

What are the infringements and fair uses pertaining to digital media? An infringement on intellectual property can occur through copyright, trademark or patent. Also, a violation can occur through rights of publicity and privacy. If one is sued for violation or infringement they are liable, not guilty.

Copyright infringement can occur when someone utilizes another's writing or media without permission. Fair use is considered a limitation to copyright protection. Fair use permits the use of copyrighted materials for certain purposes without the permission from the owner. An example of this could be an art student's use of another's photograph for a class assignment.

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There are no distinct rules on fair use regulations. Normally, fair use is dictated on a case-by-case basis. The fair use doctrine—that is, the legal rules and principles that comprise this concept—was codified with passage of the Copyright Act of 1976.² Intellectual property protections end once work enters the public domain. Copyright expiration and author's intent affect a work's passing into the public domain.

Owners of a copyright are guaranteed exclusive rights to their work. The copy-

right law places some limitations on those rights. The fair use doctrine is essential in determining the legal use of copyrighted material. One may claim fair use when utilizing copyrighted without permission. Conversely, if one uses copyrighted material for purpose of copying text or scanning pictures—and the use is not consider fair. Then you have infringed on the copyright.

The vague line between fair use and infringement of copyright is evident in the *Harper & Row v. Nation Enterprises*¹¹ case. In 1979 the *National Magazine*, which is the longest continuously running weekly magazine, acquired an unauthorized and unpublished copy of a memoir of the former President Gerald R. Ford's. The editor at the time for the *National Magazine* was Victor Navasky. Navasky received the draft of President Ford's memoirs from an undisclosed source. The Ford memoirs were written in collaboration by President Ford and Trevor Armbrister who was a senior editor of *Reader's Digest*. In the memoirs President Ford pardoned President Nixon for his insubordination while president.

The *Nation Magazine* ran the article utilizing at least 13% of direct takings from the unpublished manuscript. Harper & Row and the Reader's Digest Association sued the Nation Enterprises for copyright infringement. Harper & Row and *Reader's Digest* at the time planned on publishing the article in *Time Magazine*. There was already a deal for the article publication worth \$25,000. In addition, a \$12,500 advance was already in place.

Once the case went to the Supreme Court it was stated that The *National*

Magazine had timed its publication of the before the release of the *Time Magazine* article release. *Time Magazine* decided not to run the article and refused to pay the remaining \$12,500 balance.

The use of direct takings from the manuscript was found not a fair use. This was applied from the Copyright Act. Furthermore, the court looked at four critical factors determining fair use: (1) The Nature and Purpose of the Use, (2) Nature of the Copyrighted Work, (3) Amount of Substantiality of the Copying—13%, and (4) Effect on Market.¹

It was found that National Enterprises did indeed not utilize fair use. National was liable to pay the \$12,500 in damages which was equal to the advance that *Time Magazine* had paid.

Copyright law has its beginnings in the United States by being written into the Constitution. It reads; *Congress has the power to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*² Ultimately, this allowed individuals monopoly of their own work for a certain time. Once the time expired, the rights were available to the public to improve and build on. Clause 8 became known as the “Progress Clause.”⁹ However, intellectual property law continues to change with evolving technology, culture and commerce.

Intellectual property is distinguishable from physical property. Songs, designs, clothing, inventions, movies etc... can be considered intellectual property. This prop-

erty is derived from conceptual or mental labor not physical. These are intangible assets. Included in physical property is real property such as real estate and personal property like your clothing.

An example of an intangible asset could be your conceptual idea (invention) for a new garden tool. You may take the concept through initial development, draft, prototype, testing, industrialization, and finally market it to the public. Your initial conceptual design is an intangible asset. Once someone would buy your design at a home center then the tool would become part of their personal property. Their personal property is now considered a tangible asset.

There are, of course, distinct differences between tangible and intangible assets. Tangible assets can disappear. An example of this can be if a house is destroyed in a hurricane. Intellectual property cannot disappear. Even after death, intellectual property can stay protected for decades later.

