1. Overview

The objective of this Bulletin is to provide general background information on federal copyright law and the principles of fair use. Copyright is a complex body of law that continues to evolve and this Bulletin is an attempt to summarize some of these concepts for the general understanding of the USC community. This Bulletin is not intended as a statement of policy or as a replacement for legal advice. Case descriptions and other information contained in this Bulletin should be read with the understanding that the application and analysis of copyright principles is dependent on the facts of a particular circumstance, and subtly different facts may lead to very different results.

2. Creation and Identification of Copyrighted Works

2.1 What does copyright cover?

U.S. copyright law protects “original works of authorship fixed in any tangible medium of expression…from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” Examples include: books, poems, articles and other literary works; training manuals, workbooks and other educational materials; reports and technical documents; musical, dramatic, choreographic, pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; computer software and documentation; and architectural works. See 17 USC §102.

2.2 What is not covered by copyright?

Ideas, processes, procedures, systems, methods of operation, concepts, principles, and discoveries are not protected by copyright. Copyright law may protect the tangible medium expression of ideas (such as a poem) but not the underlying idea itself (such as the idea or concept that inspired the poem). Also note that works of the U.S. federal government are not copyrighted. 17 USC § 105.

2.3 What rights does a copyright owner have?

Copyright owners have certain exclusive rights in their copyrighted works. Only the owner of a copyright or someone authorized by the copyright owner may do any of the following (See 17 USC §106):

- Make copies of the copyrighted work;
- Prepare derivative works based on the copyrighted work (A derivative work is based on, or incorporates, one or more already existing works. Examples include multi-media works using preexisting elements, screenplays adapted from books, translations of text
into a foreign language, or any other work that modifies, is derived from or elaborates upon a preexisting work;)

- Distribute copies of the copyrighted work to the public;
- Perform the copyrighted work publicly (in the case of literary, musical, dramatic, and choreographic works, motion pictures and other audiovisual works); and
- Display the copyrighted work publicly (in the case of literary, musical, dramatic, choreographic, pictorial, graphic or sculptural works (including images from a motion picture or other audiovisual work).

2.4 How do you know if a work is copyrighted?

There are no special markings required on a copyrighted work. In the past, Copyright law required that a copyright notice, such as “© 2006 University of Southern California,” be included in all copyrighted works; otherwise, the copyright would be lost. For works published after March 1, 1989, this notice is no longer required. Therefore, absence of a copyright notice should not be read to indicate the work is not copyrighted.

Moreover, the copyright owner does not need to take any special steps to create a copyright in a work. Copyright exists the moment a work is created in a tangible medium of expression. Registration with the US Copyright Office is not required.

Copyrights are not of infinite duration, but they do last a long time. For works created after January 1, 1978, copyright protection lasts for the life of the author plus seventy years. Where works have been jointly created, copyright protection is measured by the life of the longest-lived author, plus seventy years. Protection of works “made for hire” (works created by an entity rather than an individual) lasts for the lesser of ninety five years from the year of first publication or one hundred and twenty years from the year of creation. (See 17 USC §302) For works created prior to January 1, 1978, different rules apply, and determining the copyright term for those earlier works can be a difficult complicated question.

Therefore, the safest course is to assume a work is copyrighted unless it is a US government work or a work for which you are certain the copyright has expired.

3 Copyright Infringement and Remedies

3.1 What is copyright infringement?

Copyright infringement occurs when someone who is not the copyright owner exercises one or more of the exclusive rights listed above without permission and in a manner that is not expressly authorized by the copyright law. (See 17 USC §501) The copyright law includes some limits on these exclusive rights, so that, in some instances, copyrighted works may be used without permission and without infringing the owner’s copyright. Two of these limits are

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1 However, an incorrect or absent copyright notice may impact the extent of damages that might be available in a copyright infringement lawsuit.
2 There are benefits of obtaining a formal registration, such as related to enforcement of the related copyright rights.
described below, under the sections on fair use and use of copyrighted materials in the classroom. When these limits do not apply, permission from the copyright holder is required.

One way to infringe a work is to copy it. Word for word copying of an entire work is a clear case of copyright infringement, but such verbatim copying is not strictly required in order for there to be infringement. Courts have found infringement where the new work is substantially similar to the copyrighted work.

