

Where Are Those Simple Fair Use Guidelines?

Gateway Media Literacy Week column October 3, 2010 <http://www.gmlpstl.org/>



By Mark Sableman

Partner in Thompson Coburn LLP's St. Louis office, where he practices intellectual property, media and technology law.

AS A COPYRIGHT LAWYER, I often get asked for “a few simple guidelines” for fair use of copyrighted materials. I’d love to provide such guidelines, but I can’t. I have to explain the subjective nature of the fair use doctrine, and joke that fair use is something of a copyright lawyers’ “Full Employment Act.”

Both the explanation and the joke are true, but very unsatisfactory. Intellectual property lawyers don’t need “full employment” acts—we are busy enough helping clients address difficult situations and grappling with emerging legal issues. And our clients deserve more certainty in this area of law, which affects all who research, write, and create—academics and journalists, artists and critics, business people and ordinary citizens.

Why is the fair use doctrine so difficult and frustrating? And what can be done about it?

To begin with, fair use is a necessary counterpart of the way Congress has structured the copyright act, as a strict-liability law. Copyright started off as applicable only to those few persons who owned or employed printing presses. The law granted an exclusive “right” to publish a manuscript (“copy”). That exclusive right of manuscript publication was...well, “exclusive.” But as technology has developed (cameras, tape recorders, copy machines, computers), and as copyright law has expanded its coverage (to photography, art, music, and video) that exclusivity leads to absurd results. An exclusive right to use a printing press to print a particular book is one thing. A truly exclusive right to control all of the means of reproducing and using creative works today would be quite different—it would effectively shut down much of daily life and business. Our “exclusive” strict-liability copyright law needs the safety valve of fair use so that it doesn’t blow up on itself.

We need fair use for research, for education, for news reporting. We need it for criticism and commentary. It is essential for building on prior works, and for employing the elements of our culture in new works, especially when the new artist’s perspective or viewpoint is different from that of the original creator. We need fair use because use of creative works is a part of our daily lives, and we need to be able to sing in the shower, pass around favorite articles, cartoons, photos, and videos, and comment and build on what others have created. Without fair use and other automatic rights of use of copyrighted material, as one law professor recently pointed out, we would be walking copyright violators, each of us liable daily for millions in copyright damages.

Just as the strict-liability structure of copyright law explains why fair use is needed, copyright history shows why fair use has become complex. Copyright law has expanded over the years. The term of copyright originally barely covered one generation (14 years, renewable once), but now it can cover about five generations (the life of the artist plus 70 years). We have new technologies, and more kinds of rights (for example, performance and display rights, unknown in the Founding Fathers’ time). Each expansion of the strict-liability law creates its own need for flexibility—that is, for the fair use safety valve. But while we have many copyright rights, and longer and longer copyright terms, and many protected technologies, we have pretty much one fair use right that needs to fit most situations. (We do have one special fair use provision, for libraries.)

The fair use doctrine traces back to an 1841 decision, in a case involving two rival publishers of books about George Washington, ruled upon by Supreme Court Justice Joseph Story, sitting as a trial judge. We’re using Justice Story’s factors from that case to decide cases about peer-to-peer file sharing, Internet searching, software development, and YouTube videos. You wonder if Justice Story foresaw such a future for the reasons he gave when he ruled for one of the two publishers.

So we need fair use to maintain a workable equilibrium between legally granted exclusive rights and the social

need for many permitted uses of those rights. And we are currently using a warmed-up eighteenth century legal formulation to accomplish that task. That makes it difficult for fair use to adapt to modern circumstances, particularly without advocates of its own.

Until recently, there was no real fair use lobby. Only librarian trade associations actively participated on the fair use side when the 1976 Copyright Act was put together, largely under the direction of the copyright industries of the time (the book, movie and recording industries). No one was thinking of software or the Internet, digital technologies, or the imminent blossoming of the Information Age. Most likely, Justice Story's factors got written into the law in 1976 because the copyright industries, the only ones really paying attention, knew that those factors would generally favor copyright claimants in the modern era.

The first several decades after the 1976 act brought out weakness of the fair use doctrine. Litigants like the Church of Scientology were able to use copyright claims aggressively to silence critics, whose fair use rights were viewed narrowly by courts. (Congress opened up fair use somewhat in 1991 with legislation sponsored by Senator Paul Simon of Illinois, bringing unpublished works within full fair use protection.) Even the Supreme Court's one big fair use decision of the time, the *Sony Betamax* video recording decision, reached a fair-use favorable result without ever satisfactorily grappling with fair use's underlying principles and purposes.

The Internet era, by contrast, has brought fair use and copyright reform into the limelight. The movie and recording industries are still strong, as is their partner the software industry (a newer copyright industry). But because there are far more users of material in the digital era, there are also far more people interested in fair use, and supportive of expanded fair use and/or copyright reform. Professor Lawrence Lessig, creator of the Creative Commons licensing system, focused attention on the benefits of "the commons" (shared resources and rights, like fair use) and the sometimes detrimental social effect of copyright expansion. On the other side, the Recording Industry Association of America's music-rights enforcement program brought mixed results—more visibility for legitimate digital copyright problems, but more animosity from the youth and young adults who were targeted.

Fair use is now center stage. The Supreme Court's decision in the *2 Live Crew* case in 1994 reinvigorated fair use with the concept that "transformative" use was generally fair. Academically sponsored "best practices"

guidelines in documentary filmmaking and media literacy education have fleshed out fair use in those fields. The ascendancy of technology companies like Google has given fair use advocates some strong friends (at least until those companies negotiate good deals for themselves, as Google has sought to do in the Google Book Project case). Conservative economic-approach-to-law jurists like Judge Richard Posner have pointed out problems inherent in ever-expanding strict-liability copyright laws. And a few courts are even rejoining the common-law tradition, recognizing that new situations demand new approaches, and adding new factors to their fair use analyses, to supplement Justice Story's four factors from 1841.

Why can't I give my friends and clients simple fair use guidelines? I can't do it because of the way copyright developed, the complexity of fair use as a safety valve for so many aspects of copyright law, and the weak recognition of fair use for many years following the enactment of the 1976 act. I can't do it because the same Supreme Court that said (in the *Sony Betamax* case) that it may be okay to copy highly creative Hollywood movies in their entirety also said (in the *Ford Memoirs* case) that you can't even copy one-half of 1% of a largely factual work. Mostly I can't do it because fair use ultimately depends on the situation, and on inherently subjective judicial judgments.

Despite these difficulties, I have some hope for a better, clearer fair use doctrine. Creative Commons, and the first few "best practices" guidelines, have opened doors for use of copyrighted material. You can use Creative Commons materials, so long as you follow the license terms. And if you are a documentary filmmaker and follow your industry's "best practices," you can probably get insurance for your documentary, meaning that you have overcome fair use's murkiness. The desirability and need for use of existing works is being actively discussed in the creative community. Developments like these, and increased attention and concern focused on fair use and copyright reform, suggest that important changes may be coming. Everyone who cares about words and images should join the debate about the purpose and scope of copyright protection, for this debate will ultimately make a crucial difference in our information and creative society.

But please don't ask me for simple fair use guidelines anytime soon. For the foreseeable future, for better or worse, fair use is still going to be the copyright lawyers' Full Employment Act.