered by terms of licenses or transaction fees.

Fair use is the crucial legal provision that allows our educational system to be assured of enriching the student experience and of realizing its research objectives with the widest array of knowledge and insights. It provides the necessary educational opportunity that enables our institutions of higher education to prepare students for success in the world economy.

Colleges and universities have supported, and will continue to support, the economic and creative incentives of copyright owners. But higher education also must support an expansive and flexible view of fair use in order to assure the fullest possible sharing of knowledge and to meet the unpredictable demands of teaching, learning, and scholarship, regardless of information format, learning environment, or mode of delivery.

Higher education has an obligation to educate its constituencies about intellectual properties and about the lawful uses of copyrighted material.

The remainder of this document is presented as a first step in the discharge of this educational obligation among the constituencies of higher education. In this regard, it is important for higher education to take the initiative in an effort to achieve the appropriate balance in matters related to the evolving interpretation of the fair-use doctrine.

Fair Use: Overview and Meaning for Higher Education

Copyright law begins with the premise that the copyright owner has exclusive rights to many uses of a protected work, notably rights to reproduce, distribute, make derivative works, and publicly display or perform the work. But the Copyright Act also sets forth several important exceptions to those rights. Key statutes make specific allowance for concerns such as distance learning, backup copies of software, and some reproductions made by libraries. The best known and most important exception to owners' rights is fair use.

The Fair-Use Statute

The following is the full text of the fair-use statute from the U.S. Copyright Act.

Section 107 of the Copyright Act of 1976. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified in that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. (Emphasis added)

The Meaning of the Four Factors

While fair use is intended to apply to teaching, research, and other such activities, a crucial point is that an educational purpose alone does not make a use fair. The purpose of the use is, in fact, only one of four factors that users must analyze in order to conclude whether or not an activity is lawful.

Moreover, each of the factors is subject to interpretation as courts struggle to make sense of the law. Some interpretations, and their subsequent reconstruction by policy-makers and interest groups, have been especially problematic. For example, some copyright analysts have concluded that if a work being used is a commercial product, the "nature" factor weighs against fair use. By that measure, no clip from a feature film or copy from a trade book could survive that fair-use factor. Similarly, some commentators argue that if a license for the intended use is available from the copyright owner, the action will directly conflict with the market for licensing the original. Thus, the availability of a license will itself tip the "effect" factor against fair use. Neither of these simplistic constructions of fair use is a valid generalization, yet they are rooted in some truths under limited circumstances. Only one conclusion about the four factors is reliable: each situation must be evaluated in light of the specific facts presented.

The following are brief explanations of the four factors from the fair-use statute. All four factors which affect fair use must be taken into account before reaching a conclusion.

Purpose

Congress favored nonprofit educational uses over commercial uses. Copies used in education, but made or sold at monetary profit, may not be 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, such as quotations incorporated into a paper, and perhaps pieces of a work mixed into a multimedia product for your own teaching needs or included in commentary or criticism of the original. For teaching purposes, however, multiple copies of some works are specifically allowed, even if not "transformative." The Supreme Court underscored that conclusion by focusing on these key words in the statute: "including multiple copies for classroom use."

Nature

This factor examines characteristics of the work being used. It does not refer to attributes of the work that one creates by exercising fair use. 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 courts 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. Courts more readily favor the fair use of nonfiction rather than fiction. Commercial audiovisual works generally receive less fair use than do printed works. A consumable workbook will most certainly be subject to less fair use than a printed social science text.

Amount

Amount is both quantitatively and qualitatively measured. No exact measures of allowable quantity exist in the law. Quantity must be evaluated relative to the length of the entire original and the amount needed to serve a proper objective. One court has ruled that a journal article alone is an entire work; any copying of an entire work usually weighs heavily against fair use. Pictures generate serious controversies, because a user nearly always wants the full image or the full "amount." Motion pictures are also problematic because even short clips may borrow the most extraordinary or creative elements. One may also reproduce only a small portion of any work but still take "the heart of the work." The "substantiality" concept is a qualitative measure that may weigh against fair use.