3.2 What are the remedies for copyright infringement?

If a court finds infringement has occurred, there are generally three kinds of remedies a court can impose. A court can order the infringer to stop infringing the copyright (an “injunction” or “equitable relief”). (See 17 USC §502) The court also may allow the seizure or destruction of any infringing copies. (See 17 USC §503) A court can also award damages and require the infringer to make payments to the copyright owner (“monetary relief”). (See 17 USC §§504 and 505)

There are two kinds of monetary relief available. The first is payment of actual damages, which includes payment of the copyright owner’s lost profits resulting from the infringement and payment of any profits made by the infringer through his infringing activities. Instead of seeking actual damages, a copyright owner may opt for statutory damages\(^3\), which typically range from $750 to $30,000 per infringement (up to $150,000 in cases of willful infringement).

A copyright owner may also recover his court costs and, depending on the jurisdiction, reasonable attorneys' fees. (See 17 USC §505) Note that copyright infringement, in some circumstances, may be a criminal offense. (See 17 USC §506)

4. Fair Use

4.1 What is the “fair use” doctrine?

The Copyright Act creates an exemption from liability for infringement for certain “fair uses” of copyrighted materials. (See 17 USC §107) But the Copyright Act does not draw a clear distinction between what constitutes fair use and what constitutes infringement. Instead, fair use is a fact-specific question that must be determined on a case-by-case basis.

The Copyright Act provides guidance in the form of the following four factors to be weighed in determining whether use of a copyrighted work is a fair use:

1. The purpose and character of the use;
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 on the potential market for or value of the copyrighted work.

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\(^3\) Provided a copyright registration has been timely sought.
Finding one factor clearly in favor of fair use does not mean that the analysis is over. An inquiry into the fair use of a copyrighted work requires consideration of all four factors, addressing each factor individually to determine if it weighs in favor of or against fair use, and then weighing all the factors together to determine if the arguments in favor of fair use outweigh those against fair use.

These four factors are guidelines courts can interpret different ways with varying results. Therefore, the outcome of a court’s fair use analysis can be hard to predict since the test is subjective and open to interpretation.

4.2 The first factor: the purpose and character of the use.

In applying the first factor, courts tend to favor nonprofit and educational uses of copyrighted works over commercial uses, and also tend to favor uses for criticism, commentary, news reporting and parody. Note that educational use does not automatically qualify a use as fair—all four factors must be considered and balanced.

This factor favors “transformative” uses where material taken from the original is transformed by adding new expression, meaning, or insight. Parody may be a transformative use, because the original work is presented in a different light than originally intended and held up to ridicule or comment. Scholarship, research and educational uses may also qualify as transformative uses, because the work is the subject of review or commentary.

4.3 The second factor: the nature of the copyrighted work.

The second factor examines of the characteristics of the work itself. Use of non-fiction works is generally favored in fair use analysis over fictional works. The dissemination of factual information arguably benefits the public, and non fiction works are generally considered less creative than works of fiction. In addition, this factor is more likely to weigh in favor of fair use if the material copied is from a published work rather than an unpublished work. Courts tend to give weight to the author’s right to control the first public appearance of his expression. Also, note that if the work is a consumable (such as workbooks and questionnaires) use of that work is particularly disfavored under this factor.

4.4 The third factor: the amount and substantiality of the portion used.

While there are no hard and fast percentage or numerical guidelines when reviewing this third factor, in general, the smaller the amount of the work used, the more likely a finding of fair use and the larger the amount used the less likely a finding of fair use. However, use of even a small portion, where that portion captures the “heart” or essence of a work, could fail to qualify as a fair use and be deemed an infringement. The theory is that taking the heart of a work is similar to a taking of the entire work.

4.5 The fourth factor: the effect on the potential market for the work.
Use of a copyrighted work to substitute for purchase of the work or with the potential to harm the market for the work will tend to weigh heavily against a finding of fair use. One way of viewing this factor is to ask whether the use competes with the underlying work (for example if you are borrowing portions of a work to include in a competing work). Another way of looking at this factor is to ask whether your use has the potential to deprive the copyright owner of current or potential income. Note that the analysis is based on the potential market not the actual market for the work – the copyright owner need not have actually lost sales for this factor to be met.

4.6 Examples from court cases.

To illustrate the fact-based nature of fair use analysis, and to provide examples of how the factors are analyzed and weighed by courts, the following is a sampling of various cases on the subject of fair use:

4.6.1 Use of text found not a fair use: Castle Rock Entertainment, Inc. v. Carol Publishing Group, 150 F.3d 132 (2d Cir. 1998).

