

The Fair Use Doctrine

Background

“Fair use” permits the limited use of portions of a copyrighted work without the copyright owner’s permission. It exempts limited uses of materials from copyright infringement liabilities. This is allowed when the material is used for criticism, comment, news reporting, teaching, scholarship, or research.

Four statutory factors found in Section 107 of the Copyright Act need to be collectively considered to determine if the material falls under the “Fair Use” doctrine.

1. *The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes.* Note: The use of the material as part of course packets sold through the campus bookstore or through a copy center undermines the claim that this falls under “fair use” even though it is used for educational purposes.
2. *The nature of the copyrighted work.* The use of unpublished copyrighted work is less likely to be considered fair use than published work. Also, copyrighted work that is out of print is more likely to be considered fair use.
3. *The amount and substantiality of the portion used in relation to the copyrighted work as a whole.* In other words, the more substantial the amount used the weaker the case for “fair use”.
4. *The effect of the use upon the potential market or value of the copyrighted work.* The fewer copies that are produced, the less the case can be made that this negatively impacts the potential market. Does the use of this material deprive publishers and authors of royalty income? The more the new work deviates from the original, the less likely it will be considered a copyright infringement.

Again, all four factors must be considered collectively in making the determination that the use of the material falls under the “Fair Use” Doctrine.

How does the Fair-Use Doctrine Apply to Instructors?

While fair use is meant to apply to teaching situations, scholarship, and research plus the making of copies for classroom use, there is no blanket exemption from copyright liability for educational uses.

As a guideline, if material is used in just one term, it is likely to be considered fair use. However, if an instructor uses the same material over multiple terms it is less likely to be

considered fair use. If this is the case, it is expected that the instructor will obtain permission.

Since there is no specific number of words, lines or notes that may be safely taken to avoid a copyright infringement, the safest path for the instructor to take is to seek permission from the copyright owner.

The Kinko's Case

In 1989, eight book publishers filed a lawsuit against Kinko's. The case involved Kinko's photocopying of multi-page excerpts from copyrighted works including chapters of books and articles from periodicals to create coursepacks. The sale of these coursepacks to students for a profit violated the publisher's copyrights. The copied materials made up from 5 percent to 24 percent of the original works. The Court ordered Kinko's to pay damages totaling \$2 million.

It should be noted that the Kinko's case did not prohibit the sale of coursepacks. It simply prohibited the unlawful sale and reproduction of such materials without first obtaining copyright permission.

Fair Use in the Digital Environment

The same copyright protections apply when the material is in a database, a CD-ROM, on a bulletin board or on the internet. The Internet is not public domain. It contains both copyrighted and un-copyrighted material. Consequently, both faculty and students should treat all work on the Internet as if it were copyrighted.

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