Copyright, Exceptions, and Fair Use: Crash Course Intellectual Property #3

Crash Course: Intellectual Property
https://youtube.com/watch?v=Q_9O8J9skL0
https://nerdfighteria.info/v/Q_9O8J9skL0

Hi I'm Stan Muller. This is Crash Course Intellectual Property and today we're continuing our discussion of copyright law. In his 2011 book, *Infringement Nation*, Professor John Tehranian conducts a thought experiment where he tracks a guy's encounter with copyright law through the course of an unremarkable day. Well we're going to try this experiment and I don't really think it will end up being a completely unremarkable day. I mean, in our version I end up getting a tattoo, which for me would be memorable.

(INTRO MUSIC PLAYS)

Look, I don't like to front-load the animation sequences like this, but since we're doing a thought experiment, we're going to have to do it with Thought Bubble.

As soon as I wake up, I check my Twitter feed. I spend the next thirty-five minutes or so retweeting everything One Direction posted while I was asleep and each retweet creates what might be an unauthorized reproduction of 1D's copyrighted text. The same thing happens with my email, and suddenly, I'm liable for millions in damages before I even get out of the bed.

Once I'm at work, I spend the morning procrastinating and doodle pictures of Finn and Jake from *Adventure Time* TPing Frank Gehry's Jay Pritzker Pavilion, infringing on Time Warner's copyrights on the characters and on Frank Gehry's architectural rendering.

After eight hours of work, my doodles are good enough to have them tattooed on my left shoulder. I commission this infringing work made for hire and I head off to my water aerobics class sporting my fresh ink.

When I hit the pool and Esther and Betty and Dorcus ooh and ahh over my fresh new tat, I've engaged in a public display of this infringing work. Beyond another few hundred thousand dollars in statutory liability, "The copyright act allows for the 'impounding' and 'destruction or other reasonable disposition' of any infringing work." That means Time Warner can either force me to have the tattoo removed or they can opt to destroy me.

Later, I post a bunch of my friend's pictures to my Facebook timeline, and by posting those I'm making an unauthorized copy, distribution, and public display of her copyrighted photographs.

I then head to another friend's birthday party where I use my phone to record everyone singing the Happy Birthday song, which still earns an estimated two million dollars per year and is actively enforced despite the fact that it likely isn't even protected by copyright law. At the same time I accidentally capture and make a copy of the artwork on the wall of the restaurant.

So at the end of this hypothetical day, I could be liable for millions of dollars and I might be destroyed. By the end of the year, I'd be liable for more than 18 billion dollars, and if I hadn't been destroyed, I would have a wicked bunch of scars from all that tattoo removal. Thanks Thought Bubble.

So, this story makes a few key assumptions. One, full enforcement by copyright owners. Two, a court assessing the maximum statutory damages per instance of infringement. And three, the absence of the mitigating effects of copyright exceptions and limitations. To me, the worrying thing about this scenario is that so much of our normal everyday behavior puts us at risk of infringing copyright, especially when so much of our life is digital.

To quote Professor Ian Hargreaves: "The copyright regime cannot be considered fit for the digital age when millions of citizens are in daily breach of copyright, simply for shifting a piece of music or video from one device to another. People are confused about what is allowed and what is not, with the risk that the law falls into disrepute." In other words, when the law is so broad that pretty much everyone is a copyright infringer, people stop paying attention to those laws. When the laws fail to keep up with technology, it loses legitimacy, and we become a nation of scofflaws.

So to make copyright laws work in the digital age, there have to be copyright exceptions and limitations. And there are. Fair use is the most famous exception; we'll get to that in a minute. But there are are also some more specific exceptions and limitations we should look at.

These exceptions cover a lot of different uses, like reproduction of copyrighted works for blind and disabled persons. They allow libraries and archives to preserve, copy, and distribute protected works. It also limits libraries' liability when a patron uses the copy machine to photocopy protected materials. The first sale rule under Section 109 means that once a copyright owner sells you a legal copy of a book or something, they no longer control the distribution rights of that particular copy of the work. You, as the owner of a lawfully made copy may sell, rent, donate it, or whatever. This is why libraries can loan you a book and what allows you to sell your books and music to secondhand stores, if anyone does that anymore. It's also what allows the three remaining video stores in America to stay open.

So this gives you the right to sell your books and CDs, but you probably can't sell the digital music and books that you buy from Apple or Amazon. The courts say that the first sale right applies only to the distribution right and not the reproduction right. Since selling your MP3 collection would require making a copy of those files, that is a no-no. As the law stands now, there is no legal secondary market for digital works of any type.

When you click on that purchase or buy button you're really not "buying" the copy of the work, you're entering into a type of licensing arrangement. And that's fine. I mean that licensing agreement is in the Terms of Use, which I'm sure you read- No? Didn't read it? Well, I'm sure you clicked 'accept' or even 'I understand and accept' when you created your Apple or Google or Amazon account, so, you're in the agreement.

Some types of works like musical compositions and sound recordings, for example, are subject to compulsory or statutory licenses for certain uses. These licenses provide legal authorization to use a copyrighted work in certain ways and for certain purposes, as long as the user pays the required fee and otherwise meets the conditions in the law. The copyright owner can't deny you permission as long as you pay up.

This is how artists get away with covering other artist's songs. They just pay the fee to the original rights holders and they're free to release their version. You might have noticed that cover versions of popular songs are kind of a big deal on YouTube. Searching "Frozen cover" turns up about 2.8 million results. How does this work?

