Do I Need Permission? Fair Use Rules under the Federal Copyright Law

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If the only materials that a Publisher included between the covers of a book were the independently created words of their authors, then permissions, licenses and the questions surrounding them would never arise. Ownership and control by authors of the copyright in their works arises as soon as they commit their thoughts and ideas to a tangible fixed medium of expression, so they certainly have the power to convey the right to publish with the simple standard clauses which appear in virtually every book contract.

In reality, books most often need to contain additional material to augment the author's personally chosen words. Pictures, maps, graphs, illustrations and, of course, the words of others, are nearly always necessary as part of a book's full presentation package. In most cases the right to use this additional material must be negotiated and licensed, with permission granted by the copyright owner for an agreed upon fee (or perhaps no fee) and for a specific limited purpose. In some instances copyright protected material may be used for a fee which has been previously set by market forces or statutory determination (compulsory licensing) but this is actually quite unusual in the publishing industry.

However, there are many cases where no permission at all is required, though material may have copyright protection. Publishers may often be entitled to so-called "Fair Use" of some of or all material protected by copyright, based on an analysis of the four principles governing this concept pursuant to the Federal Copyright Act. On rare occasion, no permission and no fees at all are required to use certain materials—most notably publicity and marketing materials that have been widely dispersed and where there is deemed to be an "implied license" granted to some users. As stated earlier though, this is really an unusual situation and an exception to the common rules of Copyright. In some extreme cases a copyright can even be deemed to have been abandoned.

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In this last instance material is considered to be in the "public domain" and is free for all to use.

The legal principles and standard practices governing these issues will be reviewed, examined and explained in this article. The common practical problems and occasional dilemmas that arise will be emphasized, as will issues currently in flux.

While copyright protection is afforded to a very wide scope of so-called "works of authorship," there are a number of categories of works which are not protected by copyright at all.

1. Blank Forms—Based on a Supreme Court case from over 120 years ago,[1] the Copyright Office has ruled that blank forms and similar works designed to record rather than to convey information cannot be protected by copyright.

2. Names, Titles and Slogans—Under the Copyright Act, words and short phrases are not protected. Of course, the issue which Publishers face often turns on just what is a phrase and what is simply a relatively short but copyrightable expression of an idea. Simple commonplace expressions are not copyrightable, but phrases that are new, original and not generally heard can be protected. Titles, because they are really the only way to actually describe a particular work, are "per se" not protected by copyright. However, that does not mean that titles have no protection under other types of laws, particularly trademark.

Simply put a title can achieve or "earn" the same protection as a trademark by attaining "secondary meaning" to the public. In other words, if a title becomes well known it will be protected by law and infringement can be found under the broad principles of unfair competition.

3. Common Property—If a work is not one of original authorship, it cannot have copyright protection. As such, charts, tape measures, rulers, schedules, tables, etc., or works which derive from public documents will not be protected. An important factor in connection with the non-protected status of this type of works is the limited ability to express the information they contain in any other way.

4. United States Government Works—Pursuant to the Copyright Act, protection is not available for any work of the United States Government—but the U.S. Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest or otherwise. In order to be considered work by the U.S. Government, it must have been prepared by an officer or employee of the United States Government as part of that person's official duties. It is important to note that The Copyright Act does not preclude protection for works created for the government by independent contractors, and that it applies only to the Federal government, not State or Local.

Fair Use

If material is not in the public domain,[2] then it must be subject to copyright protection. Of course that does not mean that the material cannot be used without permission, it often can. Copyright Act Section 107 specifically addresses "fair use" as a defense against a claim of copyright infringement. This particular section was new to the current Copyright Act, it was not included in the previous act (1909) in any form. However the concept of fair use was applied by courts of every jurisdiction for many years, a "common law" exception to the codified rules of the Copyright Act. The reason for the fair use defense has likewise been set forth by many courts, most recently in an extremely important and influential Supreme Court Case,[3] where it was confirmed that fair use "permits Courts to avoid rigid application of the Copyright Statute when, on occasion, it would stifle the very creativity which the law is designed to foster."