Intellectual property is divided into approximately six categories; copyright law, patent law, trademark law, trade secret law, trade dress law, design patent, right of publicity and right of privacy. Copyright law (which is the emphasis of this section) protects the expression of an idea but not the underlying idea itself, in a rule of law known as the Idea Expression Dichotomy.² The protection that copyright allows is life of the author plus 70 years against others utilizing your property (see table 1). One exception to this protection is fair use. This implies a limited use of copyrighted material without authorization from the originator. Patent law provides mo-

nopoly protection for conceptual ideas. This law applies to inventions that are truly out of the ordinary and proves useful in everyday society. Corporate identity marks, symbols, logos, and type fall under the trademark law. I have found that in order to be distinguishable from another corporate identity that the design must be of 60% change. This could be as simple as a font change or as intricate as the shape and form of a design. Secret ingredients, and other information that a business considers private falls under the trade secret law. The business does not have to register the “secret” if they choose not to. The trade dress law can co-inside with the trademark law as well as be more involved to include packaging, signage, and overall appeal of a product. A product that will be manufactured will need to have a design patent in order. This patent will protect the overall design as well as its infrastructure and how it works. Finally, the right of publicity and right of privacy protect an individual. An example could be the identity theft of a celebrity that results in a loss of monies.

Another case example is 2 Live Crew-a rap group- was sued by Acuff-Rose music in the case *Acuff-Rose Music, Inc. v. Campbell*, 1992.¹² Allegedly, Acuff-Rose accused the 2 Live Crew’s rap “Pretty Woman” was in copyright violation of the late Roy Orbison’s song “Oh Pretty Woman.” The District Court granted summary judgment for 2 Live Crew, holding that its song was a parody that made fair use of the original ballad.¹

This ruling was later overturned by the Court of Appeals. The ruling claimed that the transformative nature of the 2 Live Crew’s rap was not extensive enough.

Also, that this proclaimed parody did not isolate itself enough from the original through expression, message or meaning. Conversely, the Court of Appeals felt that the more the transformative the parody the less impact the possible infringement has on commercial and market impact.

The case of UMG Recordings v. MP3.com¹³ found traditional copyright principles applied to new digital media. In this case the Federal Court ruled that MP3's digital music services infringed on the copyrights of UMG Recordings.

The U.S district court described the service in a copyright infringement suit: *MP3.com on or around January 12, 2000 launched its "My MP3.com" service, which is advertised as permitting subscribers to store, customize and listen to the recordings contained in their CDs from any place where they have an Internet connection.*¹³

The MP3.com site utilized recognition software to search the subscribers own CD's to demonstrate that they owned a particular piece of music. If this was determined to be true then they would have space allocated on the MP3.com server allowing them to access songs from that CD anywhere on an internet connection instead of from the original CD.

Although, MP3.com had to make copy of the CD's to keep as a master file database. This was the main argument of infringement of copyright. Also, that the copyright holder's had exclusive rights to make copies.

MP3.com did true to argue that this was within the boundaries of fair use. A federal judge determined that the copying and replaying of original CD's was -in

fact- outside of the legal fair use boundaries.

President Bill Clinton initiated the Sonny Bony Copyright Term Extension Act by signing it in 1998 (see table 1). The act protects the copyright holder's exclusive right to their intellectual property for plus 70 years. Initially, the 1909 Act gave copyright protections for 28 years with a possible 28 year renewal. Later, the 1976 Act gave the right for 50 years.

In some cases copyright holders would fail to renew their copyrights involving intellectual property that was still in public viewing. One case of this is Republic Pictures "It's a Wonderful Life". The movie fell into the public domain without any copyright protection because Republic Pictures failed to renew their right. This led to the 1976 Act which allowed extensions up to 96 years.

These limitations suggest that intellectual property is ultimately limited. Also, that the copyright period is "virtually perpetual".

Another act that had a major impact is The Digital Millennium Copyright Act which pertains to internet infringement. Congress took up this issue and enacted on October 28, 1998. Criminal penalties are given "hackers" involved in the making, importing or trading in technology designed to pirate and deconstruct software. The Act also prohibits the removal or alteration of information that identifies the copyright owners of materials that are electronically stored or carried on the Internet.¹⁴

The Act also protects Internet Service Providers (ISP's). When service providers customers engage in infringement. The provider only needs show they did

not know that the infringing was taking place nor that the infringed material was on their server. If an infringement has taken place the service provider is required to block the infringing material or remove it immediately.