Effect

Effect on the market is perhaps even more complicated than the other three factors. Some courts have called it the most important factor, although such rhetoric is 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. "Effect" is closely linked to "purpose." If your purpose is research or scholarship, market effect may be difficult to prove. If your purpose is commercial, then effect is presumed. Occasional quotations or photocopies may have no adverse market effects, but reproductions of software and videotapes can make direct inroads on the potential markets for those works.

Weighing and Balancing the Factors

A central tenet of this analysis is that fair use is a flexible doctrine that Congress wanted us to test and adapt for changing needs and circumstances. The law provides no clear and direct answers about the scope of fair use and its meaning in specific situations. Instead, we are compelled to return to the four factors and reach creative and responsible conclusions about the lawfulness of our activities. People will always differ widely on the applicability of fair use, but any reliable evaluation of fair use must depend upon a reasoned analysis of the four factors of fair use. The four factors also need not lean in one direction. If most factors lean in favor of fair use, the activity is allowed; if most lean in the opposite direction, the action will not fit the fair-use exception and may require permission from the copyright owner.

Examples of Fair-Use Cases

While courts have ruled on many fair-use cases, few are directly related to higher education. Nevertheless, many cases do offer valuable guidance for the meaning of fair use at colleges and universities. Here is a sample of such cases, with an indication of how courts apply the four factors of fair use.

***Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F.Supp. 1522 (S.D.N.Y. 1991)**

Kinko's was held to be infringing copyrights when it photocopied book chapters for sale to students as "coursepacks" for their university classes.

Purpose: When conducted by Kinko's, the copying was for commercial purposes and not for educational purposes.

Nature: Most of the works were factual -- history, sociology, and other fields of study -- a factor which weighed in favor of fair use.

Amount: The court analyzed the percentage of each work, finding that five to 25 percent of the original full book was excessive.

Effect: The court found a direct effect on the market for the books because the course-packs directly competed with the potential sales of the original books as assigned reading for the students. Three of the four factors leaned against fair use. The court specifically refused to rule that all coursepacks are infringements, requiring instead that each item in the "anthology" be individually subject to fair-use scrutiny.

***Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986), cert. denied, 481 U.S. 1059 (1987)**

In 1973, the plaintiff wrote a book based on interviews with women about their own pregnancies and abortions. The defendant wrote his own book on the same subject and sought permission to use lengthy excerpts from the plaintiff's work. The plaintiff refused permission, and the defendant proceeded to publish his work with the unpermitted excerpts.

Purpose: Although defendant's book was published by a commercial press with the possibility of monetary success, the main purpose of the book was to educate the public about abortion and about the author's views.

Nature: The interviews were largely factual.

Amount: Quoting 4.3 percent of the plaintiff's work was not excessive, and the verbatim passages were not necessarily central to the plaintiff's market.

Effect: The court noted that the plaintiff's work was out of print and not likely to appeal to the same readers. This case affirms that quotations in a subsequent work are permissible, sometimes even when they are lengthy. Implicit throughout the case is the fact that the plaintiff was unwilling to allow limited quotations in a book that argued an opposing view of abortion; thus, fair use became the only effective means for the second author to meaningfully build on the scholarly works of others.

Encyclopaedia Britannica Educational Corp. v. Crooks, 542 F.Supp. 1156 (W.D.N.Y. 1982)

For-profit producers of educational motion pictures and videos sued a consortium of public school districts, which was systematically recording programs as they were broadcast on public television stations and providing copies of the recordings to member schools.

Purpose: The court was largely sympathetic with the educational purpose.

Nature: Although the films had educational content, they were commercial products intended for sale to educational institutions.

Amount: The defendant was copying the entire work and retaining copies for as long as 10 years.

Effect: The copying directly competed with the plaintiff's market for selling or licensing copies to schools. The court had little trouble concluding that the activities were not fair use.

American Geophysical Union v. Texaco Inc., 37 F.2d 881 (2d Cir. 1994), modified, 60 F.3d 913 (1995)

The court ruled that photocopying of individual journal articles by a Texaco scientist for his own research needs was not fair use. The court amended its opinion to limit the ruling to "systematic" copying that may advance the profit goals of the larger organization.

Purpose: While research is generally a favored purpose, the ultimate purpose was to strengthen Texaco's corporate profits. Moreover, exact photocopies aren't "transformative"; they do not build on the existing work in a productive manner.

