

Shell advice on "fair use of a copyrighted work"

Message #3317 of 17781

http://groups.yahoo.com/group/AFRA_CenCom/message/3317

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Re: [AFRA_CenCom] Some AFRA business

Leonard - an affirmative defense to copyright infringement is "fair use."

107 of the Copyright Act of 1976, Article 17 of the United States Code. The Section reads in its entirety:

Notwithstanding the provisions of section 106, 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 --

- (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; (*this means whether it is a 'creative' work or a data base type of property. If a minimum amount of creativity has gone into the work, it falls under creative and has stronger protections against abuses of fair use.*)
- (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.

Discussion

Purpose and character.

Section 107 specifically provides that under this factor we consider "whether [the] use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. @ 107; see also *Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir. 1983). The Supreme Court has held that "commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony Corp.*, 464 U.S. at 451. Additionally, the Supreme Court has found that "the distinction between 'productive' and 'unproductive' uses may be helpful in calibrating the balance [of interests]." *Id.* at 455 n. 40. While both are significant considerations, neither of these is determinative.

Your proposed use is for nonprofit educational purposes which favors a fair use finding

Fair use is allowable if the material is transformed in some way. Transformative use - It has been argued that the essence of "character and purpose" is the transformative value, that is, productive use, of the secondary work compared to the original. District Court Judge Leval has noted that, "the use . . . must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test." Leval, *Toward a Fair Use Standard*, 103 *Harv. L. Rev.* 1105, 1111 (1990) (suggesting a balancing between the justification for and the extent of the taking).

Most contested instances of copyright infringement are those in which the infringer has copied small portions, quotations or excerpts of works and represents them in another form, for example, a biography, criticism, news article or other commentary. See, e.g., *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985); *New Era Publications v. Carol Publishing*, 904 F.2d 152, 14 U.S.P.Q.2D (BNA) 2030 (2d Cir.), cert. denied, 498 U.S. 921, 111 S. Ct. 297, 112 L. Ed. 2d 251 (1990); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890, 108 S. Ct. 213, 98 L. Ed. 2d 177 (1987); *Wright v. Warner Books, Inc.*, 748 F. Supp. 105, 16 U.S.P.Q.2D (BNA) 1356 (S.D.N.Y. 1990). See *Pacific & Southern Co. v. Duncan*, 744

F.2d 1490, 1496 (11th Cir.), cert. denied, 471 U.S. 1004, 105 S. Ct. 1867, 85 L. Ed. 2d 161 (1985) (finding infringement by a defendant who neither "analyze[d] . . . [nor] improve[d]" the work, noting that "the preamble to Section 107 indicate[s] [that] fair uses are those that contribute in some way to the public welfare.").

I would recommend that rather than presenting the unaltered test showing the most favorable answers is to conduct our own analysis of the questions (say by category?) and include a discussion of what the questions in each category looks like, what these questions are designed to uncover and provide the responses that would result in the most favorable results. This would constitute not only a significant transformation of the original work, but would also constitute an educational analysis for the purposes of contributing to the public welfare - specifically to prevent harm from the use of that product to persons who are subjected to the test against their wills. Under these circumstances, it would be much more difficult to claim infringement, especially if AFRA's finished product does not materially resemble the original property.

Commercial use

"The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." Harper & Row, 471 U.S. at 562.

Courts' consideration of the profit factor usually arises because the alleged infringing work competes in the same market as the copyrighted work, thus making the "commerciality" more harmful to the copyright holder. See *Marcus v. Rowley*, 695 F.2d at 1175; *Haberman v. Hustler Magazine, Inc.*, 626 F. Supp. 201, 211 (D. Mass. 1986). In cases in which a defendant is claiming fair use for a criticism, commentary or other scholarly research, the courts are more likely to find fair use under this factor. In *New Era Publications v. Carol Publishing*, 904 F.2d at 156, the Second Circuit found fair use under the character and use factor since the publication in suit was not an economic exploitation of the original work but a legitimate critical biography. In that case, a critic and biographer of L. Ron Hubbard and the Church of Scientology defended his use of quotes from 48 of Hubbard's works.

A potentially widespread use which was notably non-commercial has been held to be a fair use. In *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984), television viewers taped plaintiffs' television programs on home video recorders, doing nothing to enhance the program -- simply copying them in order to view them later. The Court decided this "time-shifting" was fair use and placed emphasis on the fact that the viewers were not selling their copies of these programs for profit.

If AFRA intends to provide this analysis free of charge, it will weigh greatly in favor of a fair use determination. However, if AFRA does charge for the analysis, it still does not presumptively preclude a fair use determination.

The Nature of the Copyrighted Work.

