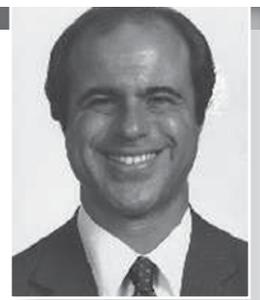


All's Fair - Court Rules that Ten Percent of a Copyrighted Work is Fair Use For Educational Institutions



By David Ellis

In my intellectual property law practice, authors and other users of copyrighted works sometimes ask me how much of another author's work they can copy, modify or incorporate in their works. Is the amount measured by some quantitative standard, or qualitatively, or something else? How much can an author change another person's work before it is deemed copyright infringement?

In many instances, the nature of the work that is copied cannot be measured in any mathematical sense. For example, for a painter who wants to copy or modify Salvador Dali's signature melted watches for use in his or her painting, what could ten percent possibly mean? Similar considerations apply for many diverse copyrighted works of the visual and performing arts, music, choreography, drama, and other materials protected by copyright.

The U.S. Copyright Act protects "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." 17 U.S.C. § 102. These comprise literary works (including computer programs); musical and dramatic works; pantomimes and choreography; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings (e.g. CDs, audio tapes, and vinyl records); and architectural works.

Some of these works can be measured quantitatively, for example, words or lines in a book, essay or poem, or bars or measures of a piece of music. Can an author claim fair use of the work of an earlier author because it is

less than some quantitative standard? In a recent case involving the use of textbook materials by college teachers, the court answered yes. *Cambridge University Press v. Becker* (N.D. Ga. 2012).

Under the Copyright Act, the owner of a copyright is granted a bundle of independent, exclusive rights, including reproduction, distribution, public display, public performance, and the right to make derivative works. Violation of any of these rights constitutes copyright infringement, unless there is a valid defense.

One of the most important defenses is the doctrine of fair use, which provides that the "fair use" of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship or research is not an infringement. The statute sets out a number of factors for courts to consider, including the purpose and character of the use, the nature of the copyrighted work; the amount and substantiality of the portion used; and the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. §107.

In the *Becker* case, the plaintiffs were academic publishers who sued teachers at Georgia State University in Atlanta for allowing unlicensed portions of their copyrighted books to be posted electronically and made available to students. They asked for injunctive relief and attorney's fees, and the defendants denied infringement and claimed the defense of fair use.

The court found that the first, second and fourth factors favored the defendants because their use of the works was for the purpose of

teaching and scholarship by a nonprofit educational institution; the works were primarily factual and informational rather than highly creative fictional works, which merit greater protection; and their use of small excerpts from the books did not affect the plaintiffs' actual or potential sales of their books.

As for the third factor, the amount and substantiality of the portion used, the court concluded that if the use by a non profit educational institution is no more than 10% of a copyrighted work, and the excerpts are limited to students in an assigned class, then the use may be deemed a fair use. The court thus found that the overwhelming majority of the excerpts submitted to it were within the 10% standard and thus constituted fair use of the plaintiffs' works.

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