By June M. Besek

Copyright: What Makes a Use "Fair"?

Fair use can raise some of the most difficult and controversial issues in copyright law. Users often wish there were clear rules to establish exactly when a use is fair and when it is not. But the ambiguity of the fair use doctrine is also its strength, because it allows courts to apply fair use to new and sometimes completely unanticipated uses of copyrighted works.

Copyright owners have certain exclusive rights, in particular the right to copy their work and to create adaptations based on the original. Those rights are not absolute, however. The law provides exceptions to permit various uses without the copyright owner's consent. Perhaps the best known is fair use, a flexible exception that allows reasonable uses that will not unduly harm the market for the original copyrighted work.

What makes a use "fair"? There is no simple formula. Some uses are favored in the law. They include criticism, comment, news reporting, teaching (including making multiple copies for classroom use), scholarship, and research. But these uses are not automatically deemed fair, nor are other uses automatically deemed unfair. Fair use depends on the facts of a particular case. The law provides four factors that must be considered in deciding whether a use is fair.

The first factor is the purpose and character of the use. Is the use commercial, or is it for nonprofit educational purposes? Although a commercial use can weigh against fair use, it is not disqualifying. Even some of the favored uses, such as news reporting or research, can be commercial. Works that transform the original by adding new creative authorship are more likely to be considered fair use, since the law favors uses that build on another work. For example, the Supreme Court found that 2 Live Crew's rap parody of Roy Orbison's song "Pretty Woman" had transformative value that outweighed its commercial aspect.[1] But even though "transforming" a work in some way can strengthen the case for fair use, it is not a requirement. Some uses are considered fair even if they involve simple reproduction.

The second factor is the nature of the copyrighted work. In general, the law is more sympathetic to copying a fact-based work—a history or a biography, for example—than it is to copying a fanciful work such as the latest Harry Potter book. Another relevant characteristic of a work's "nature" is whether or not it has been published. The scope of fair use is narrower for unpublished works than it is for published works. In finding the *Nation* magazine liable for "scooping" President Gerald Ford's memoirs and quoting brief but important passages from his work, the Supreme Court emphasized a copyright owner's right to decide whether and under what circumstances to publish his or her work.[2] Nor was the Court convinced that the copying was justified by the historical significance of the events described, which included President Ford's pardon of former President Richard Nixon. As the Court explained, "It is fundamentally at odds with the scheme of copyright to accord lesser rights to those works that are of greatest importance to the public."[3]

The third fair use factor is the amount and significance of the portion used. Generally, the more that is taken, the less likely it is to be fair use, but there are situations in which making complete copies is considered fair. For example, in the "Sony Betamax" case, the Supreme Court held that private in-home copying of free television programs for time-shifting purposes was fair use.[4]

The fourth factor used to determine if a use is fair is the effect on the potential market for or value of the copyrighted work. A use that significantly diminishes the market for the original is unlikely to qualify as fair use. A user can cause market harm even if the user does not personally profit financially. The *Kelly* and *Napster* cases, discussed below, illustrate the significance of this factor.

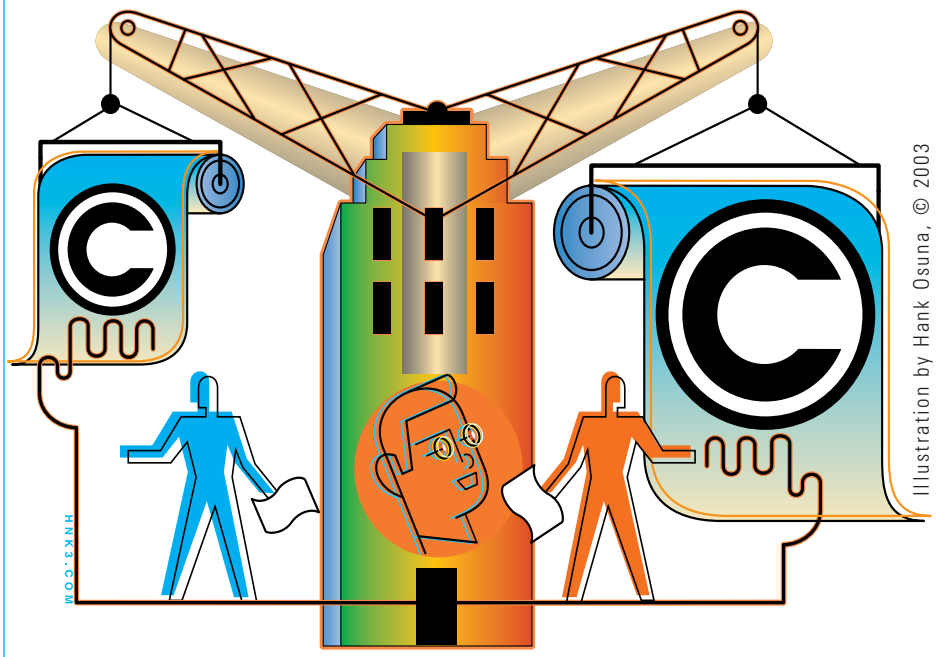
Thus, copying for laudable purposes is not necessarily fair use. The fundamental purpose of copyright is to promote the progress of science, or learning, by encouraging the creation of works of authorship. If all scholarly and academic uses were considered "fair," with no obligation to the author, the creation of works for the academic market would be discouraged.

