Intellectual Property and Writing for Digital Media

Kristina Keogh, kkeogh@ringling.edu
Claire Powell, cpowell3@c.ringling.edu
Outline

• Copyright
• Fair Use
• Fair Use in Journalism and Media
Under **the U.S. Code,**

**Title 17**

- Copyright protects “original works of authorship” that are “fixed in a tangible medium of expression.”
- Copyright extends to – literary, musical, dramatic, pictorial, graphic, architectural, and sculptural works. Also: choreography, motion pictures, sound recordings…

**Title 17, Section 106** allows the copyright holder to:
- *Reproduce* the copyrighted work whether in whole or in part (making a digital copy from an analog work is “reproduction” restricted to the copyright holder)
- *Prepare derivative works* including translations or adaptations
- *Distribute copies* by sale or other transfer of ownership
- For works capable of performance, *to perform* the copyrighted work in a public place or setting
- For works capable of display, *to display* the copyrighted work in a public place or setting
Copyright Protection
Does Not Cover:

- Underlying facts, ideas, concepts, principles, processes, procedures, systems, discoveries *(but watch out for patent law issues).*
- Federal Government Works, including works created by federal officers and employees, *(but watch out for contract works, consultants, etc.)*
- Titles, names, short phrases and slogans, familiar symbols or designs, lettering *(but watch out for trademark or other legal issues)*
- Works consisting of information that is common property *(weight charts, standard calendars, tables or lists taken from public documents)*
More Copyright exceptions under Title 17

- **Section 107** - Fair Use
- **Section 108** – Library Copying
- **Section 109 (c)** – Public Displays (helps libraries, museums, galleries, etc.)
- **Section 110 (1)** Displays and Performances in Face-to-Face Teaching (reciting poetry, reading plays, showing videos or films, playing music in traditional classroom settings.)
- **Section 110 (2)** Displays and Performances in Distance Learning (the “TEACH Act”)
Fair Use*

• “Notwithstanding the provisions of sections 106 and 106A, the 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”…

• **Purpose and character** of the use, including whether the use is for educational vs. commercial purposes

• The **nature of the copyrighted work** – is it a factual or creative work

• The **amount and substantiality** of the portion to be used in relation to the work as a whole

• The **effect or impact** of the use upon the potential market for or value of the work.
FACTOR 1: What is the character of the use?

<table>
<thead>
<tr>
<th>Nonprofit</th>
<th>Criticism</th>
<th>Commercial</th>
</tr>
</thead>
<tbody>
<tr>
<td>Educational</td>
<td>Commentary or criticism</td>
<td></td>
</tr>
<tr>
<td>Personal</td>
<td>News reporting</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Parody</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Otherwise &quot;transformative&quot; use</td>
<td></td>
</tr>
</tbody>
</table>

Fair Use NOT Fair Use
FACTOR 2: What is the nature of the work to be used?

<table>
<thead>
<tr>
<th>Fact</th>
<th>A mixture of fact and imaginative</th>
<th>Imaginative</th>
</tr>
</thead>
<tbody>
<tr>
<td>Published</td>
<td></td>
<td>Unpublished</td>
</tr>
</tbody>
</table>

Fair Use  NOT Fair Use
FACTOR 3:
How much of the work will you use?

Small Amount | More than a small amount

Fair Use | NOT Fair Use
FACTOR 4: If this kind of use were widespread, what effect would it have on the market for the original or for permissions? (Market Factor)

<table>
<thead>
<tr>
<th>Password protection; technological protection; limited time use</th>
<th>Proposed use is transformative and not merely duplicative</th>
<th>Competes with (takes away sales from) the original</th>
</tr>
</thead>
<tbody>
<tr>
<td>Original is out of print or otherwise unavailable</td>
<td></td>
<td>Avoids payment for permission (royalties) in an established permissions market</td>
</tr>
<tr>
<td>Copyright owner is unidentifiable</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No ready market for permission</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Fair Use

NOT Fair Use
Trademark Fair Use

- Trademarks (words, symbols, designs, phrases) distinguish the source of products or services provided to consumers. *The main purpose of trademark law is to avoid consumer confusion.*

- The **good news** is that courts have consistently protected the public's right to use the trademarks of others in order to engage in **criticism, commentary, news reporting**, and other forms of **noncommercial expression**.

- As a general matter, if you are reporting on, commenting on, or criticizing a trademark owner, most ordinary consumers will not be confused about whether the company or organization is the source or sponsor of your work.
Set of Principles for Fair Use in Journalism
(Center for Media and Social Impact)
http://archive.cmsimpact.org/journalism

- Incorporation of copyrighted material captured incidentally and fortuitously in the process of recording and disseminating news
- Use of copyrighted material as proof or substantiation in news reporting or analysis
- When copyrighted material is used in cultural reporting and criticism
- When copyrighted material is used as illustration in news reporting or analysis
- When copyrighted material is used as historical reference in news reporting or analysis
- Using copyrighted material for the specific purpose of starting or expanding a public discussion of news
- Quoting from copyrighted material to add value and knowledge to evolving news.
Use of User-Generated Content

(Recut, Reframe, Recycle)

http://archive.cmsimpact.org/journalism

• For User Generated Content, the use may be fair if journalists are creating:
  • satire or parody
  • negative or critical commentary
  • positive commentary
  • a quotation to start a discussion
  • illustration or example
  • reportage/diaries
  • pastiche or collage
  • archive of vulnerable or revealing materials
Use of Commercially Produced Video

(Documentary Filmmakers’ Statement of Best Practices in Fair Use)

• For commercial films - use may be fair if journalists are
  • commenting on or critiquing copyrighted material
  • using copyrighted material for illustration or example
  • capturing copyrighted material incidentally or accidentally
  • reproducing, reposting, or quoting in order to memorialize, preserve, or rescue an experience, an event, or a cultural phenomenon
  • copying, restoring, and recirculating a work or part of a work for purposes of launching a discussion
  • quoting in order to recombine elements to make a new work that depends for its meaning on (often unlikely) relationships between the elements