Nature: The articles were factual, which weighs in favor of fair use.

Amount: An article is an independent work, so copying the article is copying the entire copyrighted work.

Effect: The court found no evidence that Texaco reasonably would have purchased more subscriptions to the relevant journals, but the court did conclude that unpermitted photocopying directly competes with the ability of publishers to collect license fees. According to the court, the Copyright Clearance Center (CCC) provides a practical method for paying fees and securing permissions, so the copying directly undercuts the ability to pursue the market for licensing through the CCC.

Despite an impassioned dissent from one judge who argued for the realistic needs of researchers, the court found three of the four factors weighing against fair use in the corporate context.

Illustrative Scenarios

Faculty increasingly find themselves in situations which may involve the legitimate fair use of copyrighted works. The examples below were selected from current practices in higher education and, depending on the facts, may or may not pass scrutiny under the fair-use test.

The future undoubtedly will expand on the need for appropriate fair use as a part of education. Faculty will have to consider and balance the four factors in situations such as the ones that follow.

Fair use is a flexible concept intended to be used. In any situation, the careful evaluation of the four factors will tell you whether your use is "fair" or whether you ought to seek permission from the copyright owner.

The following scenarios are intended to emphasize the growing range and escalating complexity of copyright and fair-use issues on campuses. Many readers may hope that these scenarios will give them "the clear answer to the fair-use dilemma." However, such readers will experience some inevitable degree of frustration: rarely does the law provide a clear answer that fits all cases. A fresh balancing of the four factors of fair use is the most reliable and defensible decision-making method.

Electronic Reserves

A professor has been told by students that it is difficult to obtain reserve materials because of the large number of students enrolled. As an alternative, he scans several journal articles onto the campus network and instructs the students on how to access them so that they may complete the class assignments.

Analysis

Access restrictions can have the greatest influence on tipping the factors in favor of fair use. A problem with making text available on any network is that it can be accessible by readers far beyond the intended audience of students registered in the class. Thus, restrictions on access through passwords or other systems can enable the professor to argue that the purpose is solely to benefit the students and not to provide access for others.

Restrictions can also limit the potential adverse effect on the market for the original. By limiting the range of users who may find the document, the professor can minimize or eliminate any possibility that someone will retrieve the work from the network instead of purchasing a copy. Some critics of electronic reserves have argued that the educational purpose and the minimal market effects cannot be controlled because the electronic medium allows users to print, download, and transmit copies at little cost or effort and thereby undermine the restricted access.

The professor also must watch closely the nature of the material posted on reserves and the amount of material from the original source put on reserves.

Multimedia Production/Faculty

A professor teaches a course in which she occasionally uses a piece of music, shows a picture, or plays a piece of videotape. She has lawfully obtained all of these materials and clearly may use them in face-to-face teaching under the Copyright Act. But the professor would like to reproduce these short items onto one compact disk in order to prevent their loss or deterioration, keep them organized, and show them in the class by using a single piece of equipment.

Analysis

Guidelines for such uses are currently the subject of negotiations among diverse interest groups under sponsorship of the Consortium of College and University Media Centers. In general, those guidelines would allow the creation of such a multimedia work in the name of fair use and allow its retention and use in the classroom for up to two years without permission.

One of the complex fair-use issues for multimedia production has been an understanding of its potential effect on the market for the originals. Even brief excerpts, reproduced into digital format, are sometimes said to directly undermine the ability of the creator or publisher to market or license such excerpts. Thus, making the copies would directly erode that potential market.

Also problematic is the "nature" of the different works. Some materials may be of a factual or scholarly nature and thus more amenable to fair use. Other materials used in multimedia are often professional photography, music, or motion pictures that may have a significant public market.

Multimedia Production/Student

Students in the Twentieth Century U.S. History course are asked to create an "electronic term paper" using lawfully acquired resources from the institution's library and media center. While doing research, he finds a book with just the information he needs and photocopies the bibliography and several pages of images and text. He takes the photocopies to the student computer lab and scans the material into his electronic term paper.

Analysis

Multimedia production in the hands of students solely for an individual term project will more easily pass fair-use scrutiny. If the use is limited to the one-time project, the student can easily argue that the purpose is solely educational. Short clips of non-fiction works may also receive favorable treatment under the "nature" and "amount" factors.