The second factor concerns the nature of the copyrighted work. Courts generally hold that "the scope of fair use is greater with respect to factual than non-factual works." *New Era Publications v. Carol Publishing Group*, 904 F.2d at 157. Factual works, such as biographies, reviews, criticism and commentary, are believed to have a greater public value and, therefore, uses of them may be better tolerated by the copyright law. See *Salinger v. Random House, Inc.*, 811 F.2d at 96. Works containing information in the public interest may require less protection. See *Consumers Union v. General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983), cert. denied, 469 U.S. 823, 105 S. Ct. 100, 83 L. Ed. 2d 45, 224 U.S.P.Q. (BNA) 61 (1984). Fictional works, on the other hand, are often based closely on the author's subjective impressions and, therefore, require more protection. These are general rules of thumb.

The MMPI is a factual work, favoring fair use.

The Amount and Substantiality of the Portion Used.

"There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use." *Maxtone-Graham v. Burtchaeil*, 803 F.2d 1253 (2d Cir.), cert. denied, 481 U.S. 1059, 107 S. Ct. 2201, 95 L. Ed. 2d 856 (1987). This third factor considers not only the percentage of the original used but also the "substantiality" of that portion to the whole of the work; that is, courts must evaluate the qualitative aspects as

well as the quantity of material copied. See *New Era Publications Int'l v. Carol Publishing Group*, 904 F.2d at 158. A short piece which is "the heart of" a work may not be fair use and a longer piece which is pedestrian in nature may be fair use. The balancing of the four factors must be complete, relying solely upon no one factor. The purpose of the use may be balanced against the amount and substantiality of the use. For example, "even substantial quotations might qualify as fair use in a review of a published work." See *Harper & Row*, 471 U.S. at 564-65.

Courts have found relatively small quantitative uses to be fair use. See, e.g., *New Era Publications*, 904 F.2d at 158 (court found as fair that defendant used a "minuscule" amount of 25 works: 5-6% of 12 works, 8% or more of 11 works "each of the 11 being only a few pages in length."); *Iowa State University Research Found., Inc. v. Am. Broadcasting Cos., Inc.*, 621 F.2d at 61-62 (court found unfair copying of 8% of videotape never before broadcast); *Maxtone-Graham*, 803 F.2d at 1263 (inclusion of 4.3% of work was fair); *Salinger*, 811 F.2d at 98-99 (finding this factor weighed "heavily" in favor of Salinger, the court found no fair use of quotation and paraphrasing totalling one-third of 17 letters, and 10% of 42 letters); *Harper & Row*, 471 U.S. at 564-65 (the 300 copyrighted words appropriated to the Times article were an insubstantial portion of the work but "essentially the heart of the book.").

Additionally, "reference to a work's availability is appropriate." *Wright v. Warner Books, Inc.*, 748 F. Supp. at 112. Therefore, longer portions copied from an out-of-print book may be fair use because the book is no longer available. (This has been thought to be true because, presumably, there is little market effect produced by the copying. However, plaintiffs in this case convincingly argue that damage to out-of-print works may in fact be greater since permissions fees may be the only income for authors and copyright owners.)

This appears to apply to direct, unaltered passages from the work. Were AFRA to quote only portions of questions along with their analysis and recommendations, it would be easier to argue in favor of fair use. I suggest this because it appears that Pearsons will vigorously pursue copyright infringement, therefore careful crafting will make it more difficult for them.

The Effect of the Use on Potential Markets for or Value of the Copyrighted Work.

The fourth factor, market effect, also fails the defendant. This factor has been held to be "undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. "To negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the potential market for the copyrighted work.'" *Id.* at 568 (quoting *Sony Corp.*, 464 U.S. at 451, emphasis added).

This is the fun one. . .you betcha AFRA's use of the MMPI is intended to adversely affect the potential market for the copyrighted work. THAT is the goal. AFRA wants the MMPI completely discredited, and in an effort to accomplish that, proposes a widespread, coordinated education effort to skew the results of as many tests as possible in an identifiable and substantially similar manner. If these test results can be skewed in this manner, then the test itself is flawed and should be invalidated. However, this is not done for AFRA's profit, but for the general public welfare. Leonard's analysis of the harm caused to individuals who are compelled to take this test, can arguably justify discrediting this single copyrighted property. That creates a whole new legal theory. . .that the owner of a copyright is not entitled to government protection from using that property to expose that property to be abusive, invalid, fraudulent, speculative, prejudicial blah blah blah. That the use of that copyrighted property, substantially transformed, for non-profit analysis and education, to prevent misuses such as occur in CPS cases, even if deliberately intended to adversely affect the potential market for the copyrighted work, should constitute fair use.

Another affirmative defense COPYRIGHT MISUSE against Pearsons if they sue AFRA.

However, some courts have held that "misuse of a copyright, in violation of the antitrust laws, may be asserted as a defense in copyright infringement cases." *United Telephone Co. of Missouri v. Johnson Pub. Co.*, 855 F.2d 604, 611 (8th Cir. 1988). The defense of patent misuse has been recognized as a defense to patent infringement if the patent is being used to restrain competition, particularly through "tying clauses" which require that, in order to get a license for one product, the purchaser must buy another also. See *United States v. Loew's, Inc.*, 371 U.S. 38, 83 S. Ct. 97, 9 L. Ed. 2d 11 (1962); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (1948); *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 62 S. Ct. 402, 86 L. Ed. 363 (1942). Patent misuse doctrine is "an extension of the equitable doctrine of 'unclean hands' to the patent field."