Essentially fair use reflects a public policy that copyright law has its limits, and that some unlicensed uses of part of a protected work (and in some cases all of that work) ought to be permitted. The 1976 Act for the first time gave statutory confirmation to this so-called "rule of reason" though it was meant not to create new law but simply to codify the law as it had come to exist over many years. However, unlike some sections of the Copyright Act which are very narrowly crafted and very strictly interpreted, such as the rules which define exactly what types of works can be considered to be a work-for-hire), Section 107 simply sets forth a list of four factors to be considered in connection with determining what should be ruled fair use and what should not. The Copyright Act does not call for any particular relative weight to be put on any of these four factors, and indeed other factors not specifically enumerated in the Statute may be considered. Courts have noted that the doctrine is entirely equitable, and is so flexible as virtually to defy definition.

The four fair use factors will be discussed in this article individually with an emphasis on their meaning to authors and publishers faced with difficult decisions to make. By reviewing and analyzing each of these factors and the court Time, Inc. v Bernard Geiss Assoc. (293 F. Supp. 130 SDNY 1968)[4] decisions interpreting them (especially Supreme Court decisions) publisher and authors ought to get a good "feel" for what might be an infringement and what should not be. At the very least it will provide a basis for the author or publisher who simply has no real idea what needs to be considered in determining whether copyright protected work can be used without license or permission.

Unfortunately, it would be wholly misleading to say that even a thorough understanding of the four fair use factors will provide any more than very helpful guidance. Absolute concrete guidelines simply do not exist . Nevertheless authors and especially publishers should find that once they know how to think about these issues, they will be far more comfortable making important legal and publishing decisions.

The Purpose and Character of the Use

Essentially, the first fair use factor set forth in Section 107 takes into account exactly what type of use is being made of copyrighted material. As the introduction to Section 107 makes clear, not all uses are the same and some are simply favored over others for public policy purposes. The introduction enumerates criticism, comment, news reporting, teaching, scholarship and research as favored uses. This is not to say they will, in fact, always support a favorable finding of fair use, but they are given a sort of "special consideration." Nor should one assume that other types of uses not enumerated above are not also positive uses for fair use purposes. The notes and commentary to the Copyright Act make it quite clear that all of Section 107 is meant to provide helpful guidelines to copyright holders, licensors, users, and to judges enforcing the Law as written in merely general terms. However, as stated earlier, this guidance was not and is not iron-clad, immutable advice.

The division of potential uses of Copyright protected material into two specific categories, those of a "commercial nature" and those for "non-profit educational purposes" has caused problems and confusion for publishers and authors since the distinction was first promulgated as part of the Copyright Act. The difficulty is well stated in an often cited important Copyright case[5]

> "In so saying, the statute unrealistically paints the world into two corners—the venal commercial and the altruistic instructive. In fact, publishers of educational textbooks are as profit motivated as publishers of scandal mongering tabloid newspapers. And a serious scholar should not be despised and denied the law's protection because he hopes to earn a living through his scholarship.

The fact is nearly all publishing is done for commercial purposes as that term is generally defined legally. In other words, one of the purposes of undertaking the publishing process in nearly every instance is to take in more money than one spends; even if that does not turn out to be the ultimate result! As such, this first portion of this very first factor does not provide any benefit to authors and publishers who are aiming for at least some degree of commercial success.

The fact that some educational purposes may be served by the publication in question is not really an assertion that carries much weight. Nearly all authors feel their work is important, meaningful, and (of course) educational. However, if publication and release is undertaken by a for-profit enterprise, courts cannot help but to note the commercial status.

Just as copyright protected material published in a commercial work operates under a presumption against fair use with regard to the first fair use factor, the use of copyrighted material by a not-for-profit entity operates with a favorable presumption. Nevertheless, it is important to be aware that this is

merely a presumption, fully rebuttable, rather than a final determining factor. It is an often quoted myth that not-for-profit status confers an automatic privilege to borrow, copy, or otherwise make use of copyrighted material. This is simply not true. Once the presumptions just outlined are understood, publishers and authors must simply move forward with a thorough examination of all the Section 107 directives.

