

Understanding Fair Use

HighEdWebDev 2006
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Tuesday, October 24
www.law.duke.edu

Presentation Structure

- Fair Use and it's relationship to Copyright Law
- Criteria for Determining Fair Use
- Implications for Web Developers in Higher Education
- Alternatives?
- Resources

Copyright Law ©

Since 1989, in accordance with the *International Berne Convention* (1886), copyright in the United States is **automatic** and does **not** require any registration fee or documentation.

**This does not apply retroactively to pre 1989 works, which may be covered under The Copyright Act of 1976 or other assundry ammendments or extensions.*

see: <http://www.unc.edu/~unclng/public-d.htm>

Fair Use's Relationship to Copyright Law

“...to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster”

Campbell v Acuff-Rose Music Inc 510 US 569, 577 (1994); quoted in Sony v Bleem

Fair Use involves the **public right** to limited use of copyright material **without permission** for the purposes of criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research.

Philosophy or Definition?

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Rather than produce a specific, but limited, set of specific guidelines, the Fair Use doctrine provides 4 broadly defined factors for determining if a use qualifies.

Guidelines for Determining Fair Use

- Purpose and Character
- Nature
- Amount and Substantiability
- Effect on original works value

Guidelines for Determining Fair Use

- **Purpose and Character**

Is the use transformative (stimulate creativity) or educational (further knowledge)?

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

- Nature
- Amount and Substantiability
- Effect on original works value

Guidelines for Determining Fair Use

- Purpose and Character
- **Nature**
 - What type of work is being used?
 - Is it currently published or unpublished?
 - Is the work factual or creative?
 - Sundeman v. The Seajay Society, Inc.*, 142 F.3d 194 (4th Cir. 1998)
- Amount and Substantiability
- Effect on original works value

Guidelines for Determining Fair Use

- Purpose and Character
- Nature
- **Amount and Substantiability**
To what degree is the work being used and/or what amount of the original work is being used?
Does it involve “the **heart** of the work?”
Harper & Row v. Nation Enters., 471 U.S. 539 (1985)
- Effect on original works value

Guidelines for Determining Fair Use

- Purpose and Character
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- Amount and Substantiability
- **Effect on original works value**

What effect does the reuse have on the original uses current or *potential market*

Kelly v. Arriba-Soft, 03 C.D.O.S. 5888 (9th Cir. 2003)

The DMCA and DRM:

The **Digital Millenium Copyright Act** (passed in 1998) makes it a criminal act to circumvent **Digital Rights Management** systems

- Can DRM prevent access to content under Fair Use?
- Is it legal to circumvent DRM for purposes that fall under Fair Use?
- “Horse and buggy” method irrelevant in a software/web setting

** The Register of Copyrights has repeatedly requested that an exception of fair use be added, though, to date, no exception has been suggested.*

Fair Use in the Real World

Fair Use in the Real World

- Educational applications of Fair Use are favored
- Educational issues historically unlikely to be pursued through litigation
 - * *(an exception are commercially produced course packets)*
- Nonprofit Educational Institutions may (if determined to be in good faith) be offered a statutory damages exception § 504(c)(2)
- Definition is intentionally ambiguous

But...

Fair Use in the Real World

- No clear guidelines
- Litigation can be expensive
 - * *statutory damages from \$200 to \$150,000 per infringement*
- Publisher contracts can override your right to Fair Use
- Definition is intentionally ambiguous

And...

Fair Use in the Real World

- **The Copyright Clearance Center**
Web-based rights advisory and management service generally disregards Fair Use in clearing copyright usage.
** such as the Bb Creative Clearance Module*

Hypotheticals for Discussion

Commercially Published Work

A faculty member is featured in a prominent publication which requires a fee based membership in order to login and view the article. In light of this, the faculty member posts a scanned copy of the print article on their personal website.

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A faculty member is featured in a prominent publication which requires a ~~fee-based membership~~ in order to ~~login~~ and view the article. In light of this, the faculty member posts a ~~scanned~~ copy of the print article on their **personal website**.

