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## SECTION 1.

# UNDERSTANDING COPYRIGHT

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To understand copyright, it's important to first understand the First Amendment. It protects five freedoms, including the freedom to think what you want to think, the right to tell others what you think (freedom of speech and of the press), the right to gather together with others to discuss what you think with each other, and the right to ask the government to change. The First Amendment is designed to promote democracy, further the search for truth, and enable self-expression. The news, history, science, and the arts thus all receive protection under the First Amendment. So do movies, music, videogames and other forms of popular culture -- because these materials affect our political attitudes and shape how we think, feel and act.

## THE PURPOSE OF COPYRIGHT

Copyright law builds upon the values of the First Amendment by emphasizing that sharing ideas and information leads to new knowledge and innovation. These ideas about copyright were built into the U.S. Constitution in 1787, which reads: "The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Policy analysts and legal historians identify several principles that support this approach to intellectual property rights:

- Science and arts -- the production of new knowledge and cultural experience -- are important for society.
- The purpose of copyright is to promote the creation and use of knowledge.
- Congress has the power to grant authors, artists, scientists, and inventors exclusive property rights for the fruits of their labor.
- In order to maximize the social value of new knowledge and cultural works, the duration of intellectual property rights should be limited.
- Making it possible for authors, artists, and inventors to benefit from their intellectual property provides a motivation to produce knowledge for the good of society.
- The rights of authors, artists, scientists, and inventors are granted by Congress and are not intrinsic or natural.

Copyright law protects works of "intellectual property" -- creative expressions of ideas in fixed symbolic form. (Patent law protects the expression of novel ideas in the form of objects or processes.) Books, movies, music, paintings, photographs, websites, images, videogames, performances, architecture, and software are among the many types of creative work protected by copyright.

Though we use the word "copyright" in singular form, it actually involves a bundle of several different rights. Owners have the exclusive right to do and to authorize others to do these things:

- reproduce the work;
- distribute copies of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

- to perform the work publicly;
- to display the work publicly;
- to create derivative works; that is, to create new works based closely on the original, such as a translation of a book from one language into another, or making a book into a movie.

Copyright initially lasted 14 years, plus 14 additional years if the copyright owner renewed the registration. But the duration of owners' rights has lengthened over the years. A work created today by an individual author will be protected by copyright for 70 years after the author's death. Ownership control is even longer if the copyright is for a work commissioned by a corporation -- either 95 years from the year of its first publication, or 120 years from the year of its creation.

As a result, a successful copyright infringement action gives the copyright owner the right to stop someone from printing, performing, sharing or otherwise disseminating the work. Infringing works can be seized and destroyed. Legal scholar Rebecca Tushnet has pointed out that a successful copyright lawsuit can lead to "book burning mandated by law."

## THE FAIR USE DOCTRINE

Fortunately copyright law has an important exemption, a way to ensure that copyright law does not become a vehicle for preventing uses of copyrighted material in the service of society just because an owner wants to maximize profit. Interestingly, today we recognize that while fair use may diminish the profits of a copyright holder to some degree, doing so can simultaneously provide a stimulus to other profitable economic activity and support for the information economy. In the words of the president of the Computer & Communication Industry Association (CCIA), an advocacy organization that represents the computer, Internet, information technology, and telecommunications industries, "As the United States economy becomes increasingly knowledge-based, the concept of fair use can no longer be discussed and legislated in the abstract. It is the very foundation of the digital age and a cornerstone of our economy."

Fair use helps ensure that people have access to the information they need to fully participate as citizens. From this perspective, every citizen needs to understand fair use. The fair use doctrine allows users to make use of copyrighted works without permission or payment when the benefit to society outweighs the cost to the copyright holder.

The fair use doctrine, which is found in Section 107 of the Copyright Act of 1976, states that the use of copyrighted material "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" is not an infringement. Courts consider these factors in determining fair use: the purpose of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the original work; and the effect of the use on the market for the original.

In recent years, legal scholars have found that courts return again and again to two questions in deciding if a particular use of a copyrighted work is a fair use:

- Did the unlicensed use "transform" the material taken from the copyrighted work by using it for a different purpose than that of the original, or did it just repeat the work for the same intent and value as the original?
- Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

Applying the doctrine of fair use requires a reasoning process, not a list of hard-and-fast rules. It requires users to consider the *context and situation* of each use of copyrighted works. Thus, an extremely important element of the context and situation is the community of practice within which these uses occur.

## FAIR USE IN CREATIVE AND PROFESSIONAL COMMUNITIES OF PRACTICE

Each professional and creative community applies fair use uniquely, depending on how copyrighted material is used for its own purposes. For example, art historians use copyrighted materials somewhat differently than either artists or historians. Community consensus on what is considered to be fair use can provide guidance to people within the community who need to use copyrighted materials freely in order to produce their own work. It can also be valuable to courts that must evaluate whether a claim of alleged infringement is valid or not.

Documentary filmmakers – as a community-- asserted the need to be able to quote from other films and videos in making their own films. Until recently, a culture of fear had led documentarians to avoid a wide range of subjects including political and social commentary, musical subjects and popular culture. Many documentarians—as well as lawyers, insurers, distributors and broadcasters with whom they interacted to release their works—felt that every single use of a copyrighted work needed to be paid for through getting permissions and clearance rights. Many people in this creative community did not understand how fair use applied to their work.

When filmmakers developed the Documentary Filmmakers' Statement of Best Practices in Fair Use, they addressed these problems. They identified four principles concerning their most typical uses of copyrighted materials as falling within the doctrine of fair use: using copyrighted materials for media criticism; quoting copyrighted works of popular culture to illustrate an argument or point; capturing copyrighted media content in the process of filming something else; and using copyrighted material in a historical sequence.

When the Statement of Best Practices was released, filmmaker Byron Hurt, creator of *Beyond Beats and Rhymes*, a film that explores the representation of gender in hip hop music, employed the Statement in order to release his film at the Sundance Film Festival. This film used many examples from music videos to make its point. The film never could have been made if the filmmaker needed to get permission from copyright holders. Clearly, the Statement of Best Practices has had a beneficial effect for both filmmakers and the general public.