

ESA OPPOSES CHANGES TO “FAIR USE” DOCTRINE

What is the “Fair Use” doctrine?

“Fair Use” is a privilege that allows limited uses of copyrighted materials in ways that would otherwise be an infringement of copyright. Fair Use, one of the few exceptions to rights holders’ exclusive rights, balances the public interest in scholarship, research, commentary and the like with the artist’s interest in having the exclusive right to reproduce and distribute his or her work. When the use of a copyrighted work for such a purpose has been judged a “Fair Use,” it is not an infringement of the copyright, even if the use was made without permission of the copyright owner. Originally created by the courts, the Fair Use doctrine was codified in the 1976 Copyright Act.

What kinds of uses are “Fair Uses”?

Fair Use has always been determined on a case-by-case basis. There are no hard-and-fast rules that dictate that certain uses are always fair (or never fair). The statute lists four factors to take into account (although others can also be used) that must be considered in determining whether or not the use is fair:

- The purpose and character of the use. Title 17, Section 107 recites examples such as copying for purposes of criticism, news reporting, teaching, scholarship or research. But those purposes don’t automatically make a particular use a fair use. Nor is every use by a library or educational institution necessarily a fair use under the law;
- The nature of the copyrighted work in question;
- How much of the work is copied or otherwise used; and
- The effect of the use on the potential market for the work. This includes not only the impact on the current market, but also whether allowing the use (and others like it) could prevent a new commercial market from developing.

How about private copying by an individual for personal use?

U.S. copyright law has never provided that private or personal copying is automatically fair use, and no court has ever so held. Instead, courts apply the statute, including the four factors listed above, to particular circumstances of copying. It was on this basis that the Supreme Court Betamax decision in 1984 ruled that private copying of over-the-air TV broadcasts for the purpose of time-shifting was fair use, but even that case did not apply the same rule to private taping of pay-TV broadcasts, and no later court has cited the Betamax case as a basis for permitting “private copying”. Aside from a specific provision adopted in 1992 regarding non-commercial home recording of music on cassette decks and the like, any other instance of personal copying must be evaluated under the law’s four factors to determine if it is entitled to Fair Use treatment.

The same is true of so-called “space shifting” or “platform shifting” – for instance, copying a videogame so that it can be played on a different technological platform than originally intended by the copyright owner. In fact, such copying, if not authorized, may be infringing. It’s up to the publisher to decide when and whether to publish a videogame on a different platform; the statute contains no Fair Use privilege for a user to make that decision unilaterally, and no court has ever recognized one. Here too, Fair Use applies only after consideration of all four statutory factors. That includes the impact of the unauthorized “platform shifting” on the copyright owner’s potential markets, including the market for the same game on a new platform, should the copyright owner choose to pursue it.

Do we need to make any changes to Fair Use?

No. This doctrine codifies nearly two hundred years of judicial experience in balancing the rights of copyright owners with social interests in research, scholarship and the like. Fair Use works well to accommodate these goals while retaining incentives for creators to create and for publishers to invest in bringing new copyrighted products to market.

Some point to recent developments, such as efforts to break the encryption of DVD movies and the well-publicized DMCA criminal case against a Russian programmer accused of circumventing the copy protection for Adobe System’s e-books, as reasons to re-examine Fair Use. Neither case has anything to do with that doctrine. In both cases, the defendants were charged with trafficking in tools that strip off encryption and leave formerly protected material “in the clear” for any use, fair or piratical. The DMCA outlaws such trafficking, and clearly rules out any Fair Use defense by the traffickers.

The Entertainment Software Association (ESA)

The Entertainment Software Association (ESA) is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish video and computer games for video game consoles, personal computers, and the Internet. ESA members collectively account for more than 90 percent of the \$6.9 billion in entertainment software sold in the U.S. in 2002, and billions more in export sales of U.S.-made entertainment software. The ESA offers services to interactive entertainment software publishers including a global anti-piracy program, owning the Electronic Entertainment Expo trade show, business and consumer research, government relations and First Amendment and intellectual property protection efforts.