It is also generally considered a truism in the publishing industry that use of non-fiction rather than fictional material is more likely to be considered fair use under Section 107. This observation, in fact, is indirectly supported by the language of the statute itself, although such a distinction is not stated formally. The favored categories (as set forth previously) all are much more conducive to description of non-fiction rather than fiction.

The well-known "Twin Peaks" case[6] provided a good deal of guidance to the publishing industry since 1993. The highly influential Second Circuit held that a work which summarized in detail all the plots of this hit TV show could not avail itself of a fair use defense. It was not that the television show itself was considered somehow inappropriate for criticism or analysis, highbrow and lowbrow ought to get identical treatment for fair use purposes. A fair use defense was defeated in that case by the full and quite complete detail of the plot summaries. Likewise, in the so-called "Seinfeld" case[7] involving a quiz book published about the often absurd details of this TV show the Court ruled against the publisher and author's claim of fair use on the basis that any so-called "transformative use" was slight to nonexistent. Some Courts view transformative use—creating new information, new insights and understanding, etc.—as necessary for a fair use determination.

As stated earlier, infringement can certainly be found regardless of the state of mind or good faith belief of an author. Nevertheless, in the context of the first fair use factor, some consideration of a defendant's conduct and thought process is in order. This does not mean that a prior attempt to secure permission to use material is any sort of proof that a defendant in a subsequent legal action for copyright infringement has no fair use defense available to him. Indeed the Supreme Court has specifically ruled that "being denied permission to use a work does not weigh against a finding of fair use." [8] Nevertheless, in cases involving the acquisition of material based on misrepresentation as to intended purpose, a fair use defense can often be precluded. Furthermore, knowingly and intentionally using stolen material will cut off a fair use defense. On the other hand, if a copyrighted work contains unfair, inaccurate or derogatory information, Courts have held that an aggrieved party may copy and reproduce "such parts of the work as are necessary to permit understandable comment on the statements in the work."[9] Finally, with regard to paraphrasing,, it is indeed relevant whether the paraphrasing was done in good faith of with a knowingly evasive motive. These motives are considered indicators that the nature of the use is one that simply does not support fair use,and that any infringement found to exist should be mitigated or excused.

Nature of the Copyrighted Work

Fair use factor number two focuses not on the work which may or may be infringing, but instead on the plaintiff's work which is allegedly infringed. Just as all contested uses are not the same, all works which plaintiffs claim ought to be afforded protection against infringement are not the same either! Quoting directly from the Supreme Court's Campbell decision,[10] "This factor calls for recognition that some works are closer to the core of copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.

The type of works given the most protection, as already noted, tend to be non-fiction rather than fiction. The more creative, original and innovative a work is, the greater protection it will receive, and the more reticent an author or publisher ought to be about using material taken or paraphrased from such works. On the other hand, works that are primarily compilations, catalogs, etc., receive a far lower level of protection. Once again quoting from the Supreme Court, this time from the landmark Universal Pictures decision,[11] "The scope of fair use is greater when informational type of works as opposed to more creative products are involved...Copying a news broadcast may have a stronger claim to fair use than copying a motion picture." The Court also noted, "If a work is more appropriately characterized as entertainment, it is less likely that a claim of fair use will be accepted."

This second factor in fair use analysis has long been intertwined with the distinction between published and unpublished works. Indeed, many have taken the position that among the most basic rights an author can possess is the right to determine whether his or her work is published, and how publication is undertaken. Thus, Courts have generally been unwilling to sanction fair use of works that have not yet been published—with two very well known Supreme Court cases leading the way. In the rather infamous Harper and Row Case[12] the magazine "The Nation" used (without permission) approximately 300 words from a not-yet-published book of memoirs by Gerald Ford. In finding infringement, the unpublished nature of the book was "a key, though not necessarily determinative factor in fair use analysis." The Court affirmatively found that ordinarily "the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use."

