

DISCUSSION ON FAIR USE

WHAT DO THE WORDS 'FAIR USE' MEAN?

“ Fair Use is a concept of copyright law in which a limited copying of copyrighted material is permissible under some circumstances such as criticism, comment, news reporting, teaching, scholarship or research and is not an infringement of copyright. Factors to be used in determining if usage is fair use include: the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; the nature of the work; the amount work used; and the market value impact on the copyrighted work. “ (*See Footnotes - Reference #1*)

DISCUSSION SAMPLE

Lets assume we visit a website and see similar to the below included within the Copyright Policy/Statement:

" Some of the content on this website, when sourced from other organizations, is copyrighted material, the use of which has not been specifically authorized by the copyright owner. We are making such material available in its efforts to advance understanding of future technology. We believe this constitutes a 'fair use' of any such copyrighted material as provided for in section 107 of the US Copyright Law. “

Although we can understand that the author/s of the above is making his/her/their website material available in his/her/their efforts to advance understanding of future technology his/her/their use of the particular content must meet certain requirements that constitute a 'fair use' of any such copyrighted material as provided for in Section 107 of the US Copyright Law prior to a claim of Fair Use being considered valid.

SECTION 107 OF THE US COPYRIGHT LAW

Fair Use - Section 107 (*See Footnotes - Reference #2*) contains a list of the various purposes for which the reproduction of a particular work may be considered fair, such as criticism, comment, news reporting, teaching, scholarship, and research. Section 107 also sets out four (4) factors to be considered in determining whether or not a particular use is fair:

1. The purpose and character of the use, including whether such use is of commercial nature or is for non-profit educational purposes. (*Let's for the sake of the above discussion sample recognize that the work displayed is for non-profit educational purposes.*)
2. The nature of the copyrighted work.
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole. (*How do we, with any certainty, ascertain the amount and substantiality of the portion used in relation to the copyrighted work as a whole?*)
4. The effect of the use upon the potential market for, or value of, the copyrighted work.

The distinction between fair use and infringement may be unclear and not easily defined. There is no specific number of words, lines, or notes that may safely be taken without permission. Acknowledging the source of the copyrighted material does not substitute for obtaining permission.

Copyright infringements brought to court are adjudicated based upon facts which are presented as evidence. A defence when the facts presented are prima fascia evidence of a copyright violation is “fair use.” Then the four factors above are applied. Each case is determined upon the specific facts, by a Judge so we have a general guideline in the form of the four factors above. Generally the complete or substantial reproduction of an authors work, without permission is a copyright violation. Substantial reproduction, which includes rebuttal, would generally be held as scholarly discussion.

The 1961 Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law cites examples of activities that courts have regarded as fair use:

- ❖ Quotation of excerpts in a review or criticism for purposes of illustration or comment.
- ❖ Quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations.
- ❖ Use in a parody of some of the content of the work parodied.
- ❖ Summary of an address or article, with brief quotations, in a news report.
- ❖ Reproduction by a library of a portion of a work to replace part of a damaged copy.
- ❖ Reproduction by a teacher or student of a small part of a work to illustrate a lesson.
- ❖ Reproduction of a work in legislative or judicial proceedings or reports.
- ❖ Incidental and fortuitous reproduction, in a newsreel or broadcast and / or of a work located in the scene of an event being reported.

Copyright protects the particular way an author has expressed himself. It does not extend to any ideas, systems or factual information conveyed in the work.

WHAT IS THE SAFEST COURSE TO TAKE?

The safest course is always to get permission from the copyright owner before using copyrighted material. A Copyright Office cannot give this permission.

When it is impracticable to obtain permission, use of copyrighted material should be avoided unless the doctrine of fair use would clearly apply to the situation. a Copyright Office can neither determine if a certain use may be considered fair nor advise on possible copyright violations. If there is any doubt, it is advisable to consult a Legal Advisor.

To be totally safe the use of material (where no copyrights can be ascertained) should not be used at all.



FOLLOW THESE STEPS TO DECIDE WHETHER PERMISSION IS NEEDED TO USE A COPYRIGHTED WORK

1. IS THE WORK PROTECTED?

Copyright does not protect, this Policy does not apply to and anyone may freely use:

WORKS THAT LACK ORIGINALITY.

- Logical, comprehensive compilations (like the phone book.)
- Unoriginal reprints of public domain works.