Carol Publishing published a book of trivia questions about the events and characters in the "Seinfeld" television series called the “Seinfeld Aptitude Test” (the “SAT”). The book included questions based upon 84 "Seinfeld" episodes and used actual dialogue from the show. The court analyzed the four fair use factors as follows and found that the use of the text was not fair use.

First factor held against fair use- purpose and character of the use. The court found that any transformative purpose in the SAT was “slight to non-existent.” The court rejected the argument that The SAT was created to educate Seinfeld viewers or to criticize or otherwise comment upon “Seinfeld.” The court found that the SAT’s purpose, as evidenced by the statements of the book’s creators and by the book itself, was to repackage “Seinfeld” content to entertain “Seinfeld” fans.

Second factor held against fair use – nature of the copyrighted work. The court found that “Seinfeld” was a creative work and found this factor to weigh against fair use.

Third factor held against fair use – the amount and substantiality of the portion used. The court found that this factor weighed against fair use based on the similarity between the text of the SAT and “Seinfeld” scripts. The SAT posed as many as 643 trivia questions quoting from Seinfeld episodes.

Fourth factor held against fair use – the effect on the potential market. The publisher of the SAT claimed that this factor should be found in favor of fair use because Castle Rock evidenced no interest in publishing “Seinfeld” trivia quiz books and only minimal interest in publishing “Seinfeld”-related books at all. The court found it sufficient that The SAT impaired Castle Rock’s future ability to develop similar works or license rights to others to develop them.

4.6.2 Use of text found to be fair use: Sundeman v. The Seajay Society, Inc., 142 F.3d 194 (4th Cir. 1998).
A researcher at a nonprofit foundation used quotations from an unpublished early literary manuscript of a famous author in an analytical, oral presentation that she delivered to a scholarly society. In the presentation, the researcher quoted approximately 2,464 words from the text of the work, or four to six percent of the total text, and she paraphrased substantially from the book. The researcher’s presentation was never published. The court found that the researcher’s presentation was a fair use.

First factor held in favor of fair use- purpose and character of the use. The researcher’s use was found to be scholarly, transformative, and held to provide criticism and comment on the original manuscript. The court found the researcher attempted to shed light on the author’s development as a young author, review the quality of the unpublished work, and comment on the relationship between the author and her mother. The court noted a potential commercial motivation on the researcher’s part (she intended to publish and commercialize her work) but found it important that the researcher sought approval from the copyright owner prior to publishing the work (which approval was denied and therefore no publication took place).

Second factor held against fair use – nature of the copyrighted work. The court relied on a long series of cases to resolve that the unpublished nature of the book from which the quotes were taken weighs against a finding of fair use. The book was also a work of fiction.

Third factor held in favor of fair use – the amount and substantiality of the portion used. The court found that no more of the work was taken than needed for the researcher’s purposes. The amount used was consistent with the purpose of scholarly criticism and commentary, and there was no evidence of taking "the heart of the work."

Fourth factor held in favor of fair use – the effect on the potential market. The court found no evidence that the presentation displaced any market for publishing the original book, and the researcher’s presentation at a scholarly conference may in fact have increased demand for the book itself. The court also found that the researcher’s work served a different market function than the book itself, and would not supplant the book in the marketplace.

4.6.3 Use of photograph found not to be fair use: Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992)

Rogers created a famous photograph of German shepherd puppies. Koons, a sculptor, purchased a graphic note card with the image of Rogers’ photograph on it. He used the photograph without permission as the basis for wood sculptures, creating a three-dimensional sculptural piece from the two-dimensional photograph. The court analyzed the four fair use factors as follows and found that the use of the photograph was not fair use.

First factor held against fair use- purpose and character of the use. Koons argued that his sculpture was a satire or parody of society at large - criticism of the mass production of
commodities and media images that, in his opinion, has caused a deterioration in the quality of society. He argued that, through incorporating these images into works of art, he comments critically both on the incorporated object and the political and economic system that created it. The court rejected this argument stating that the copied work must be, at least in part, an object of the parody, otherwise there would be no need to use the original work at all. The court could not discern any parody of the photograph itself in Koons' work. The court also determined that Koons' use of the work was commercial in nature and therefore, the court concluded that this first factor of the fair use doctrine weighs against a finding of fair use.

Second factor held against fair use – nature of the copyrighted work. The court found photograph to be a published work of creative art. Therefore the court found this factor to militate against a finding of fair use.

