

Copyright, Fair Use, Images and Blogs

by Art Smith (art@artsmithphotography.com), June 17, 2011.

Do you write a blog, or even longish posts on your social medium of choice? Have you ever used content (words, images, video, etc.) not entirely of your own creation? If not, this white paper needn't concern you, but if so, read on! We're going to be looking at the legal issues of copyright, and fair use, and how they pertain, especially, to images and to blogs and other web communications. I wish I could say this is simple, or even clear-cut. It is neither, but it is critically important that you make yourself knowledgeable about these issues to avoid running afoul of a law suit that could easily run into the tens or even hundreds of thousands of dollars.

Before I go any further, let me be very clear about one thing. I am a photographer, not an attorney. I have studied copyrights and fair use, and consulted with an attorney to make sure nothing I say here is completely wrong, but nothing in this article should not be taken as legal advice. For any specific questions regarding copyrights or fair use, I strongly suggest you contact a competent attorney specializing in this area of the law.

History and Purpose

What is a copyright? It's the right of the creator of a work (be it written, visual, musical, etc.) to control the publication and replication of said work. It is a matter of U.S. law (Title 17 of the United States Code, to be exact) as provided for in Section 8 of the U.S. Constitution ("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."). Note that the purpose is *not* to protect the rights of the creators, but rather to promote the progress of science and art. It is designed to benefit society as a whole by making it cost-effective to be creative.

On the one hand, if there were no such protection, there would be less incentive to create a work, as it could be exploited by anyone and the chances of recouping the costs of creation and earning a living by creating would be low. On the other hand, giving the creator unlimited exclusive rights would not benefit society either, since that would limit beneficial use of the work to just what the creator can (and chooses to) accomplish. So the law has a need to balance these competing rights for the good of society as a whole, and copyrights and fair use rights are the result. Balancing these competing interests is the job of the courts, and it is not a cut-and-dried process, as we will see.

It's important to note that a copyright applies only to the work itself. It does not apply to ideas, concepts or inventions (to the extent they are protected, that is accomplished by patents), nor to names and symbols (those are trademarks). A copyright does protect the creator against infringing derivative works, though. For example, I often photograph artwork for local artists. As the photographer, I have the copyright on the photograph, but it is also covered as a derivative work of the artist's copyrighted work. I couldn't exploit the image (say by selling prints) without running afoul of the original artist's

copyrights. Similarly, he couldn't sell prints of my photographs without my permission (though he could sell nearly identical shots he took himself). Things get a little murky, though, when trying to determine if a work is derivative (and therefore covered by the original creator's copyright) or transformative (different enough to be considered a separate work from the original). That's just one of the many difficult areas.

What is covered by copyrights?

The Copyright Act of 1976 extended copyright protection to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." Works of authorship include:

- 1) Literary works,
- 2) Musical works (including accompanying words),
- 3) Dramatic works (including accompanying music),
- 4) Pantomimes and choreographic works,
- 5) Pictorial, graphic and sculptural works,
- 6) Motion pictures and other audiovisual works,
- 7) Sound recordings
- 8) Architectural works (added in 1990).

The Act not only broadened what was covered, but also removed the requirement of publication and notice. Any covered work is automatically protected by copyright from the moment of creation, and formal application with the Copyright Office is allowed (and carries advantages in the event of an infringement), but is not required.

The same act also granted specific exclusive rights to the copyright holder:

- 1) The right to reproduce (copy)
- 2) The right to create derivative works of the original work,
- 3) The right to sell, lease or rent copies of the work to the public,
- 4) The right to perform the work publicly,
- 5) The right to display the work publicly, and
- 6) The right to perform a sound recording by means of digital audio (added in 1995).

The duration of these protections has been extended over the years, and so depends on when the work was created, but currently stands at the author's life plus seventy years for most current works.

So... the bottom line is: most every creative expression which can be copied is copyrighted today. While older works may not be covered by the original copyright (either because one was not obtained (prior to 1976), or because it has expired), any electronic representation of the work is covered by its own (possibly derivative) copyright. Contrary to what many people think, and with few exceptions, if it's on

the web, it *IS* copyrighted, unless specifically placed in the public domain by the copyright owner (or otherwise allowing licensed copies).

Let me say that again. If it's on the web, it *IS* copyrighted, with few exceptions.

Fair Use

The Copyright Act of 1976 also first codified the concept of Fair Use. These balancing rights existed prior to then, but as a body of case law only, often with conflicting decisions. The act established Section 107 of Title 17 which states, in part: "The fair use of a copyrighted work... for purposes such as criticism, comment, news reporting, teaching..., scholarship or research, is not an infringement of copyright." This section also lays out four specific factors that must be considered when "determining whether the use made of a work in any particular case is a fair use." Specifically:

- 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;
- 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.

Thus, at least sometimes, it is permissible to use some portion of a work protected by copyright, for certain purposes. Note that the list of fair use purposes in the statute is *not* an exhaustive list. For example, parody (as opposed to satire) has been established by case law as often a permissible use.

As you might guess from the above, the definition of what is and is not fair use is far from clear. It has been left to the courts to decide where the balance point lies between the creator's rights (copyright) and the user's rights (fair use). Often the four factors will push in different directions in a single case, and the courts must decide which factor is more important in that specific case. These decisions are often surprising and even contradictory, making it difficult to know, for any new use, whether or not it is covered by the fair use doctrine. In the words of Carolyn E. Wright, an attorney specializing in photographic intellectual property: "It does appear that the current application of the law on fair use is unstable and unpredictable." To make it worse, the above deals only with U.S. law, but the Internet is a worldwide phenomenon, and the laws of other countries vary significantly. Some international agreement exists (specifically among signatories of the Berne Convention), but even that is subject to frequent controversy and confusion.