Moreover, because the work is for one-time use only, and not for further reproduction, broadcast, or other dissemination, the copyright owners of the materials are not likely to find a market for licensing under these circumstances. Thus, the isolated individual uses may have no significant adverse effect on the market.

Downloading or Printing a Document from the Internet

A professor is conducting research by finding materials on the Internet and locates a report that is directly relevant to his current study. The document was made available on the Internet with the copyright owner's permission, and the professor had lawful access to it. For research purposes only, the professor wants to download a copy of the document to a computer disk or print a copy on the attached printer.

Analysis

The Internet provides access to a wealth of original material and, although it is freely and easily accessible, we must assume that original materials on the Internet are protected by copyright until we learn explicitly that the copyright owner has dedicated the materials to the public domain, or the copyrights have expired. Therefore, the fair-use limits for materials found on the Internet are essentially the same as the fair use of materials disseminated by any other means.

Single copies of short items for a person's own study may fall within fair use. If a work is freely available on the Internet, making a copy will have little or no effect on its market simply because no commercial market for the work has been established or claimed. Nevertheless, some publishers have argued that the potential market for charging Internet users for each copy means that any copying hinders the market. In the meantime, copying of works that are freely accessible to the public for personal uses only will likely satisfy the "purpose" and the "effect" factors of fair use.

As with photocopying, one might reasonably conclude that the "nature" factor would favor uses of non-fiction rather than fiction, and that the "amount" factor might reasonably favor copying excerpts of longer works or copying short essays or articles rather than copying an entire book or other longer piece.

Developing a Slide Collection

A professor photographs and makes slides of a number of reproductions of artworks in a book on Italian painting and sculpture. She plans to show the slides to the students enrolled in her course.

Analysis

This scenario is much more problematic than it appears. The purpose may be clearly educational, but when a professor copies a photograph, he or she is reproducing the entire work of the copyright owner. Fair use seldom allows the reproduction of an entire copyrighted work. Further, art is highly creative, so under the "nature" factor a court may not conclude that it is the type of work meant to be reproduced to serve the purposes of fair use.

Further complicating the scenario is the contention that a photograph of a work of art actually embodies two copyrights: the first is the copyright to the original art; and the second is the copyright to the photograph of the work of art. By that standard, even if the original painting is now in the public domain, the photograph of it may still be under copyright protection.

A textbook with multiple art images is likely based on the work of many different photographers. Perhaps the most feasible method for arguing that the "amount" and "effect" factors may weigh in favor of fair use is by reproducing only a small number of images from any one textbook. Adverse effect on the market may also be minimized if the publisher does not sell either select slides or a set of slides from the textbook.

Adapting Materials for Students with Disabilities

A university serves many students with various disabilities. Certain works need to be adapted to serve their needs, perhaps by creating large print copies of some materials or by creating a closed-captioned version of a commercial educational videotape. The copyright owners have not authorized anyone to make such versions available for purchase. In addition, some of these adapted materials might be electronically delivered to disabled students in their homes.

Analysis

Adapting materials for students with disabilities raises several problems under traditional fair-use analysis. First, the students generally need the entire work, so the "amount" factor will often weigh against fair use. Students also need a wide range of materials, often including works of fiction and feature release motion pictures.

In some such instances, the "nature" of the material can weigh against fair use. Although the copyright owner may not currently market a version of the work adapted for students with disabilities, the owner may nevertheless argue that making and providing any copy under any circumstances will deprive the owner of a potential sale and create an adverse effect on the market. The making of a single copy for one-time use may have at best a limited effect on the market, but anytime such a work is disseminated in copies or otherwise distributed or broadcast to the students, the effects on the market will be compounded.

Fair-use law may ultimately protect the adaptation of short works or excerpts from longer works as may be needed to serve the requirements of specific students enrolled in specific courses. Fair use is less likely to encompass the adaptation of a full textbook or full motion picture for long-term retention in anticipation of unspecified needs.

