

“FAIR USE” DOCTRINE PERMITS LIMITED COPYING OF COPYRIGHTED MATERIAL

Q: What is a copyright?

A: A copyright is a grant of rights from the government for original works of authorship, such as books, songs, plays, computer programs, and videos, that are fixed in a tangible medium of expression. Any item which embodies or holds the original work of authorship, such as the canvas of the “Mona Lisa” or the CD on which the Beatles’ song, “Yesterday” is recorded is a “tangible medium of expression.” The media can be paper (advertising, instructions, training manuals or drawings) or something that requires a machine to be perceived (such as DVDs or CDs).

Q: What is copyright infringement?

A: A copyright owner has certain exclusive rights. These include the rights to reproduce, distribute, display and perform the work. The copyright owner also has the exclusive right to prepare “derivative works,” which are works based on the original, but which include some different or additional material. A violation of any of the copyright owner’s rights constitutes copyright infringement. Copyright infringement most commonly occurs when a copyrighted item is copied in whole or in part. Copyright infringement may occur even when the infringing copy is not identical, but only “substantially similar” to the original. When a substantial portion of a copyrighted work is used in another work, it also usually infringes as an unauthorized “derivative work.” For example, if you own an original oil painting and you make prints of that painting, you infringe on the copyright rights of the artist who created the painting. Only the artist or someone who has received that right under a contract with the artist, is legally authorized to reproduce the painting.

Q: Are there some instances where a work of an author can be copied without infringing copyright rights?

A: Yes. A work of authorship can be reproduced, distributed, displayed and performed by someone other than the copyright owner without infringing the copyright rights in

certain situations. The United States statutes concerning copyrights contain exceptions to a copyright owner's exclusive rights. However, the broadest exception is the "doctrine of fair use."

Q: What is a "fair use"?

A: Reproducing, distributing, displaying or performing a copyrighted work may, in limited circumstances, be found to be a "fair use." A fair use is something that is permitted by law that would otherwise constitute copyright infringement. For example, if a page from an encyclopedia is copied at the public library for personal use, it is probably a fair use.

Unfortunately, deciding whether a use is a "fair use" is often difficult. Therefore, it is always wise to consult an attorney experienced in copyright law to determine if what you plan to do is likely to be an infringement of a copyright.

Q: How is it determined if a use is a fair use?

A: An evaluation for fair use requires the weighing of a number of factors. Some of the factors that are considered in determining whether a use is a fair use are:

- the purpose and character of the use;
- the nature of the work;
- the amount of the work involved;
- the effect of the activity on the market for the original work; and
- whether the original work is published or unpublished.

Q: What is the most important factor in the fair use analysis?

A: Often the character of the use is the most important factor. If the use is related to a profit-making activity this suggests that the use is not a fair use. For instance, photocopying a Dilbert® cartoon, framing it, and selling it would likely not be a fair use. However, hanging that framed photocopy in your own home would probably be a fair use. However, if it is determined that the framed cartoon reduces the market for framed Dilbert® cartoons sold by the creator of Dilbert, Scott Adams, it may not be fair use. The fair use analysis is often not easy.

Q: Is copying a copyrighted work for a non-profit organization always a fair use?

A: No. A number of churches have gotten into trouble for copying music or lyrics. The copying reduces the market for the sheet music and therefore is not usually considered a fair use.

Q: What if the work copied is a collection of facts?

A: The doctrine of fair use grants broader use without infringement if the work is a collection of facts, such as a database of baseball statistics or an encyclopedia, as compared to a fictional work such as *Twilight* by Stephanie Meyer.

Q: How does the amount of the work copied affect the determination of fair use?

A: If the amount of the copyrighted material copied is small and it does not impact the copyright owner's ability to make money from his or her work, it will weigh in favor of fair use. For instance, an author who quotes a line from a prior book by another author in his or her book on a similar topic will probably be protected by the doctrine of fair use.

Q: Is it a fair use to copy an unpublished work?

A: Use of an unpublished work is less likely to qualify as a fair use than use of a published work. The law gives a copyright owner the right to control when his or her work is first published. All of the fair use factors must be considered and

weighed in deciding if an activity is exempt from infringement liability. As this involves making a legal judgment, questions about fair use should be referred to an attorney experienced in copyright law.

Q: What are the penalties for copyright infringement?

A: The penalties for copyright infringement can be severe. The law provides the copyright owner with the right to obtain actual damages or “statutory damages.” Statutory damages are those set by law and can range from \$750 to \$150,000 per infringement plus attorney fees. As a result, damage awards can be much higher than the actual loss to the copyright owner. Also, in some circumstances copyright infringement may be a criminal offense punishable by fine or imprisonment. For these reasons it is important to work with experienced legal counsel when dealing with copyright issues.

Law You Can Use is a weekly consumer legal information column provided by the Ohio State Bar Association. This article was prepared by Patricia A. Walker, a principal with the law firm Walker & Jocke. Articles appearing in this column are intended to provide broad, general information about the law. Before applying this information to a specific legal problem, readers are urged to seek advice from an attorney.