** (note that a contract with the publisher may override any Fair Use rights)*

Video Clips

A 4 minute video clip from *Fight Club* is posted on a course website for the purpose of studying the film's perspective on gender. The website is publicly available, though intended primarily for students enrolled in the course (gender and western society), or other students studying the same field. DRM protection was circumvented in order to format and post the video clip



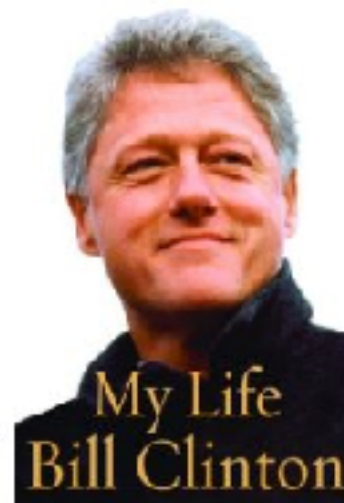
Video Clip

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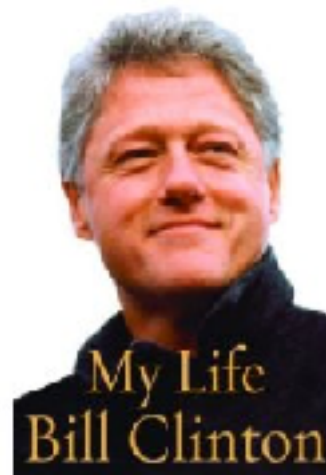
Billy's Bio

An excerpt of 10 pages from Bill Clinton's autobiography *My Life*, is included in the book, *The Dayton Peace Accords: Public Policy towards the 21 Century*. The latter book is available for free download in the internet under a creative commons attribution license.



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Billboard Bittorrents

Billboards top ten pop songs of 2005, downloaded from bittorrents, are stored on a *password protected site accessible only to students enrolled in the course: Adolescents and popular culture.

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** (Publishers have begun requesting backdoor access)*

What About Google?

An image of *Simpsons* character, Ned Flanders, is acquired through a google search and posted on the homepage (and saved to the server) of a universities Center for the Study of Religion in America.



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** (there may also be a potential trademark fair use issue with using Ned)*



How do you know when a use is fair?

When the judge tells you!

Is there an Alternative?

Creative Commons

Where Fair Use is a **defense** for using a work, Creative Commons offers a **preventative** solution to determine how a work is used while assuring that the original author receives proper credit.

Creative Commons licenses were specifically designed for websites, scholarship, music, film, photography, literature, and courseware.

- Attribution
- Noncommercial
- No Derivative Works
- Share Alike

GNU General Public License

General Public Licenses are designed to make sure that you have the freedom to distribute copies of free software (and charge for this service if you wish), that you receive source code or can get it if you want it, that you can change the software or use pieces of it in new free programs; and that you know you can do these things.

<http://www.gnu.org/copyleft/gpl.html#TOC2>

- The freedom to run the program, for any purpose
- The freedom to study how the program works, and adapt it to your needs
- The freedom to redistribute copies so you can help your neighbor
- The freedom to improve the program, and release your improvements to the public, so that the whole community benefits

Content Resources

- Information:
 - Wikipedia - http://en.wikipedia.org/wiki/Main_Page
 - Project Gutenberg - http://www.gutenberg.org/wiki/Main_Page
 - Science Commons - <http://sciencecommons.org/>
- Images
 - Flickr (Creative Commons) - <http://www.flickr.com/creativecommons/>
 - Stock xchng - <http://www.sxc.hu/>
 - FirstGov - <http://www.firstgov.gov/Topics/Graphics.shtml>
- Video:
 - Internet Archive - <http://www.archive.org/details/movies>
 - youtube (public domain) - http://www.youtube.com/results?search_query=Public_Domain
- Software:
 - SourceForge.net - <http://sourceforge.net/>
 - Free Software Foundation - <http://www.fsf.org/>
- Web Specific Programs
 - Gimp (image editor) - <http://www.gimp.org/>
 - PHP Designer (source code editor) - <http://www.mpsoftware.dk/phpdesigner.php>
 - Xenu (link validator) - <http://home.snafu.de/tilman/xenulink.html>

Fair Use Related Resources

- Wikipedia (Fair Use) - en.wikipedia.org/wiki/Fair_use
- Creative Commons - creativecommons.org/
- GNU Licenses - www.gnu.org/licenses/
- Duke Law Center for the Study of the Public Domain - www.law.duke.edu/cspd/
- Harvard Law School Berkman Center for Internet and Society - cyber.law.harvard.edu/home/
 - "Digital Rights Management and the Process of Fair Use," Timothy Armstrong. (forthcoming, *Harv. J.L. & Tech.*, vol. 20, no. 1, fall 2006).
 - "The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age," William W. Fisher and William McGeeveran, August 2006.
- Stanford Copyright and Fair Use - fairuse.stanford.edu/
- Lawrence Lessig - www.lessig.org/blog/
- Cornell US Code Collection - www.law.cornell.edu/uscode/
- Electronic Frontier Foundation - www.eff.org/
- Defective by Design - defectivebydesign.org/en/node

Thanks to:

Jennifer Jenkins – Duke Law Center for the Study of the Public Domain

Kevin L. Smith – Scholarly Communications Officer, Center for Instructional Technology (CIT)

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