Well, in 2011 YouTube entered into an agreement with several major music publishers to allow cover versions of songs to reside on the site, with part of the advertising revenue going to the original rights holders. So those are a few of the specialized exceptions and limitations to copyright enforcement. But by far, the broadest, most flexible, most controversial, and most famous copyright exception is fair use.

Courts have said the fair use defense allows them to quote, "Avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." Fair

use acts like a safety valve. It allows for certain socially beneficial uses that you might otherwise get in trouble for.

To paraphrase an 1841 court decision: "The progress of learning advances when the law allows follow-on authors to bestow their intellectual labor and judgment in reworking selections from a prior work, without prejudicing the profits or prospects of that work." What? Who would say this? Y'know, Mark, I would love to advance the progress of learning by bestowing my intellectual labor and judgment on the reworking of this prior work, but uh, I just worry about prejudicing the profits of the prospects of that work.

Anyway, fair use is an affirmative defense, which means the defendant must show and prove that the use was fair and not an infringement. The only way to definitively find out whether something is fair use is by having a judge tell you it is. And this is a problem when taking a copyright case through trial costs anywhere from $300,000 to a couple million dollars. Some courts have called the fair use exception the most troublesome in the whole law of copyright. And they are not wrong. I mean, the term fair use isn't defined in the Copyright Act and courts have a lot of leeway in how they decide if something is fair use.

Courts have to consider all the factual evidence at hand for each particular case. And every case is different thanks to the huge variety of copyrightable works and the many contexts in which these works can be used, like classroom lessons, blog posts, YouTube videos, or in a project where the entire contents of a university library are digitized.

So how to decide. Courts use four factors to determine whether a use is fair. The first factor is the purpose and character of the use. Like whether the use is commercial or is for nonprofit educational purposes. Noncommercial or educational uses weigh in favor of fair use. In the last twenty years courts have expanded this factor to include consideration of whether the work is transformative. They look at whether the use actually transforms the underlying purpose of the work by adding a new meaning or message. Courts often hold the parody as a transformative fair use. Parody functions as a critical commentary of the original work. Courts have also recently held that a project to digitize large collections of works and the making available of small segments of texts from those works are transformative uses. That makes the Google Books project a fair use. That Google Books decision is currently in the appeals process though, so it might not hold up.

Publishers and authors will argue that merely copying all these books without adding expression or value other than placing the work within a highly commercialized digital ecosystem in a crass attempt to attract users, is not transformative. Google tells a slightly different story. They'd say the project makes these works searchable, discoverable, and universally accessible, and that that is a transformative use with significant public benefit.

The second factor has to do with the nature of the copyrighted work. Courts have consistently held that the more original and creative a work is, the more protection it's given from copying and it's less likely that a court will find fair use. On the other hand, the more informational or functional the plaintiff's work, the broader the scope of the fair use defense. In practice, this means that fictional works tend to have a stronger copyright protection as they're works of imagination. They're basically pure expression. Nonfiction works like news, biographies, and encyclopedias are filled with uncopyrightable facts. This means they require less creativity to make and they're granted less protection under copyright law.

The third factor basically looks at how much of the work you use, and there are two parts to this factor. The first is quantitative substantiality. That looks at the amount of work you use, like how much of the video or how many pages of the book. So wait a minute. How did we get so far into an episode about exceptions without rolling the Mongol-tage? Hit it!

(Music plays)

The Mongol-tage, besides being awesome, is an excellent example of this factor. We use three clips for a total of three seconds out of a ninety minute film. I think we have a pretty good case that this use isn't quantitatively substantial. The other part of this is qualitative substantiality. This refers to a use that borrows only the most valuable part of the source work. While I would argue that the clips that comprise the Mongol-tage are the most important and valuable parts of 1963's *Hercules vs. the Mongols*, a court would probably find that these clips aren't the heart of the film. Spoiler Alert! The heart of the film is when Hercules kills Genghis Khan.

The fourth factor addresses the effect of the use on the potential market for, or value of the copyrighted work. What we're looking at here is whether the derivative work has harmed the copyright owner's ability to make money from the original. Courts try to weigh any public benefit derived from the new use with the personal gain the original owner will receive if the use is prohibited. If your use doesn't damage the original copyright owner's ability to make money, you don't have to show a whole lot of public benefit. It's just hard to argue that you uploading *Interstellar* to your YouTube channel has any public benefit.

While these four factors are most often used to determine fair use, courts can use any other factors that they deem relevant, including broad considerations of whether the use will advance the public interest and the goals of the Copyright Act. Unfortunately, this means that there is no clear formula for how courts determine fair use. Fair use is designed to be a flexible tool, and any rule that's flexible is necessarily unpredictable. Yet many people have argued that fair use has become predictable in recent years.

A string of court decisions have expanded the meaning of what is considered to be a transformative fair use. Courts are carving out policy-specific areas, like education where uses are pretty likely to be allowed. User groups have published Best Practices documents, many of which are available online; we've got some links down below. Authors and publishers argue the courts have expanded the breadth of fair use too far, that these best practices guides are biased in favor of expanding fair use. In Supreme Court case Harper & Row v Nation, the majority opinion coined what I like to call the Copyright Golden Rule. Take not from others to such an extent and in such a manner that you would be resentful if they so took from you. Thanks for watching. I'll see you next week.

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