

On copyright

Copyright in the networked world: multimedia fair use

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Abstract

This column examines a “non-legislative” report on “Fair use guidelines for educational multimedia”. Although the guidelines have serious flaws, they offer several positive features: they recognize that fair use applies to multimedia, they include photographs and numeric databases, and they provide easily understood metrics for the amount of material that can be used.

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One of the curiosities of the modern copyright world is its (apparent) failure to reproduce print-based patterns for the legal use of digital materials. It is a curiosity in two senses:

- (1) because the vast majority of reasonably educated people seem to expect it; and
- (2) because legal reasoning relies heavily on analogy.

This column examines a “non-legislative” report on “Fair use guidelines for educational multimedia”, which the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary of the US House of Representatives adopted in 1996 (US House of Representatives, 1996). The report has no legal standing. It is neither statute law nor case law, nor even a resolution of the whole of the House of Representatives. It may offer some protection in an infringement suit. Its narrow, safe-harbor limits may also seduce people into giving up broader fair use rights than would be necessary, if the print-world analogy were applied.

Origin and support

The house subcommittee which adopted the guidelines did not actually write them. That was done by the Consortium of College and University Media Centers, which brought together a group of interested parties to draft a set of agreements. An impressive list of organizations has endorsed the guidelines, including the Association of American Publishers, the Information Industry Association, the Broadcast Music, Inc. (BMI), the Association of American Colleges and Universities, the Motion Picture Association of America, Recording Industry Association of America (RIAA), and the Special Libraries Association (SLA). US government agencies that officially support the guidelines include: the National Endowment for the Arts (NEA), the Copyright Office, and the Patent and Trademark Office.

A number of library associations participated in the discussions but did not endorse the results, including: the American Library Association, the Association of College Research Libraries, and the Association of Research Libraries. This does not necessarily

mean they opposed the end product, but does suggest some wariness about how much the guidelines limit fair use rights.

Definitions

The guidelines define their scope relatively narrowly:

These guidelines apply to the use, without permission, of portions of lawfully acquired copyrighted works in educational multimedia projects which are created by educators or students as part of a systematic learning activity by nonprofit educational institutions.

In other words, these guidelines would not apply to for-profit educational organizations like the University of Phoenix, or to a work created for something other than a “systematic learning activity” such as a promotional video about the university. A later section further limits the use to “curriculum-based instructional activities” only.

They also define educational multimedia projects as ones which:

... incorporate students’ or educators’ original material, such as course notes or commentary, together with various copyrighted media formats including but not limited to, motion media, music, text material, graphics, illustrations, photographs and digital software which are combined into an integrated presentation.

It is particularly interesting that the definition requires original material and an “integrated presentation”. This precludes a work that just contains one or more unrelated segments from copyrighted works with no original material to frame it. Yet that is precisely the kind of fair use clip that a library might want to provide to a student who is browsing a range of material.

The definition of educators includes “faculty, teachers, instructors, and others who engage in scholarly, research and instructional activities for educational institutions”. Librarians could reasonably fit into the “others” category, but their absence is again worth noting. The guidelines give a strong impression that public libraries may well not fit the scope of these guidelines.

The definitions also apply only to works that were “obtained by the institution or individual through lawful means such as purchase, gift or

license agreement but not pirated copies”. This is fairly standard language for print-world fair use, but it puts a burden on the educator for knowing the provenance of a work and knowing whether it is a legal copy. Many faculty think that a videotaped copy of a television program represents a legal copy, and it does in some sense under the 1984 Sony decision (Nimmer *et al.*, 1991). But it probably would not be a legal copy for creating educational multimedia under this guideline.

One important feature is that the guidelines apply to distance education over the Internet. The “educational multimedia products” may be used for:

... remote instruction to students enrolled in curriculum-based courses and located at remote sites, provided over the educational institution’s secure electronic network in real-time, or for after class review or directed self-study, provided there are technological limitations on access to the network and educational multimedia project (such as a password or PIN) and provided further that the technology prevents the making of copies of copyrighted material.

The final clause about the technology preventing copying could mean something as simple as streaming video or audio, but could at some future time also imply more elaborate technological protections.

Time limitations

The statutory definition of fair use (17 USC 107, 2000) includes limits on amount and substantiality. These guidelines add a new limit on how long the work containing the fair use clips can exist:

Educators may use their educational multimedia projects created for educational purposes under Section 2 of these guidelines for teaching courses, for a period of up to two years after the first instructional use with a class. Use beyond that time period, even for educational purposes, requires permission for each copyrighted portion incorporated in the production.