Blogging and other web uses

Bloggers and other web authors have to be particularly careful about using any content that is not uniquely their own creation. As we've already seen, with few exceptions, if it's on the web, it's protected by copyright. On the other hand, the very essence of the world wide web is the interconnectedness and ability to link to other content. So what's a web author to do?

The safest thing to do, if you're going to use content not your own, is get permission from the copyright holder. This may be as easy as firing off an e-mail describing what you want to use, and why, and getting an affirmative response. It also could produce no response or a negative response, or the owner may not be apparent or reachable. Then what?

Consider the nature of your page. Are you reviewing or critiquing? Are you providing an educational service (especially as part of an established not-for-profit educational institution)? These would weigh in favor of fair use. Or are you advertising your own product or service, or just "sharing content"? These would weigh against fair use. Are you making any financial gain from your use of the content, or are you in any way compromising the copyright holder's ability to capitalize on the content? Either of those would argue against fair use. Remember, just because you aren't making any money off the use doesn't mean you aren't somehow depriving the copyright owner of their rightful proceeds.

Consider how much of the content you are using, too. If you include a few sentences from a long work, the chances are it may constitute fair use. With images, it's a little harder to see how to apply the "how much" rule. If the creator has a large body of work, and you are just showing an example, especially with a recommendation to seek more content from the original source, that might weigh in favor of fair use. Similarly, if the image you use is very small, that might weigh in favor of fair use (thumbnails, for example, have been considered fair use in many cases). This is true especially if the image is too small for the author's intended or commercially exploitable use. That's far from a guarantee, however.

Some arguments that are often presented as justification for including other's content do not constitute fair use. Giving credit does not make a use fair. It may, in some cases, weigh slightly in favor of fair use, but is not, by itself, enough. With pictures in particular, one often hears the justification "I'm doing the guy a favor by giving him exposure." Exposure is not yours to give – it is the protected right of the copyright holder to exploit, control, or restrict. In some cases, exposure (especially if untimely or inappropriate) may even be detrimental to the copyright holder, and this would weigh against fair use.

Remember, it is your responsibility to obtain permission to use any work, or to establish that a use is fair if you are charged with infringement. The copyright owner need only prove that they own the copyright to the work. Once that is established, it is the user's responsibility to demonstrate that they have rights to use the work, either by contract or by establishing fair use. If you intend to rely on fair use claims, it is in your own best interest to make sure you understand what fair use means, or consult with an attorney versed in that area.

Gray areas

Some aspects of copyright and fair use are particularly murky, especially with regards to the internet. In particular, it has not been established whether linking to content is a permissible use. On the one hand, you're not putting something new out there, you're only telling someone where to go to find it. On the other hand, you are exploiting the creator's resources to your own benefit. And in some cases deep-linking may deprive the author of click-based advertising revenue they would normally expect when their content is viewed. As is often true, case law lags technology. The courts have yet to offer a clear indication of how links should be viewed. In my personal (and non-attorney!) opinion, I don't see how

linking could be categorically considered an infringement – the repercussions would be too extreme – but stranger things have happened.

Even more murky than offering a link are in-lining and framing. With these techniques, you aren't just providing a connection to the content, you are actually providing access to the content without leaving your page, even though the content is still hosted by another (presumably authorized) source. Even though you don't actually have a copy of the work (only a reference to it) on your server, and that reference could be rendered useless by the actions of the source host (by removing the content or changing its URL), these are largely technicalities, and the appearance is that of a copy. I think, in general, you should treat in-lined and framed content as if it were a copy, and so all the rules of fair use would apply. Again, this is my personal opinion, and the case law to support (or contradict) that opinion is mostly nonexistent at this point.

What if the copyright owner has put a "share" button on the work? Does that constitute an implicit or explicit license to copy the work? As before, this has not yet been determined by case law. There does seem to be some intention of making the work widely available without charge, but that does not necessarily mean you have license to use it. As always, my recommendation is to get explicit permission if possible, and otherwise to carefully consider the factors weighing for or against fair use.

Confused yet? I know I am. I feel a little better thinking that it's an "informed confusion," but that isn't going to win any court cases for me. Hopefully after reading this, you're a little better informed, too, and will be able to make better decisions regarding your use of non-original content in your blogs or other creations. For more information, I've included (hopefully fairly!) several links below that you may want to peruse.

Links

http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-a.html: Definition of fair use.

http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-b.html: The four factors for fair use.

http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-c.html: Case law regarding fair use.

www.photoattorney.com/2008/05/fuss-about-fair-use.html: an interesting article about fair use from an attorney specializing in photography and the law.

<http://www.copyright.gov/title17/>: the actual US statutes covering copyright law. Chapter 1 is of particular interest here.

<http://www.copyright.gov/fls/fl102.html>: a flyer from the Copyright Office about copyrights in general.

<http://www.copyright.gov/help/faq/faq-fairuse.html>: an FAQ from the Copyright Office regarding fair use.

<http://www.templetons.com/brad/linkright.html>: an interesting article about linking, in-lining and framing from a copyright perspective.