One area in which guidelines do exist is photocopying for classroom use. These guidelines, negotiated when the 1976 Copyright Act was passed, allow classroom copying, subject to tests of brevity and spontaneity.[5] The test for brevity spells out in quantitative terms how much of different types of works may be copied. The guidelines are narrow, but they do provide a "safe harbor" and leave open the possibility that a greater degree of copying can still be fair use.

In general, courts have been reluctant to let commercial copying enterprises stand in the shoes of their customers and thus justify their business on fair use grounds. In a case involving a 350-page

coursepack produced by a copyshop for students in a college course, the court refused to permit the copyshop to invoke any fair use defense that might have been available to the students if they had copied the material independently.[6]

How has the fair use doctrine responded to digital technology and to the new uses the technology facilitates? The courts now see many more claims involving complete (sometimes multiple) copies of works and many more defendants who believe that the convenience of digital copying itself makes a compelling case for fair use. Two cases—with different results—illustrate how courts have handled such claims.



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In *Kelly v. Arriba Soft*, a federal appeals court concluded that it was a fair use for an Internet search-engine database to include "thumbnail" reproductions of photographic images available on the Internet and to display them in response to users' queries.[7] The court clearly wanted to preserve the search engine's valuable function and viewed the use of the images as "transformative" because they were being used as part of a tool to enhance access to information on the Internet, rather than for artistic purposes. Significantly, it also concluded that the thumbnail images were too small and of insufficient quality to eliminate the need for the originals.

In contrast, the court in the *Napster* case concluded that consumers' use of Napster's peer-to-peer file-sharing program and service to reproduce and distribute copyrighted sound recordings was not fair use.[8] The court did not regard the "repeated and exploitative" copying of sound recordings to be private, noncommercial use. It concluded that the unauthorized copying would have an adverse impact on the market for compact discs and for authorized online distribution of music.

Two copyright exceptions are often discussed (and sometimes confused) with fair use. The first is for performances and displays of copyrighted works in the course of teaching activities. This provision was recently amended by the TEACH Act, discussed in an earlier *EDUCAUSE Review* article.[9] The second exception is for library copying. Qualified libraries and archives may make up to three copies of an unpublished copyrighted work currently in their collections if "solely for purposes of preservation and security or for deposit for research use in another library or archives."[10] They may also make up to three copies of a published work to replace a work in their collections if it is damaged, deteriorating, or lost or the format has become obsolete and if the library determines that an unused replacement cannot be obtained at a fair price. In any case, a library may not copy for commercial advantage, and copies in digital format may not be made available to the public outside the library premises.

Qualified libraries have other copying privileges, subject to specific conditions in the law. They may reproduce articles and short excerpts at the request of users, and they may reproduce out-of-print works at users' request if those works cannot be obtained at a fair price. However, they may not engage in systematic reproduction and distribution of copies. Libraries may enter into interlibrary arrangements provided the copies they receive under the arrangement do not substitute for a purchase or subscription. Even if copying a work is not expressly allowed by the library-copying exception, a library may still invoke the fair use doctrine in appropriate circumstances.

Many users—librarians, students, consumers, and even lawyers—continue to be frustrated by the lack of specific, quantitative guidelines to determine whether a use is fair. But fair use was designed to be flexible, so that it could evolve with new circumstances and new types of uses. Uncertainty is the price we pay for that flexibility. A statute that provided greater certainty would inevitably be less responsive to changes in technology and to the myriad ways in which copyright owners and users exploit their works.

Notes

1. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
2. *Harper & Row, Pubs. v. Nation Enterprises*, 471 U.S. 539 (1985).
3. Ibid., 559.
4. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
5. H.R. Rep. No. 94-1476, 94th Cong., 2d sess. 68–72 (1976). There are also guidelines pertaining to educational uses of music.
6. *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996) (en banc), *cert. denied*, 520 U.S. 1156 (1997).
7. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).
8. *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).
9. Laura N. Gasaway, "Balancing Copyright Concerns: The TEACH Act of 2001," *EDUCAUSE Review* 36, no. 6 (November/December 2001): 82.
10. 17 U.S.C. § 108.

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