U.S. Gypsum Co. v. National Gypsum Co., 352 U.S. 457, 77 S. Ct. 490, 1 L. Ed. 2d 465 (1957). Patent and copyright doctrine can be compared on this point.

It has proven difficult to convince courts of the misuse defense. In CBS v. American Society of Composers, 400 F. Supp. 737 (S.D.N.Y. 1975), CBS defended a copyright infringement claim by assailing ASCAP's and BMI's blanket licensing arrangements as copyright misuse. The court held that CBS failed to prove copyright misuse because it did not show that the defendants had "refused or would refuse to license their compositions . . . or [had] otherwise used their collective leverage to compel CBS to license rights to music which it did not wish to license." 400 F. Supp. at 782. In F.E.L. Publications, Ltd. v. Catholic Bishop, 506 F. Supp. 1127 (N.D. Ill. 1981), rev'd on other grounds, 214 U.S.P.Q. (BNA) 409 (7th Cir.), cert. denied, 459 U.S. 859, 74 L. Ed. 2d 113, 103 S. Ct. 131 (1982), the Circuit Court reversed the District Court and held that plaintiff's licensing agreement, which required licensees to pay for all 1,400 songs in its hymnal regardless of how many songs were actually copied, was no violation of the Sherman Act. Id. at 413-16. In United Telephone, supra, defendant increased its licensing fee 500% to 49 cents, but only after it had offered plaintiff the opportunity to license its telephone listings at 10 cents per entry. The court denied defendant's copyright misuse defense since defendant initially had been offered the lower price and because defendant had not shown that plaintiff's telephone list was a monopoly since defendant could canvass the city and develop its own list. 855 F.2d at 612.

Can AFRA go to another source to obtain this information? No, the MMPI is the instrument of oppression which is AFRA's focus, and there is a single source for this information. Will Pearson's grand AFRA a license? Would the terms of this license effectively prevent AFRA from using this property in the manner it intends to? Should AFRA attempt to obtain the license to use this property for non-profit educational services? If AFRA cannot obtain the license granting the use it requires, would that weigh in AFRA's favor?

I think this is a front burner issue - destroy the weapons they use against the parents, discredit them in the process - huge psychological defeat and a public relations nightmare for CPS and courts. . . before the fix was discovered, it might prevent a lot of parents from losing their kids. When it was discovered, it would throw a lot of courts and cps vultures into a complete tizzy. It would help us tear down every alter to psychology that CPS worships at and we could fight to keep all that psychobabble voodoo out of the courts. Psychobabble is too subjective and too flawed to be even considered for evidentiary purposes in all but the most extreme and objectively measurable conditions. Courts and juries are too influenced by the complicated incantations to even consider giving it the proper evidentiary weight, therefore, it must be excluded as too imperfect and too prejudicial. This is a right step toward that process.

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Wed Mar 10, 2004 5:54 pm
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Tracey Sheehan, Intellectual Property and Contracts, Pearson Assessments seems to have the job of checking the Search Engines for mentions of the MMPI or the test questions. I removed the actual 567 test questions per her complaint last month...

We also found a rough shareware program to score the test. But it IS rough. We need someone with programming experience to hook it all together into a self-contained package.

Yesterday, we received a **new complaint** about my LINKS to COPIES of sites that had a few test

question on them.

So I checked it out with Hession and he felt we were probably on solid ground, but I decided to just pull the "infringing material" because "intellectual copyright" is not the fight I want with them.

It appears to me that [Pearson Assessments](#) may well be one of the snakes in the "Medusa Head" of the corruption in America. They can't be oblivious to the abusive way their tests are being used. What else ARE they used for?

Imagine- having a product that people are FORCED to buy under extreme threat- which is then used to carry out the threat anyway. That's why the Fifth Amendment was created.

I want to stuff the MMPI and every other psych test up the fascist monster's national ass. This is not American Liberty.

This is the fight we want- We believe the MMPI is routinely and UNCONSTITUTIONALLY ordered, which violates our Fifth Amendment Right against self-incrimination.

THIS IS NOT a "front burner" project at this time. I am tossing it out for you guys to mull over.

Don't miss the Rent-A-Center story. There has **already been precedent set and a settlement of \$2 Million** over the use of their test as a condition of employment. How much worse is it that their tests are used as a guise to DESTROY people's lives?

Are we now powerful enough to kick Pearson Assessment's ass over the way their tests are being used?

It could be a major case. And winnable, I think.

Do we want to? Or do we attack differently someplace else? It's not as if there aren't plenty of things, places, and persons that need to be exposed as the frauds they are.

Let's talk about it.

Leonard