The other major legal case came a few years later in the Salinger case[13] (mentioned previously) in which the Court ruled that unpublished works should generally be considered to be completely protected against copying in any way. This 1989 decision generated so much criticism in publishing circles (a very influential community!) that it led directly to an amendment to the Copyright Law. In 1992 the following short phrase was added to Section 107 of the Copyright Law: "The fact that a work is unpublished shall not in itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

The amendment grew out of concerns that publishers and authors would be overly constrained by a complete and total ban on fair use of unpublished works, and it made it abundantly clear, despite the contradictory language in Salinger, that published/unpublished status was not a sole determinative factor.

The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

This third factor used to determine whether a particular use is a fair use is essentially a common sense approach to the issue of quantity/quality of material used. As in other aspects of Copyright Law discussed earlier in this article, there are simply no iron-clad rules to indicate that X words used are allowed but Y words is too many. Each case of potential fair use is different, and this factor provides a directive to take a hard look at the specifics of the proposed use to make a rational decision. Fifty words from a 100-word Copyright protected poem constitutes half of the protected work, and that may simply be too much for fair use. The same 50 words from a 5,000-word poem constitutes a mere 1 percent use—and may be allowed. Obviously the less use made of a copyrighted work, the smaller the chance of a finding of infringement. Likewise, the "importance" of the words used can play a pivotal role. In the Harper and Row,[14] the use of 300-400 words out of over 30,000 words was found not to be fair use. The words taken, which describe President Ford's thoughts about Richard Nixon, were deemed to be the "heart of the work" and therefore protected against fair use, though very few actual words were in question. Likewise, in the Seinfeld case,[15] defendants made use of approximately 5 percent of the episodes from the Seinfeld TV show in a trivia book titled "The Seinfeld Aptitude Test." A defense of fair use was defeated in this case as the Court confirmed "even a small amount of material extracted from an original work can suffice to counter a claim of fair use."

The Effect of the Use upon the Potential Market for or Value of the Copyrighted Work

This fourth and final factor used to make fair use determinations under Section 107 is also based on a somewhat intuitive common sense approach. It has even been sarcastically referred to as the No Harm/No Foul factor. In the Harper and Row case [16] the Supreme Court ruled that the factor was "undeniably the single most important element of fair use." While this statement actually conflicts with the overall rule that no one factor shall be considered more or less important than others, the reality is that this fourth factor should be given special attention. An honest appraisal of what might happen to the value of an underlying copyright if a proposed fair use is undertaken is always in order. If the value is reduced, for instance, because the use of a copyrighted

work can be said to "scoop" news value, then a fair use finding is unlikely. Likewise, if the market for the sales of the copyrighted work is going to be adversely affected by the proposed fair use, then an infringement finding is likely.

It is important to note that only one narrow principle is focused on by Courts in connection with this factor—reduced commercial demand for a copyrighted work because a portion was used in a competing work without permission. This is not to be confused with a scathing review or work of criticism, which cannot produce a so-called "negative effect" as contemplated by this fourth factor. Finally, using material unprotected by copyright is not a relevant issue either. Courts will consider only the negative results of making protected material available in another unauthorized form.

On the other hand, the scope of just what can be considered a negative effect can be wider than one might originally suspect. This factor is broadly interpreted to relate to the effect of proposed fair use publication on any potential new market or derivative work based on copyrighted material. In other words, the right to create new tapes of works afforded copyright holders allows them to expand or license their works into other fields (i.e., books into films) and adverse effects on those future markets have become an important area of consideration. Furthermore, it is not legally persuasive to assert that a copyright holder has not made use of some derivative right, the fact that the holder *could* pursue a potential use will afford that use protection under the fourth factor. For instance, in Seinfeld[17] the Plaintiff had not actually published books or licensed to third parties at all, but the Court protected the right to do so in the future.