Third factor held against fair use – the amount and substantiality of the portion used. The court found that the essence of Rogers' photograph was copied nearly in total, much more than would have been necessary even if the sculpture had been a parody. The sculpture included an exact copy of the photograph in three dimensional form.

Fourth factor held against fair use – the effect on the potential market. The court rejected the argument that sales of the photograph would not be impaired by sales of the three dimensional sculpture. The court found that, if these kinds of unauthorized uses of the photograph became widespread, it would prejudice Rogers' potential market for his work. The court’s inquiry considered not only harm to the market for the original photograph, but also harm to the market for derivative works. Koons’ work may chill the market for others to license Rogers’ photograph to produce a sculpture. If Koons’ sold photographs of his sculpture, it would prejudice Rogers' potential market for the sale of his photograph as well.

4.6.3 Use of song lyrics found to be fair use: Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994)

The rap group 2 Live Crew copied the opening music and the words (but not the melody) from the first line of the Roy Orbison song "Oh Pretty Woman" for use in their song titled “Pretty Woman.” Acuff-Rose Music, Inc., filed suit against the members of 2 Live Crew and their record company, claiming copyright infringement. The court found in favor of the rap group applying the fair use doctrine.

First factor held in favor of fair use - purpose and character of the use. The court found that the rappers’ song could reasonably be perceived as commenting on or criticizing the original Roy Orbison version. The court stated

“2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naivété
of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies.”

Therefore, the parodic transformative nature of the work weighed in favor of fair use, even though the work was for a commercial purpose.

Second factor held to be neutral – nature of the copyrighted work. The court found that the original work was creative in nature but that factor was outweighed by the fact that parodies “almost invariably copy publicly known, expressive works.”

Third factor held in favor of fair use – the amount and substantiality of the portion used. While the court conceded that the heart of Roy Orbison’s work was taken here (the most recognizable elements of the song), the court also found that step necessary in order to effect a parody. The court found that, for the humor and commentary in a parody to work, the audience must clearly recognize the underlying work. The court also found that the rappers copied the first line of the original, but thereafter departed markedly from the Orbison lyrics.

Fourth factor held in favor of fair use – the effect on the potential market. The court found it unlikely that there would be a market for licensing critical reviews or lampoons of an author’s or musician’s work and therefore found this factor to weigh in favor of fair use. However, the court also noted there is a market for rap versions of previously released popular songs and asked the lower court to reconsider the impact of the 2 Live Crew’s version on the market for a non-parody rap song based on “Oh Pretty Woman.”

4.6.4 De minimis copying upheld without the need for fair use analysis: Sandoval v. New Line Cinema Corp., 147 F.3d 215 (2d Cir. 1998)

In this case the court found that the amount of material copied was so small (or "de minimis") that it was deemed to be permitted without even conducting a fair use analysis. In the motion picture “Seven”, several copyrighted photographs appeared in the background of the film, prompting the copyright owner of the photographs to sue the producer of the movie.

During a minute and a half in the film, the photographer’s pictures, or portions of each, were briefly visible in eleven different camera shots. The longest uninterrupted view of the pictures lasted six seconds, but the photographs were otherwise visible, in whole or in part, for a total of approximately 35.6 seconds. The photographs never appeared in focus, and except for two of the shots, were seen in the distant background, often obstructed from view by one of the actors. In these two shots, figures in the photographs were barely discernable, with one shot lasting for four seconds and the other for two seconds. In one of the shots, after one and a half seconds, the photograph was completely obstructed by a prop in the scene.

To establish that the infringement of a copyright is “de minimis”, the alleged infringer must demonstrate that the copying is so trivial as to fall below the quantitative threshold of substantial similarity. Courts often look to the amount of the copyrighted work that was copied, as well as, (in cases involving visual works), the observability of the copyrighted work in the allegedly
infringing work as determined by the length of time the copyrighted work appears and its prominence as revealed by the lighting and positioning of the copyrighted work.

The court held that the photos "appear fleetingly and are obscured, severely out of focus, and virtually unidentifiable." The court excused the use of the photographs as "de minimis" and a fair use analysis was not required.

