

What You Don't Know about Fair Use CAN Hurt You By

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I visited an orthopedist recently to discuss a pain in my right shoulder. After reviewing the X-rays and examining my shoulder, he diagnosed me with shoulder cuff impingement and recommended physical therapy. He then handed me five faded photocopied sheets, "Home Exercise for the Weak Shoulder," by Dr X (my physician)-Adapted from University of X (a major West Coast university).

As I read those five photocopied sheets, my inner copyright geek went into high alert. I asked myself, "Was my physician's distribution of copyrighted material for his patients 'fair use'?" To find out, let's start by defining fair use.

Fair Use

Fair use refers to situations in which the use of a copyrighted work will not constitute infringement. Fair use is a defense against a claim of copyright infringement. Fair use is generally limited to use for purposes of teaching, scholarship, research, commentary, and news reporting. The four factors to be considered in determining whether a use is a fair use, as listed in Section 107 of the US Copyright Act, are:

- a. purpose and character of use including whether or not such use is of a commercial nature or is for nonprofit or educational purpose;
- b. the nature of the copyrighted work;
- c. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- d. the effect of the use upon the potential market for or value of the copyrighted work.

No single factor is determinate of fair use. Rather, all four factors should be considered. There are no blanket rules for fair use, and the only way to definitively determine if a use is a fair use is to have a court rule on the specific situation. Fair use determinations are made based on the specific case, facts, and circumstances.

From *McHugh and Koehser's Right and Permissions Glossary* <https://tinyurl.com/srhtakhf>

Fair use is one of the trickiest concepts in the Copyright Law for publishing professionals. Fair use allows a lot of leeway and judgment. And that is the crux of the matter. Perhaps the one rule to follow is this, "When in doubt, ask permission." Attorney Lloyd Jassin told me years ago, "Asking permission is the cheapest insurance policy against copyright infringement."

An Attorney Weighs In

To provide you with some background on fair use, I asked attorney Dave Koehser the following questions:

- *Is my orthopedist's use of University X's five photocopied sheets for patients fair use?*

Most likely not, although as noted above, fair use is a facts and circumstances test, and there may be other facts to consider. For example, did Dr. X merely copy pages from a book, or did he "adapt" certain ideas and concepts from the book to create his own handouts? If he simply made photocopies from the book, then it would be difficult for Dr. X to assert a defense of fair use. However, if he instead created his own adaptation, there may not be infringement - not due to fair use, but rather because there was no copying. Dr. X merely distilled unprotected ideas and concepts from the book and then explained them in his own words.

If he is merely distributing photocopies of pages from a book, then in addition to using the material for a commercial purpose (to promote his practice and to facilitate the delivery of services to paying patients), his use could be viewed as having a negative impact on the potential market for or value of the work. The publisher of the book most likely has a process in place for issuing permission for use of portions of the book. Failure to follow this process results in loss of income to the publisher and the author, and if other physicians did likewise, those losses would mount up.

- *Of the four factors in the Copyright Law, is there any one factor that is more determinant of fair use than the others? How about in this situation?*

The statute does not give any single factor priority over the others or rank the four factors in any particular order. Similarly, court decisions are often careful to point out that no single factor is dominant. However, in practice, courts tend to look first and foremost at whether the use in question is "transformative"; that is, is the use for a new and different purpose than the purpose for which the copyrighted work was initially intended, or does it add some new or different meaning?

As an example, a photographer took photos of an ephemeral lake that appeared on the floor of Death Valley after a heavy rain. An online publisher used the photos to illustrate its article about the lake. The court found that the use was not transformative, in that it merely reused the photos for their originally intended purpose of depicting the lake. The article did not add any new or different meaning to the photos. Had the publisher instead using the photos in an article about how to employ different lighting and shading techniques to create unique images, it may have qualified as a fair use.

- *How does fair use apply in a digital environment? For example, if these five sheets were posted at the physician's website, would that make a difference in how fair use criteria are applied?*

As in almost all digital situations, the answer is still "no." It is the **use** rather than the medium that is relevant. Use in a digital format will be subjected to the same tests as use in a print format.

- *Are there any recent "landmark" cases impacting fair use that publishing professionals should be aware of?*

Trends are probably more important than trying to identify any “landmark” case. As cited above, the trend has been toward placing greater emphasis on whether the use in question is or is not transformative. If a court finds that the use makes it over the transformative use bar, the other three fair use factors will typically fall in line, and the use will be found to be a fair use. However, if the use cannot pass the transformative use test, it most likely will not qualify as a fair use.

- *What else should we know about fair use?*

There are a few uses, such as short quotes from a book in a review of that book, which are clearly acknowledged to be fair use. Outside of that, the best practices are to get a legal opinion before proceeding, or, as suggested by the quote from Lloyd Jassin above, get permission, as permission is indeed the safest harbor and the cheapest insurance policy against an infringement claim.

Thanks to Bev Kolz and Liz Novak for their editing of this article.

Free Articles of Interest

- R-23, *McHugh's and Koehser's Rights and Permissions Glossary*, 2019, 10 pages, <https://tinyurl.com/4r2yw4w3>
- R-28, *Rights and Permissions: McHugh's Recommended Books and Web Sites*, 2014, 3 pages, <https://tinyurl.com/yzh6f9n6>

Rights and Permissions Services

John B. McHugh is an experienced publishing executive and consultant with special expertise in managing rights and permissions. His advice and insights cover all areas of intellectual property management for both print and digital products.

Tap into McHugh's extensive information industry expertise to help you:

- Grow revenues by fully exploiting the income potential of your digital rights. McHugh will help you effectively organize your rights management to take advantage of the exploding innovation in digital distribution.
- Educate yourself and your staff about the confusing and ambiguous subject of copyright with McHugh's executive coaching and question and answer service.
- Get a detailed analysis of the strengths and weaknesses of every area of your rights management with McHugh's ***Rights and Permissions Audit***. He will make recommendations to optimize staffing, streamline management processes, and increase rights, revenues and profitability. *Most importantly, McHugh will alert you to serious legal exposure and when you should contact a copyright attorney.*

About David Koehser, Attorney-at-Law

David Koehser is a Minneapolis-based lawyer who practices in the areas of copyright and trademark law. Dave's website contains articles on the topics of: Publishing Law, Merchandise Licensing, Copyrights and Trademarks, and Theater and Performing Arts. Request a copy of Dave's informative quarterly e newsletter, *Publishing and Merchandise Licensing Law Update*. Dave has a B.A. from the University of Iowa and a J.D. *cum laude* from the University of Minnesota Law School. You can find his website at www.dklex.com. Contact Information: dklaw@cognisinc.com; 612-910-6468.

About John B. McHugh

John B. "Jack" McHugh is a 40-year veteran of the publishing business. Jack has worked as an executive for Houghton Mifflin, Wadsworth, and Saint Mary's Press. Jack is also an experienced association publishing executive. For seven years, he was Publisher and Director of Programs at the American Society for Quality and, for a two-year period, he served as the Interim Publisher at the Project Management Institute. He is a member of the ASAE Advisory Board for Publishing, Communications, and Media Issues and Practices.

Jack's specialties include association/nonprofit publishing, book publishing, executive recruiting, journal publishing, rights and permissions, new ventures, organizational design, and social media strategy and policy. McHugh is also the manager of the LinkedIn™ group, **Association and Nonprofit Publishing**, <https://www.linkedin.com/groups/2949807/>

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