Music sampling is another area of copyright issues. It is a common misconception that use of only parts of a song is fair use. Even if the sampling is only 30 seconds or 8 bars- which most think is within parameters of fair use- it is considered copyright infringement. Actually, there is no such rule that permits even the smallest sampling of songs to be considered fair use.

A music sampling case between Grand Upright Music v. Warner Brothers Records¹⁵ was a matter of only 3 words of sampled music. The case involved a song for Cold Chillin' Records called "Alone Again" by rap artist Biz Markie. The song sampled parts of another song previously recorded by Gilbert O'Sullivan called "Alone Again Naturally." Initially, Markie and Cold Chillin' Records requested permission to sample the song. They were denied, but decided to utilize the sampled music anyways and implement the song on album to be released.

The case went to federal court that kept the album from being released due to unlawful use of the O'Sullivan song. The court felt that the Cold Chillin' Record Company had blatant disregard for the law and that there should be stronger measures because of this case.

Another case found the use of three separate words/phrases and a keyboard line was in copyright infringement. The case was Jarvis v. A & M Records.¹⁶

The use of “ooh,” “moves,” and “free your body” were in question of copyright of work written by Boyd Jarvis. There was a question of whether the words/phrases was copyrightable along with the keyboard music. The court did indeed find that the song portions that were sampled were significant enough to be considered intellectual property and found in support of Mr. Jarvis.

What then determines fair use? The Fair Use Doctrine identifies four factors. The factors do have stipulations such as special facts of the situation and how much of any work you can use. One factor is the purpose and character of the use such as research, new reporting or non-profit use. The second factor is the nature of the copyrighted work such as factual versus creative. Factor three is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. And the fourth factor is the effect of the use on the market.

I feel the most controversial factor is factor one. The other factors seemingly can be proven by actual fact. Factor one has vagueness to it that would need to be proven more in depth. An example of factor one that comes to mind is “*The Daily Show*” on Comedy Central. Considering the parody that the show portrays of the media and the political spectrum, most would think that figures portrayed in the shows skits would never give permission for use. In fact, since the parodies are satirical they are not considered infringement and the information is newsworthy.

Another area of fair use is educational responsibilities. Educational use does not give more room for copyright infringement than another other area. An educator or

student still should credit the work of an author. The Copyright Act of 1976 found educators and publisher's mapping out what is known as the "Classroom Guidelines" (also known as the CONTU guidelines). These guidelines specify that copying for classroom use should meet the criteria of brevity, spontaneity, and lack of cumulative effect.² In general, this means an educator does not have time to constantly seek permission, does not utilize the same materials each semester, and the amount is not significant.

Safe Harbor guidelines were set forth in 1998 during the Conference on Fair Use. This conference addressed issues of instructors and students who utilize media in an educational environment. For example, 100 of 100 words of text that is copyrighted and an entire photograph but not more than 5 images on one creator is considered fair use. These are only proposed figures. There is no set formula of educational fair use.

A scenario that may arise in a fair use situation in an educational environment is if a student wants to utilize images from another creator in their website. One approach to determine this is to go through the four factors of the Fair Use Doctrine. Factor one is the purpose and character of the work. Since this is being used in a non-profit educational environment the usage of the image is considered fair use. Also, the student may choose to edit the images on his/her site that would lend to a more "transformative" state of the original work. Thereby, making the work more their own. The second factor determines the nature of the work. Since the

images are creative and not factual fair use weighs against the student in this case. Factor three is the amount and substantiality of the images used. Here the fact of how much the student didn't use is not a factor. And factor four is the effect on the market. Usually, if the work has any effect on the market (for profit) then it is not considered fair use. Since the student will utilize the images in an educational environment they are safe here. Factor one seems to be the most influential factor in this case. Since the student is utilizing the images in a non-profit educational environment the work is considered fair use.

The prior case scenario leads to an additional area of copyright and fair use of licensing agreements. A licensing agreement is permission given by a copyright holder to utilize their work. There are a number of licensing agreements: royalty-free or rights-managed agreements, and exclusive or non-exclusive.²

When someone wants to utilize someone else's intellectual property a royalty fee is usually paid. Examples of this can include a school play, internet video casting, and advertising. In most cases royalty fees do not pay out much. But consider a show like *Seinfeld*. Each time this show airs on re-runs a royalty fee is paid out to the people involved within the sitcom. The same royalty fee consideration applies to the music industry. Each time a song such as "The Christmas Song" by Mel Torme is played he receives a royalty fee.