5. Use of copyrighted materials in the classroom

Instructors may perform or display a copyrighted work in face-to-face teaching activities in a nonprofit educational institution, as long as this occurs in a classroom or similar place devoted to instruction and is related to the content of the course being taught. Use of a motion picture or other audiovisual work, the performance, or the display of individual images (such as photographs), must be by means of a copy that was lawfully acquired. See 17 USC §110(1)

6. Use of copyrighted materials for distance learning

Under a specific statutory exception to copyright infringement, under certain circumstances instructors may digitally transmit portions of a copyrighted work that would normally be displaying in the course of a live class session (whether an actual live session or not). This may be in the case of digital transmissions over a computer network for distance learning. The works may not be those which are produced or marketed for instructional activities. Further, the work must be an “integral part” of a class for enrolled students, and used under direction of or actual supervision of the instructor. Other specific requirements apply. See 17 USC §110(2) as implemented in the “TEACH Act.”

7. Getting permission to use copyrighted works.

The following is a basic checklist of steps to take if you want to use a copyrighted work. This checklist is not intended to replace or modify the procedures in place in your department for getting permission to use a work, if necessary.

(a) Is the work covered by copyright? See section 2 above. If no (for example, because you are using a U.S. government work) then you need not proceed with the next steps.

(b) Does the fair use doctrine apply to your use of the work? See section 4 above. If clearly yes, then you need not proceed with the next steps.

(c) Does the exemption for face-to-face classroom use in teaching apply? See section 5 above. If clearly yes, then you need not proceed with the next steps.

(d) Does the exemption for distance learning apply? See section 6 above. If clearly yes, then you need not proceed to the next steps.
(e) Do you know who the copyright owner is? The author or creator of a copyrighted work is usually the owner, except where work-for-hire rules apply or where ownership has been transferred. Many publishers require creators to assign their copyrights as a condition of publication. The U.S. Copyright Office (http://www.loc.gov/copyright) offers online searching of some of its records. Various companies also offer professional search assistance for a fee.

If you know who the copyright owner is, you can contact them directly to ask for permission. Permission to use the copyrighted work should be in writing and should clearly describe the work and the scope of permission being given. Also, you should take steps to make sure that the person giving permission is in fact authorized to do so.

(f) Does USC have permission to use the work under any kind of license agreement? In the case of certain kinds of copyrighted works, such as computer software and digital, multimedia materials, as well as some textbooks and other educational materials, USC may already have entered into a license agreement with the copyright owner, granting it permission for employees to copy and make other uses of those works. Note, there may be strict limitations on the use rights granted to USC, such as solely for educational uses and limitations on access for only currently enrolled students. Examples would include the various digital collections licensed to USC that are housed in the USC Digital Archive (http://digarc.usc.edu:8089/cispubsearch/).

(g) Is permission to use the work available through a rights clearinghouse or other entity? For literary works, such as articles or parts of a book or journal, the Copyright Clearance Center (“CCC”) operates a service for permissions. CCC services and information can be obtained from the CCC website, at www.copyright.com. For plays, Samuel French, Inc. is the best-known agency for obtaining rights.

The rights involved in musical works can be complicated, because separate copyrights exist in the sound recording (a song, as recorded by an artist) and in the musical composition (the sheet music and lyrics). In order to perform a musical work in a nondramatic (merely playing a sound recording of a song), permission may be granted by the performing rights societies (the most well known ones are BMI (www.bmi.com), ASCAP (www.ascap.com), and SESAC (www.sesac.com). They administer public performance rights on behalf of the owners of musical composition copyrights and can grant public performance permission for many well-known musical works. USC currently has agreements with all three of these performance rights societies granting USC limited rights. When a musical work is used in a dramatic context (such as being combined with staging, costuming, or choreography), this is a separate rights that is usually licensed directly from the creator of the work or their publisher. For use of sound recordings, the Recording Industry Association of America (RIAA), whose membership includes most major record labels, may be able to assist you in getting permission. (http://www.riaa.com)
For motion pictures, contact the Motion Picture Licensing Corporation (http://www.mplc.com) or Movie Licensing USA (http://www.movlic.com), which both can grant public performance rights to motion pictures.

8. Rights of Publicity/Privacy

The foregoing discussion has been limited to copyright rights only. In certain circumstances, rights of publicity and privacy may be present where a work contains a likeness, image, name or voice of a person (whether deceased or living). For example, a photographer would have copyright rights in a photograph taken by him/her. In addition, where there are individual persons depicted in such photograph, those individual persons may have rights of publicity and privacy and unauthorized use may give rise to liability. However, some form of commercial gain is typically required, such as using a person’s image in connection with advertising of a product or service.

Moreover, commercial uses of likeness, image, name or voice of student athletes may result in NCAA sanctions and eligibility.

9. What to do if you need more information or assistance?

If after reading this Bulletin, you need more specific information or legal advice, please contact the Office of the General Counsel.