

# Primer on Copyright Liability and Fair Use

Posted January 24th, 2008 by the Citizen Media Law Project

As a lead up to the launch of the [Citizen Media Law Project's Legal Guide](#) later this month, we are putting up longer, substantive blog posts on various subjects covered in the guide. This post is the second in our series of legal primers. The first addressed the subject of [immunity and liability for third-party content under section 230 of the Communications Decency Act](#). In this post we discuss copyright and fair use in the context of citizen media.

## I. COPYRIGHT PROTECTION AND FAIR USE

A broad array of creative, expressive media are subject to copyright protection, including literature, photographs, music compositions and recordings, films, paintings and sculptures, and news articles – any “original work of authorship fixed in any tangible medium of expression.” [17 U.S.C. § 102](#). Citizen media creators who use the works of others need to be careful that they do not open themselves to copyright liability when doing so.

Fortunately, there are several circumstances in which the work of others may be used without liability. Bare facts and ideas, government documents, and items in the public domain are not subject to copyright, and some materials may be published under a [Creative Commons](#) license or other license that permits reuse. In addition, the doctrine of fair use provides that copyrighted materials may be used without the consent of the original owner in certain situations, such as when using excerpts for criticism or news reporting.

### A. What can be copyrighted?

Because only creative expression, not facts or ideas, may be copyrighted, you can typically use bare factual information found in other sources without liability. There are some situations in which a compilation of facts may be protected if the creator of the original publication selected, coordinated, or arranged the facts in an original way. See [Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.](#), 499 U.S. 340, 344 (1991). However, in these situations the raw facts may still be copied at will. If you copy historical facts, current events, or other ideas and facts from another resource, you should be careful not to copy the method of expression in the original source.

It is also worth noting that linking to copyrighted material will not subject you to copyright liability. Courts have consistently held that no copying is involved in the act of hyperlinking. See [Ticketmaster Corp. v. Tickets.com, Inc.](#), 2000 U.S. Dist. LEXIS 4553 (C.D. Cal. 2000). Although some websites may try and prohibit 'deep linking' (i.e., linking to a page within a website other than the home page), these prohibitions are not legally enforceable.

In addition, works by the U.S. Government are not copyrightable, [17 U.S.C. § 105](#), which

includes "work prepared by an officer or employee of the United States Government as part of that person's official duties." [17 U.S.C. § 101](#). Thus, not only may you freely copy documents and other material produced by the federal government, but also the texts of speeches by government officials made in their official capacities.

## **B. Fair Use**

The policy behind copyright protection is aimed not at the rights of those who produce content, but at the "promotion of the sciences and the useful arts." Because allowing authors to enforce their copyrights in all cases would actually hamper this end, the fair use doctrine was adopted to permit uses of copyrighted materials that are considered to be beneficial to society, many of which are also entitled to First Amendment protection.

Fair use will not permit you to merely copy another's work and profit from it, but when your use contributes to society by continuing the public discourse or creating a new work in the process, fair use might come into play. Fair use thus has its origins in both the First Amendment and the general policies regarding creative endeavors that form the basis of the copyright code.

Fair use, which is now a part of the [Copyright Act](#) itself, is defined in the Act as follows:

*[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--*

*(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit 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; and*

*(4) the effect of the use upon the potential market for or value of the copyrighted work.*

Unfortunately, there is no clear formula that you can use to determine the boundaries of fair use. Instead, a court will weigh these four factors holistically in order to determine whether the use in question is a fair use.

In order for you to assess whether your use of another's copyrighted work will be permitted, you will need an understanding of why fair use applies, and how courts interpret each part of the test.

## **1. Purpose and Character of Your Use**

If you use another's copyrighted work for the purpose of criticism, news reporting, or commentary, this use will weigh in favor of fair use. See [Campbell v. Acuff-Rose Music](#), 510 U.S. 569, 578 (1994). Purposes such as these are often considered "in the public interest" and are favored by the courts over uses that merely seek to profit from another's work. [Online Policy Group v. Diebold, Inc.](#), 337 F. Supp. 2d 1195, 1203 (N.D. Cal. 2004). When you put copyrighted material to new use, this furthers the goal of copyright to "promote the sciences and the arts."

In evaluating the purpose and character of your use, a court will look to whether the new work you've created is "transformative" and adds a new meaning or message. To be transformative, a use must add to the original "with a further purpose or different character, altering the first with new expression, meaning, or message." [Campbell](#), 510 U.S. at 579. Although transformative use is not absolutely necessary, the more transformative your use is, the less you will have to show on the remaining three factors.

Courts originally presumed that if your use was commercial it was an unfair exploitation. Court later abandoned that assumption because many of the enumerated purposes (such as news reporting) are conducted for profit. Although the commercial nature of the use is still part of the analysis, courts will look to the degree to which it is commercial and will not disfavor a transformative use merely because it makes a profit. Accordingly, the presence of advertising on a website would not, in of itself, doom one's claim to fair use.