This kind of limit would not be possible in print (without book burning), or even in analog tape or other physical medium (without similar destruction). Apparently banning the use of a digital multimedia work after two years seemed less drastic. Popular notions of the

impermanence of digital works may have made this seem acceptable, even ordinary.

Portion limits

The guidelines use the term “portion” to refer to what is generally called “amount” when discussing fair use limits. The significance, if any, of this choice of language is unclear, though in legal discourse the choice of words almost always matters. It may be that “portion” was intended to incorporate a cumulative limit not usually found in print-based fair use:

These limits apply cumulatively to each educator’s or student’s multimedia project(s) for the same academic semester, cycle or term.

In the print world, an author can incorporate the same fair use quotations from the same works in three or four published articles in the course of a semester. The amount and substantiality limits on fair use apply to each new article, not cumulatively. These guidelines would make similar simultaneous repetition impossible for educational multimedia.

Elementary school students are expected to follow these limits too, though the guidelines recognize that “students in kindergarten through grade six may not be able to adhere rigidly to the portion limitations in this section in their independent development of educational multimedia projects”. The authors are not jesting. When they write about the need to instruct “all” students about copyright protection, they intend to imply no exceptions.

Limits by media

The guidelines offer specific limits for different media, rather than the very broad principles in 17 USC 107 for determining a fair use amount. Yet some consistent numbers are evident:

- *Motion media.* “Up to 10 percent or three minutes, whichever is less. . .”.
- *Text material.* “Up to 10 percent or 1,000 words, whichever is less. . .”.
- *Music, lyrics, and music video.* “Up to 10 percent, but in no event more than 30 seconds, of the music and lyrics from an

individual musical work (or in the aggregate of extracts from an individual work). . .”.

The 10 percent theme runs through these three media types, but applies only to videos shorter than 30 minutes, to articles under 10,000 words (less than 20 pages of *Library Hi Tech*), and to music under five minutes. This amount is not overly generous, but might suffice for most uses.

The limits become more complicated for images and numerical datasets:

- *Illustrations and photographs.* “Under these guidelines a photograph or illustration may be used in its entirety but no more than five images by an artist or photographer may be reproduced or otherwise incorporated. . . When using photographs and illustrations from a published collective work, not more than 10 percent or 15 images, whichever is less. . .”.
- *Numerical data sets.* “Up to 10 percent or 2,500 fields or cell entries, whichever is less, from a copyrighted database or data table may be reproduced or otherwise incorporated. . . A field entry is defined as a specific item of information, such as a name or Social Security number, in a record of a database file. A cell entry is defined as the intersection where a row and a column meet on a spreadsheet.”

It is a plus that these guidelines allow photographs, which generally do not fit print-world explanations of fair use at all, and make some specific provisions for numerical data sets. In many cases, a well-selected 10 percent subset will be as useful as being able to quote an appropriate passage from a text. Unfortunately there will also be times when 10 percent of a numerical data set will be as useless as 10 percent of a picture, because the dataset only has meaning as a whole. The guidelines make no allowance for this.

Number of copies

The guidelines limit the number of copies of the work containing the fair use copies:

For all of the uses permitted by Section 3, there may be no more than two use copies only one of which may be placed on reserve. . . An additional

copy may be made for preservation purposes but may only be used or copied to replace a use copy that has been lost, stolen, or damaged. In the case of a jointly created educational multimedia project, each principal creator may retain one copy but only for the purposes described in Sections 3.3 and 3.4 for educators and Section 3.1 for students.

In the print-world, this would be the equivalent of saying that I could make only three copies of any article I wrote that contained fair use quotations. The provision is also unenforceable, except in a society where the copyright police have standing access to everyone's private disk space.

Conclusion

This column is not an educational multimedia work, but supposing it were, and supposing that the "Fair use guidelines for educational multimedia" were a copyright-protected work, and not a public domain US Federal document: this article would just make it within the guidelines' limits on text quotations, which include almost exactly 10 percent of the original. This means that, even if I wanted to, I could not quote anything from the final section on "important reminders" without cutting earlier quotations. It would be irrelevant that the material was being used in a critical review – generally a plus for fair use. I would also have to

remove the copy that I put on the server, because its daily-back-ups would create illegal additional copies after three days. Two years hence I would have to make sure that no one used the column or had access to it. And I could not reuse the quotes this semester in anything else.

These guidelines fail to meet my expectations for fair use for multimedia in the digital world, but they offer several positive features: they recognize that fair use applies to multimedia, they include photographs and numeric databases, and they provide easily understood metrics for the amount of material that can be used. The guidelines are now five years old and relatively unused. Perhaps it is time to try again.

References

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