State of Mind

Though not actually discussed in the Copyright Act, it is worth noting what happens when an action for infringement is brought against an author or publisher who honestly had so-called "innocent intent" regarding his or her actions. In other words, a defendant who truly had no knowledge that they were infringing someone else's copyright, and was truly acting in "good faith." For instance, authors and publishers often use work furnished by a third party who warrant and represent that the material they submit may be published. Sometimes an author or publisher moves forward believing that a use is a fair use but then a court rules differently. Does the innocent intent of a party constitute any sort of defense? The quick and basic answer is no, it does not. An infringement is an infringement regardless of whether there was bad faith. What may be affected are the damages awarded to a successful plaintiff against an innocent infringer. If a Court rules that a party guilty of copyright infringement was not aware of the infringement and had no reason to believe that his or her acts constituted infringement, a statutory award can be reduced from the minimum figure of $500 down to $200. This is not a mandatory reduction,

it is entirely discretionary by the judge. The maximum statutory penalty for infringement is $30,000 per infringement—and this can be increased to $150,000 per infringement in cases of willful behavior. Furthermore, Courts can allow recovery of costs and attorneys fees for a successful litigant.

Internet, Electronic and On-line Publishing

The explosive growth of the Internet and the transmission of digital information through various forms of electronic publishing have profoundly affected the balance between permissive fair use of copyright protected material and illegal infringement. An important new law amending the Copyright act was passed in the Fall of 1998 and literally hundreds of legal actions have been brought in the past few years challenging courts to apply existing law and established doctrine to new situations that technology has thrust upon them. In the past, new inventions have tested the Copyright Laws which have always adapted to cover potential infringements which could not have been previously contemplated. Photocopy machines, VCR's, and computers are good examples of this phenomena. The Internet and electronic publishing may simply be the next entry on this list. On the other hand, it is argued quite persuasively by many that the ease of copying, transmission, reproduction, and dissemination will simply overwhelm Copyright law as we know it today and render enforcement virtually impossible.

In October 1998 the United States enacted legislation known as the "Digital Millennium Copyright Act" (DMCA) implementing recommendations made by the World Intellectual Property Organization (WIPO). This law clarifies and confirms that rights afforded a copyright holder are indeed applicable for works embodied in digital format, and prohibits efforts to circumvent encryption or anti-piracy systems designed to protect such material. The constitutionality of this law was recently upheld in light of the potential First Amendment issues it raises.[18]

Additionally, the law provides some protection for Internet service providers with regard to infringing materials which become available on their systems without their knowledge and as a result of independent efforts by their clients.

At this point it is important to note that electronic rights in material which a Publisher controls print publication rights are not necessarily controlled by the Publisher. In the Landmark Tasini case[19] the Second Circuit reversed a District Court ruling and held that without an express contractual provision granting electronic rights Publishers simply do not own or control them. While the technical basis for this ruling may be beyond the scope of this article, the result is certainly worth including as because of its affirmation of the scope of author's copyright protection in the electronic rights to their works.

The long established rules of Fair Use as a defense to Copyright infringement are not really different in any way for material published digitally rather

than in a more traditional method. The four factors set forth in the Act still govern. What is inarguably quite different is the ease by which material can be appropriated and disseminated over the internet. Indeed, noted Georgetown University law professor David Post has publicly stated that the Internet can be viewed as "a gigantic worldwide copying machine" and that control of copyright infringement simply isn't going to continue in the future. At the time of this writing, this issue is facing the recording industry in highly publicized litigation involving dissemination of copyright protected music. There is no doubt that the publishing industry will likewise soon be involved in legal proceedings involving the unauthorized digital copying and transmission of literary works. This ease of copying has led to the development of various technological measures designed to control access and protect the rights of Copyright owners. As mentioned earlier, the DMCA mandates that us of methods designed to defeat this so-called "encryption technology" shall constitute copyright infringement. Critics of this provision have argued that in addition to Constitutional issues, it virtually eliminates the fair use concept, as the very act of accessing protected material is itself an infringement, regardless of intent, purpose, or effect. The legality and enforcement of this provision will almost certainly continue to be tested in the future.

Another very important aspect of the DMCA mentioned earlier is the special "safe harbor" provision for Internet Service Providers.[20] This law effectively shields business entities such as Yahoo, America Online, etc from any potential contributory liability for Copyright infringement as long as five specific conditions are satisfied;

1. Transmission of material was initiated by or at the direction of a person other than the service provider

2. Transmission, routing, connections and storage is carried out through an automatic technical process without selection of the material by the service provider

3. Service provider does not select the recipients of the material except as an automatic response to the request of another person

4. No copy of the material is maintained on the system or network in a manner ordinarily accessible to anyone other than the intended recipient

5. Material is transmitted through the system or network without modification of its content

The DMCA provides that a service provider can only be liable if it has actual knowledge of an infringement, knowledge of the facts and circumstances surrounding such infringement, or notice of the infringing activity.