If you merely reprint or repost a copyrighted work without anything more, however, it is less likely to qualify for protection under this prong. If you include additional text, audio, or video that comments or expands on the original material, this will enhance your claim of fair use. In addition, if you use the original work in order to create a parody this may qualify as fair use even without commentary directed toward the original work.

Moreover, if the original work or your use of it has news value, this can also increase the likelihood that your use is a fair use. Although there is no particular legal doctrine specifying how this is weighed, several court opinions have cited the newsworthiness of the work in question when finding in favor of fair use. See, e.g., [Diebold](#), 337 F. Supp. at 1203 (concluding "[i]t is hard to imagine a subject the discussion of which could be more in the public's interest"), [Norse v. Henry Holt & Co.](#), 847 F. Supp. 142, 147 (N.D. Cal. 1994) (noting "the public benefits from the additional knowledge that Morgan provides about William Burroughs and other writers of the same era").

## **2. Nature of the Copyrighted Work**

In examining this factor, a court will look to whether the material you have used is factual or creative, and whether it is published or unpublished. Although non-fiction works such as biographies and news articles are protected by copyright law, their factual nature means that one may "rely more heavily" on these items and still enjoy the protections of fair use. Unlike factual works, fictional works are typically given greater

protection in a fair use analysis. However, this question is not dispositive, and courts have found fair use of fictional works in some of the pivotal cases on the subject. See, e.g., [Sony Corp. of America v. Universal City Studios, Inc.](#), 464 U.S. 417, 456 (1984).

The published or unpublished nature of the original work is only a determining factor in a narrow class of cases. In 1992, Congress amended the Copyright Act to add that fair use may apply to unpublished works. See [17 U.S.C. § 107](#). This distinction remains mostly to protect the secrecy of works that are on their way to publication. Therefore, the nature of the copyrighted work is often a small part of the fair use analysis, which is more often determined by looking at the remaining three prongs.

### **3. Amount and Substantiality of the Portion Used**

Unfortunately, there is no single guide that definitively states how much of a copyrighted work you can use without copyright liability. Instead, courts look to how such excerpts were used and what their relation was to the whole work. If the excerpt in question diminishes the value of the original or embodies a substantial part of the efforts of the author, even an excerpt may constitute an infringing use.

If you limit your use of copyrighted text, video, or other materials to only the portion that is necessary to accomplish your purpose or convey your message, it will increase the likelihood that a court will find your use is a fair use.

Of course, if you are reviewing a book or movie, you will need to reprint portions of the copyrighted work in the course of reviewing it. Even substantial quotations may qualify as fair use in "a review of a published work or a news account of a speech that had been delivered to the public or disseminated to the press" [Harper & Row, Publishers, Inc. v. Nation Enterprises](#), 471 U.S. 539, 564 (1985). However, substantial quotations from non-public sources or unpublished works do not enjoy the same protections. *Id.*

### **4. The Effect of Your Use Upon the Potential Market for the Copyrighted Work**

In examining the fourth factor, which courts tend to view as the most important factor, a court will look to see how much the market value of the copyrighted work is affected by the use in question. This factor will weigh in favor of the copyright holder if "unrestricted and widespread" use similar to the one in question would have a "substantially adverse impact" on the potential market for the work.

Although the copyright holder need not have established a market for the work beforehand, he or she must demonstrate that the market is "traditional, reasonable, or likely to be developed." [Ringgold v. Black Entertainment TV](#), 126 F.3d 70, 81 (2d Cir. 1997). An actual effect on the number of licensing requests need not be shown. The fact that the original work was distributed for free, however, may weigh against a finding that the work had publication value. See [Nunez v. Caribbean Int'l News Corp.](#), 235 F.3d 18, 25 (1st Cir. 2000). Likewise, the fact that the source is out of print or no longer sold will also weigh in favor of fair use.

The analysis under this factor will also depend on the nature of the original work; the author of a popular blog or website may argue that there was an established market since some such authors have been given contracts to turn their works into books. Therefore, a finding of fair use may hinge on the nature of the circulated work; simple e-mails such as those in [Diebold](#) are unlikely to have a market, while blog posts and other creative content may fit the mold of those turned into published books or otherwise sold. In addition, the author of a work not available online, or available only through a paid subscription, may argue that the use in question will hurt the potential market value of such work on the Internet.

Assessing the impact on a copyrighted work's market value often interplays with the third factor because the portion of the work used will often determine how much value remains. For instance, the publication of five lines from a 100 page epic poem will be treated differently than the publication of the entirety of a five-line poem.