WORKS IN THE PUBLIC DOMAIN.

- Freeware (not shareware, but really, expressly, available free of restrictions-ware - this may be protected by law, but the author has chosen to make it available without any restrictions)
- US Government works.
- Facts.
- Ideas, processes, methods, and systems described in copyrighted works

The presence or absence of a copyright notice no longer carries the significance it once did because the law no longer requires a notice. Older works published without a notice may be in the public domain, but for works created after March 1, 1989, absence of a notice means virtually nothing.

The rules for determining whether a protected work is in the public domain are set out in chart form by Lolly Gasaway. These rules are complex and somewhat hard to describe, partly because they have changed many, many times during the 20th century. The general rules (excluding anonymous works and works for hire) can be summarised as follows:

- Any work published on or before December 31, 1922 is now in the public domain.
- Works published between January 1, 1923 and December 31, 1978, inclusive are protected for a term of 95 years from the date of publication, with the proper notice. But, if the work was published between 1923 and December 31, 1963, when there used to be a (non-automatic) "renewal term," the copyright owner may not have renewed the work. If he or she did not renew, the original term of protection (28 years) would now be expired and these works will be in the public domain.
- After 1978, the way we measure the term of protection changes. It is no longer related to a date of publication, but rather runs for 70 years from the date the author dies (called, "life of the author" plus 70 years). Further, publication is irrelevant. Works are protected whether they are published or not.
- Finally, those works that were created before December 31, 1978, but never published, are now protected for the longer of life of the author plus 70 years or until December 31, 2002.

REMEMBER THAT SOME WORKS ARE NEVER PROTECTED AT ALL!

2. IF THE WORK IS PROTECTED, DO YOU WISH TO EXERCISE ONE OF THE OWNER'S EXCLUSIVE RIGHTS?

- Make a copy (reproduce.)
- Use a work as the basis for a new work (create a derivative work.)
- Electronically distribute or publish copies (distribute a work.)
- Publicly perform music, prose, poetry, a drama, or play a video or audio tape or a CD-ROM, etc. (publicly perform a work.)
- Publicly display an image on a computer screen or otherwise (publicly display a work.)

3. IS YOUR USE EXEMPT OR EXCUSED FROM LIABILITY FOR INFRINGEMENT?

If an exemption does not excuse infringement and eliminate the need to ask permission or pay fees to exercise the owner's rights, you need permission.

- ** Even if all or part of a work is not protected by copyright law it may be protected by other laws. For example, you may need to consider rights of privacy and publicity, ask permission to use a trade or service mark, or get a license to practice a patented process or system, but discussion of these rights and interests is beyond the scope of this Policy statement.



HOW TO SEEK PERMISSION OF USE OR JUST WANTING MORE INFORMATION

- ❖ [17 U.S.C. § 107 \(Fair Use\) | Copyright Law | Washington University in St. Louis](#)
- ❖ [University of Connecticut Libraries Copyright - Identify Copyright Owners](#)
- ❖ [University Publishing: Copyright](#)
- ❖ [UC Copyright](#)



CONCLUSION

Most people think that the fair use test is difficult. Actually, it's not so much difficult as it is uncertain - susceptible to multiple interpretations. Two people can review the same facts about a proposed use and come to different conclusions about its fairness. That's because one must make many judgments in the course of weighing and balancing the facts.

Note that the writer is not against Fair Use. In fact he/she believes it can play an important role in education and divulgence of otherwise unavailable or unknown material. But that's the authors' opinion and he/she believes that given the multinational membership of APEX they should stay away from such legal "grey areas" given the very subjective nature of the definition of them.

When placing a copyright notice at the bottom of a page on your website remember that it only relates to any content that you have personally created and not to any material created by any other person and which you are using with their permission.

Whilst the owner's terms for reproducing their material may vary it is generally recommended that you should always include a text acknowledgment on the same page as their material is used to clearly identify who the real owner is and that the material is being used with their permission.

If you do not follow this guideline, then you are misleading visitors into thinking that the work is by you.



Footnotes:

Reference #1 - Copyright and Related Topics Glossary - [Copyright and Related Topics Glossary](#)
Reference #2 - US Copyright Office - Fair Use - U.S. Copyright Office - Fair Use - <http://www.copyright.gov/fls/fl102.html>

Copyright © APEX 2007 onwards.

APEX