Another area of potential Copyright infringement created by the emergence

of the internet is known as "framing." This technology enables a website owner to display a portion of a second website as part of the original hosting website's content. The Internet user is not actually transported or "clicked" to this new site, but information is simply displayed in a special "frame." It has been argued by many Copyright experts that the practice of framing infringes on Copyright ownership, especially when a different and therefore derivative display of material is created through methods of graphic manipulation. In the highly publicized *Washington Post*[21] case the defendant's web site displayed the news portions of various other media web sites, surrounding them by frames and also advertising messages. The case was actually settled before going to trial when the Defendant agreed to stop its framing practice, but it is generally accepted that Plaintiff would have ultimately prevailed.

The use of frames should be distinguished from "linking" (a/k/a hyperlinking), the technology which allows a user to point and click the cursor on a portion of a website and be immediately transported to another site which has been linked. Absent some misleading or other intellectual property law consideration (i.e., trademark) a simple website link is not considered to be violate of Copyright just is a simple identifying description of another's work is not understood to be an infringement.

The final legal issue created by the use of the Internet is the use of "Metatags." This involves the placement of key words in data fields which cannot be seen by website users but are surveyed by search engines. While it is highly unlikely that Copyright infringement can result from this practice (short phrases and titles are not protected) there have been numerous cases where this practice has been found to violate Federal Trademark Law. In the often cited Brookfield case[22] the Court actually held that that "using author's trademark in one's metatags is much like posting a sign with another's trademark in front of one's store."

Permissions

Assuming a work is not in the public domain, and that use would not be protected as Fair use, permission must be sought from the Copyright owner. There are certain steps which tend to produce positive results.

The first step, confirming that a work is protected by copyright is often rather difficult. For works published after January 1, 1978, the absence of a Copyright notice means very little. It is simply not required, although there are various reasons that notice is, in fact, preferred. For copyrighted works published prior to 1978, it is safe to assume that the maximum possible period of protection is 95 years (recently extended by Congress from 75 years) but other than that there are no perfect methods for determining whether a Copyright is still in force or for tracking down the actual Copyright owner. Some helpful hints include:

1. If the Work is part of a book or journal article, contacting the publisher (if known) or the Copyright Clearance Center (*www.copyright.com*)
2. Many professional organizations represent image creators who license their work for publication. Three notable agencies include Academic Press Image Directory (www.imagedir.com) American Society of Media Photographers (www2.asmp.org.asmp) and Picture Network International (www.auraquanta.com/PNI.HTML)
3. For authors who have retained copyright in a contribution to a periodical permission can often be obtained through Uncover (*www.uncweb.carl.org*) which handles rights licensing for Publication Rights Clearinghouse
4. Copyright registrations, and all recorded assignments and licenses from January 1, 1978 on can be found and searched at *www.lcweb.loc.gov/copyright*. Remember though, only registered works can be found here, and a work need not be registered to be protected by Copyright

The fact that a writer cannot be located to request permission does not make copying acceptable. As explained earlier in more detail, copying without permission is infringement regardless of efforts to avoid it. When a Publisher or author does know exactly who a request should be made to, that request should always be in writing and it should include an unequivocal request for permission to use material specifically defined with as much detail as possible. The nature of the work to be published should be explained, and the credit line to be used for attribution set forth. To make the letter binding, words such as "consented and agreed to" should be added with a line for signature. The letter should also note that if rights are not controlled by the addressee of the letter, the identity and address of the correct party is requested

Forfeiture and Abandonment

Many Authors and Publishers have come to believe that a Copyright can be "forfeited" or "abandoned" by the behavior of its owner. This is technically true, although the circumstances by which this takes place are far more limited than commonly believed. It is first important to distinguish between these two somewhat different concepts. A Copyright is forfeited when work is published without notice during a period when notice was, in fact, legally required. The desire and intent of a Copyright owner is not really a relevant factor. The need for notice was eliminated in March 1989 when the Copyright Act was amended to bring it in compliance with the Berne Convention, an international treaty covering Intellectual Property Laws of well over 100 countries. Copyright is no longer forfeited by failure to post a valid Copyright notice, although for various other legal reasons this remains an important step to take.