A royalty-free agreement means a user can purchase the right to utilize another's copyright. This can be use for multiple occasions or unlimited times. If the

work is available to any number of purchasers then this is considered non-exclusive license. An example of this being stock photography on the web. Anyone can purchase the images and utilize them as much as the like.

Rights-managed agreements apply to rights to work in a geographical region during a certain time frame. If only a single user under specific conditions will utilize the work then this is considered an exclusive license. An example of this would be a purchase of an image for use on a billboard.

It seems as those issues pertaining to fair use can go on forever. Also, new cases being provided everyday with evolving technology, culture and commerce. The fair use doctrine provides substantial provisions of fair use, but it still has a fluid base where there is not an absolute distinct line.

Unless a party has permission or is using someone else's intellectual property as a parody they should ask permission. This seems to be the golden rule among fair use.

TABLE 1: SIGNIFICANT CHANGES IN U.S. COPYRIGHT LAWS

Act	Works Included	Copyright Term	Effect
Act of 1790	Books, maps, charts	14yrs+14yr renewal	Author still U.S. citizen or resident and still alive
1802	Prints		
1831	Musical compositions	28yrs+14yr renewal	Widows and children included.
1856	Public Performances of dramatic works		
1865	Photographs		
1870	Fine Art: 2d and 3d art and design		
Copyright Act of 1909		28yrs+28yr renewal	Protection began upon publication.
Copyright Act of 1976	Original works of authorship	Life of author+50yrs	Copyright at the time of conceptual development (tangible medium). Limitations through fair use.
Visual Artists Rights Act of 1990			Fine artists were granted rights to have their name removed from works that have been edited or used without permission.
Architectural Works Copyright Protection Act of 1990	Design of a building		
Computer Software Rental Amendment of 1990 & Record Rental Amendment of 1984	Copyright owner given exclusive control over rental of computer programs and sound recordings		
Audio Home Recording Act of 1992	Digital Audio Transmission		Anticopying technology was installed by manufacturers in exchange for the recording industry not suing the public for home recording.
Uruguay Round Agreements Act of 1994			Restored copyright to non-U.S. works not previously protected.
Sonny Bono Copyright Term Extensions Act of 1998		Life of author+70yrs; 95 years for the work for hire, anonymous, or pseudonymous works	Extended copyright protection by 20 years to new and existing works that were in copyright
Digital Millennium Copyright Act of 1998			Criminal penalties are given "hackers" involved in the making, importing or trading in technology designed to pirate and deconstruct software. The Act also protects Internet Service Providers (ISP).
TEACH Act of 2002			Extended educational exemption to distance learning environments.
Family Entertainment and Copyright Act of 2005	Unreleased film and music		Made it a crime to tape movies in a theater or share on a network an unreleased film or song, and allowed use of hardware that can skip and mute DVD's

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- ⁸MGM v. Grokster 545 U.S. 125 S.Ct. 2764, 2771 (2005).
- ⁹The Constitution; Article 1, Section 8, Clause 8.
- ¹⁰Sonny Bono Copyright Extension Act
- ¹¹Harper & Row, Publishers, Inc. and Reader's Digest Ass'n, Inc. v. Nation Enterprises and Nation Associates, 557 F.Supp. 1067, 1069 (S.D.N.Y. \1983), 9 Med.L.Rptr. 1229.
- ¹²Acuff-Rose Music, Inc. v. Campbell, 754 F.Supp. 1150 (M.D.Tenn.1991).
- ¹³UMG Recordings v. MP3.Com, 92 F.Supp.2d 349 (S.D.N.Y.2000).
- ¹⁴Digital Millennium Copyright Act, Pub.L.No. 105-3-4, 112 Stat. 2860.
- ¹⁵Grand Upright Music v. Warner Brothers Records Inc., 780 F.Supp. 182 (S.D.N.Y.1991.)
- ¹⁶Jarvis v. A & M Records, 827 F.Supp. 282 (D.N.J.1993)

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