Obtaining Permissions

The complexities of fair use require that each member of the university community learn to apply the four factors and make a sound judgment about the permissibility of quoting, photocopying, downloading, and making other uses of protected works. Invariably, however, each of us will encounter situations where we need to obtain permission from the copyright owner. Common examples where permission is ordinarily

required include photocopying an entire article or entire book chapter into a course reader that students will purchase, or mounting substantial text or graphic work onto a publicly accessible World Wide Web page.

When permission is necessary, you must contact the copyright owner or the owner's authorized agent. Often the copyright owner will be named in the formal copyright notice accompanying the original work. Such notices are no longer required to obtain copyright protection, so many works often lack the notice or include the name of someone who is not the actual or current copyright owner. Nevertheless, you should logically begin your search for the copyright owner by directly contacting the author or publisher. Reference librarians can be extremely helpful for finding names and addresses. You will also find that the quest for the copyright owner can be simplified by using your telephone to call the parties and to ask direct questions about ownership and rights of use.

The Copyright Clearance Center (CCC) can also simplify the process by acting as the agent on behalf of thousands of publishers and authors to grant permission.

Please keep in mind that copyright owners have wide discretion when responding to your request for permission. Your permission may be granted or it may be denied. It may be granted, but only on condition of paying a fee. The fee may be modest or it may be exorbitant. Copyright owners also have no obligation to respond at all. For most common uses of materials for educational and research purposes, you will often find that copyright owners will be cooperative and will understand your needs.

The following is a sample letter, with instructions, that you may adapt when requesting permission. Please remember that a telephone call before sending the letter can give you the exact name and address of the person to contact and might even give you an immediate answer to your request. Oral permission granted over the telephone is legally valid, but good practice requires that you document the permission with a letter that the grantor will sign and return to you.

A Sample Letter

[letterhead stationery or return address]

[Date]

[Name & address of addressee]

Dear [title, name]:

[If you called first, begin your letter: This letter will confirm our recent telephone conversation.] I am [describe your position] at [name of institution] University. I would like your permission to [explain your intended use in detail, e.g., reprint the following article in a coursepack for my course]. [Insert full citation to the original work.]

Please indicate your approval of this permission by signing the letter where indicated below and returning it to me as soon as possible. My fax number is set forth above. Your signing of this letter will also confirm that you own [or your company owns] the copyright to the above described material. Thank you very much.

Sincerely,

[Your name and signature]

PERMISSION GRANTED FOR THE USE REQUESTED ABOVE:

[Type name of addressee below signature line]

Date:

Instructions for Permission Letters

- Be sure to include your return address, telephone number, fax number, and the date at the top of the letter.
- Spare no effort in confirming the exact name and address of the addressee. Call the person to confirm the copyright ownership.
- Clearly state the name of your university and your position.
- Precisely describe the proposed use of the copyrighted material. If necessary or appropriate, attach a copy of the article, quotations, diagrams, pictures, and other materials. If the proposed use is extensive, such as the general use of an archival or manuscript collection, describe it in broad and sweeping terms. Your objectives are to eliminate any ambiguities and to be sure the permission encompasses the full scope of your needs.

The signature form at the end of the sample letter is appropriate when an individual grants the permission. When a company (such as a publishing house) is granting the permission, use the following signature format:

PERMISSION GRANTED FOR THE USE REQUESTED ABOVE:

[Type name of company]

By:

Title:

Date:

Fair Use: A Listserve Opportunity

A Listserve Opportunity

To facilitate an open discussion and to help track developments and points-of-view regarding fair-use scenarios, we invite your thoughts. Specifically, we invite you to join the fair-use scenarios listserve, located at fairuse-talk@calstate.edu.

To sign on to the listserv, send an e-mail message to fairuse-talk-request@calstate.edu with the single word "**subscribe**" as the body of the message. In the beginning, for economic reasons, the listserv will not be monitored. Please contribute messages with your thoughts about the evolving meaning and circumstances that are associated with the various scenarios such as those presented in Section 5.

Some might suggest that the inevitable ambiguity in scenarios can be resolved by simply deciding against fair use. While that course might reduce lawsuit potential, it is an extremely expensive choice for higher education. If such a choice reduces access to information and reduces the ability of faculty and staff to produce high-quality instructional materials, then the impact on higher education will be negative. Thus, time and effort expended on learning more about the nuances of fair use is a worthwhile investment. Please share your experiences.