On the other hand, abandonment takes place only where there is an intent by the Copyright holder owner to do so, evidenced by overt acts taken by such holder. It is not enough that a Copyright holder fails to pursue or prosecute infringers, there needs to be an affirmative authorization to circulate work free of Copyright. This is a rather strong burden to overcome, and Courts have supported claims of abandonment on a very infrequent basis. In other words, if a Copyright is known to be within its statutory period of duration,[23] than anything short of an unequivocal act evidencing forfeiture will not be deemed to waive the necessity of properly licensing copyright protected material.

Conclusion

Given the well developed and quite interesting body of law which has addressed the issues of Fair Use in publishing industry, it is a bit surpassing that more editors, publishers, authors, etc. are not aware of the scope of this legal doctrine. It is often the case that by the time a proper level of training and guidance is afforded in this area it is often too late to avoid expensive and time consuming litigation. As costs rise even higher, and as the ease and frequency of disseminating information over the Internet becomes even more widespread (widening the potential for Copyright infringement) this situation may change.

Notes

1. Baker v. Seldon 101 US 99 (1879).
2. "Public Domain" is the phrase used to describe works that are not protected by Copyright Law and are therefore free for all to use. This includes works which were never protected by Copyright as well as works that were once protected but are no longer.
3. Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569 (1994).
4. Time, Inc. v. Bernard Geiss Assoc. 293 F.Supp. 30 (SDNY 1968)
5. Salinger v. Random House 811 F. 2d 90 (2d Cir. 1987).
6. Twin Peaks Prods. Inc. v. Publications Int'l, Ltd. 996 F.2d 1336 (2.d Cir. 1993).
7. Castle Rock Entertainment v. Carol Publishing Group 150 F.3rd 132 (2nd Cir 1998).
8. See Campbell v. Acuff-Rose Music, Inc.
9. Hustler Magazine, Inc. v. Moral Majority 796 F.2d 1148 (9th Cir 1986).
10. See Campbell v. Acuff-Rose Music, Inc.
11. Universal City Studios, Inc. v. Sony Corp. of America 464 U.S. 417 (1984).
12. Harper & Row, Publishers, Inc. v. Nation Enters. 471 U.S. 539 (1985).
13. See Salinger v. Random House.
14. See Harper & Row, Publishers, Inc. v. Nation Enters.
15. See Castle Rock Entertainment v. Carol Publishing Group.
16. Harper & Row, Publishers, Inc. v. Nation Enters.
17. See Castle Rock Entertainment v. Carol Publishing Group.
18. Universal City Studios v. Reimerdes (00 Civ. 0277 Aug. 18, 2000) held that while computer code is speech, it is not "purely expressive any more than the assassination of a political figure is purely a political statement."
19. Tasini v. New York Times Co, 1999 WL 753966 (2d Cir. 1999)
20. Service Provider is defined as a provider of online services of network access . . . including an entity offering the transmission, routing or providing of connections for digital online communications , between or among points of the user's choosing, without modification to the content of the material as sent or received."
21. Washington Post v. Total News 97 Civ. 1190 (PKL) (S.D.N.Y. Feb. 20, 1997)
22. Brookfield Communications Inc. v. West Coast Entertainment Corp. 174 F.3d 1036 (9th Cir. 1999).
23. Duration. Pursuant to the most recent set of amendments to the Law, Copyright lasts 70 years from the

death of a work's author. For anonymous, pseudonymous and works for hire the duration is 95 years from publication or 120 years from creation—which ever is shorter. For works published prior to January 1, 1978, the 1909 Copyright Act governs and duration is 28 years plus a potential 67-year renewal period.