This fourth factor is concerned only with the remaining value in the copyrighted work itself; the fact that the use may otherwise financially harm the copyright holder (such as negative publicity) is not part of the analysis. [Diebold](#), 337 F. Supp. 2d at 1203; see also [Campbell](#), 510 U.S. at 591-92 (“[W]hen a lethal parody. . . kills demand for the original, it does not produce a harm cognizable under the Copyright Act.”). The fact that the use being challenged creates or improves the market for the original work will likewise favor a finding for fair use on this prong. See [Nunez](#), 235 F.3d at 25 (finding fair use when the publication of nude photos actually stirred the controversy that created their market value and there was no evidence that the market existed beforehand).

### **C. Publishing the Contents of Factual Research**

As previously mentioned, you may make use of the facts you draw from research reports without violating the copyright of the author. As long as you do not copy the creative expression of those ideas or the specific arrangement of the facts, fair use need not even apply since those aspects of the report are not copyrightable. Research reports created by the U.S. Government, including those of Congress and executive agencies, are also in the public domain.

Moreover, fair use may also protect your use of even copyrighted materials in research reports. For example, quotes from research reports that are used for news reporting may be used if the factors discussed above indicate fair use.

### **D. Publishing the Contents of Private Letters and E-Mail (including letters from lawyers threatening legal action)**

Fair use may protect the publication of the content of private letters and e-mail, including communications from lawyers threatening legal action. As mentioned above, unpublished materials sometimes enjoy greater protection than published documents. Although an author may argue that the "unpublished" nature of his or her correspondence warrants a

finding against fair use, such an argument carries weight only when the use involves a heretofore secret work “on its way” to publication.

Recently, two students at Swarthmore college posted an e-mail archive of internal e-mails among Diebold employees; an online newspaper linked to the archive in an article critical of Diebold’s voting machines. A court held that although the letters were not published, they were nonetheless protected by fair use. [Diebold](#), 337 F. Supp. 2d at 1203. Applying the four fair use factors, the court found the fourth factor entirely lacking because Diebold had no intention of selling the archive for profit, they were not denied any value when it was published online. The court also noted the students and newspaper use was intended to support criticism of the company, which was a transformative use under the first factor.

## **II. DIGITAL MILLENNIUM COPYRIGHT ACT**

Even when you have a strong argument that your use of another's copyrighted work is a fair use, you may still find that your hosting provider has taken down your material in response to a "cease and desist" letter sent by someone claiming copyright infringement. The [Digital Millennium Copyright Act](#) (DMCA) provides that Internet Service Providers (ISP) or Online Service Providers (OSP) that take down material in response to such a claim do not face liability themselves for copyright violations. [17 U.S.C. § 512\(a\)](#). Although the DMCA does not impose automatic liability on service providers that do not take down allegedly infringing materials, litigation-averse companies may routinely take down material upon receipt of such a notice to stay within the DMCA’s safe harbor.

To prevent misuse of this procedure, the DMCA provides penalties for copyright holders if they "knowingly and materially" misrepresent that copyright infringement has occurred. [17 U.S.C. § 512\(f\)](#).

In the [Diebold](#) case discussed above, the students and newspaper filed an action under this provision of the DMCA. When Diebold sent cease and desist letters to their hosting providers, the students and newspaper filed a lawsuit, alleging that because there was no possible copyright protection for the e-mail archive, Diebold’s letters contained “material misrepresentations.” The court agreed and held that Diebold's use of the DMCA's take-down procedure was improper, finding that some materials in the archive were not copyrightable content and that the student and newspaper's use of copyrighted material was a fair use. [Diebold](#), 337 F. Supp. 2d at 1198.

## **III. THE IMPACT OF WIDESPREAD PUBLIC DISSEMINATION ON COPYRIGHT**

A copyrighted work cannot enter the public domain through widespread distribution. A work enters the public domain when the copyright expires, usually 70 years after the author’s death. [17 U.S.C. § 302](#). No actions by third parties can end the copyright protection of a particular work (although the author herself can disclaim copyright).

Wide distribution of a copyrighted work may, in some cases, strengthen a claim of fair use. If such circulation was done without the copyright holder's permission, however, it will not support a finding of fair use. Nevertheless, if the copyright holder widely posted the work in question, this may indicate that a subsequent use of the work is a fair use. For example, wide posting by the author herself may weaken the argument that the infringing use hurt the market value.

#### **IV. CONCLUSION**

While there is no definitive test for determining whether your use of another's copyrighted work is a fair use, there are several things you can do to minimize your risk of copyright liability:

- 1. Use only as much of the copyrighted work as is necessary to accomplish your purpose or convey your message;**
- 2. Use the work in such a way that it is clear that your purpose is commentary, news reporting, or criticism;**
- 3. Add something new or beneficial (don't just copy it -- improve it!);**
- 4. If your source is nonfiction, limit your copying to the facts and data; and**
- 5. Seek out Creative Commons or other freely licensed works when such substitutions can be made and respect the attribution requests in those works.**