

“Fair Use” Isn’t What You Think



David Baker

again.”

“Don’t worry, Mom.” Kevin spoke up. “We’re covered by the ‘Fair Use’ doctrine.”

While on summer break from State University, Kevin was interning at the park and he had been behind the push to revamp the park’s website with cool new photographs, a couple of popular songs, and several video clips copied from YouTube.

“The ‘Fair Use’ doctrine? What the heck is that?” Allison asked.

Several of the management team members shifted uncomfortably in their chairs and wished they were elsewhere as Kevin continued, “It’s a copyright concept. I learned about it in college and it means we can use whatever we want on our website just so long as we found it on the Internet.”

“But, Kevin, one of these letters is from a movie studio and two are from music licensing companies. And they’re all threatening to sue us.”

“No worries.” Kevin leaned back in his chair and clasped his hands behind his head. “We’ve got nothing to worry about.”

“Actually, Allison, I took a look at our website this morning,” the park’s attorney had just entered the room. “And, we may have a serious problem.”

The “Fair Use” Doctrine Itself

Websites are made up of things that are protected by copyright law. Editorial content (aka the words used on the site), photographs, videos and music, even the graphic elements that form the structure of the site all originated somewhere and the right to use them rests with the owner of the copyrights. This means that virtually everything you can find on the Internet is, at least theoretically, protected by copyright law. However, just because it can be found on the Internet does not mean it can be used on a company website. Copyright law allows the owners of online content to control how the content they’ve created can be used by others.

Unfortunately, there are numerous misconceptions about what can and cannot be done with that content and many of those misconceptions are perpetuated on the Internet itself. One of the most common misconceptions is the role of the “fair use” doctrine in copyright law.

Fair use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain very limited circumstances. In fact, Section 107 of the U. S. Copyright Act provides the statutory framework for determining whether something is a fair use and identifies certain types of uses - criticism, comment, news reporting, teaching, scholarship, and research - as examples of activities that *may* qualify as fair use.

What the Doctrine Protects

When it comes to vetting content that may be used on a company website, it is always a good idea to seek input from the company’s legal de-

partment or outside counsel. However, it also doesn’t hurt to understand how the fair use doctrine is applied. Essentially, courts applying the doctrine consider four key factors in evaluating a question of fair use:

1. Purpose and character of the use. How is the party claiming fair use using the copyrighted work? Courts are more likely to find that non-profit educational and noncommercial uses are fair but they will balance the purpose and character of the use against the other factors. As well, “transformative” uses (those that add something new, with a further purpose or different character) are more likely to be considered fair.

2. Nature of the copyrighted work. To what degree does the work relate to copyright’s purpose of encouraging creative expression? A more creative or imaginative work is less likely to support a claim of a fair use than is a factual work.

3. Amount and substantiality of the portion used in relation to the copyrighted work as a whole. Courts look at both the quantity and quality of the copyrighted material that was used. Generally speaking, the larger the portion of the copyrighted work is used, the less likely the doctrine will be applied.

4. Effect of the use upon the potential market for or value of the copyrighted work. Courts review whether and to what extent, unlicensed use harms the market for the original work.

Courts evaluate fair use claims on a case-by-case basis, and the outcome of any given case depends on a fact-specific inquiry. This means that there is no formula to ensure that a particular percentage or amount of a work will be acceptable. But it is safe to say that the fair use doctrine never provides blanket protection for use of content that is “found on the Internet.”

How You Should Use It

Strictly speaking, the “fair use” doctrine is a defense to a claim of copyright infringement. This means that most companies should not rely on fair use when they create website content. Instead, they should create their own original content. And, if they decide not to create original content they should, at the very least, obtain licenses for the content that they do use.

The same rule applies to all of the content a park like Sunrise Meadows uses to promote itself, whether the content is used on brochures, magazine ads, billboards, radio spots, or even television commercials.

Getting back to the Management Office, when the park’s attorney had finished his presentation on copyright law and fair use, Allison tossed the demand letters onto the conference room table in the direction of the attorney. She gruffly said “so, it seems like the bottom line is that if we don’t own the legal right to use something on our website, then we can’t use it.”

Getting up from her chair at the head of the table, she added, “And, as for you Kevin, I think we have a better assignment for you this summer. Please start looking for a professional who can immediately revamp our website so it doesn’t get us sued!”