Fair Use

by Lawrence Rosen

Occasionally I hear the "fair use" defense made to excuse someone's breach of someone else's copyright. Unfortunately the word "fair" has colloquial meanings that are very different from the legal meaning of the phrase "fair use."

Copyright law says you can't copy certain software even though it may be *fair* to have a backup copy at home. You can't create derivative works from certain software even though it may be *fair* to build whatever programs you want. You can't reverse engineer certain software even though it may be *fair* to be able to fix defects, ensure security, and interwork with your other software.

The law doesn't say that any licensing practice you find distasteful or that you morally oppose can be ignored if to do so would be *fair*.

The constitutional foundation for the fair use doctrine was described by one court this way:

> The fundamental justification for the [fair use] privilege lies in the constitutional purpose in granting copyright protection in the first instance, to wit, "To Promote the Progress of Science and the Useful Arts." [Const., Art. I, Sec. 8, Cl. 8] ... To serve that purpose, "Courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry." *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1976).

Under this formulation, fair use is a privilege and not just a defense. Your right to make certain uses of copyright materials is guaranteed by the Constitution in the same sentence that allows an author to obtain a copyright on his or her works. The monopoly that copyright law confers is a *limited* one, limited not only as to duration but also limited as to the author's exclusive rights. Fair use limits the author's exclusive rights.

Congress codified the fair use doctrine in the Copyright Act, 17 U.S.C. § 107, to make it clear what forms of use are to be considered fair. The statute lists "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" that can justify fair use of a copyrighted work.

Whenever you see the phrase "purposes such as" in a statute, be prepared for a debate. Congress obviously didn't (or couldn't) list all purposes. So what other purposes such as the ones listed in section 107 will pass muster? For example, copying your office word processing program onto your home computers because you're only using it in one location at a time is not one of the purposes listed in the statute, but can you argue that it is a "purpose such as" one of those purposes? Is reverse engineering to detect security flaws in software a form of criticism or research? Can a teacher make thousands of copies of a software program available for a course taught over the Internet?

And as if that isn't enough vagueness for a statute, Congress then proceeded to list four *factors* that must be considered in determining whether a use is fair:

1. **The purpose and character of the use**, including whether such use is of a commercial nature or is for nonprofit educational purposes. News reporting, scholarly research and teaching are examples of favored fair uses of copyright material. Commercial use is not favored.

2. **The nature of the copyrighted work**. The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy. To the extent one must permit expressive language to be copied in order to assure dissemination of the underlying facts, copying may be more justified.
3. **The amount and substantiality of the portion used in relation to the copyrighted work as a whole**. Fair use is less appropriate if entire works, or the most valuable parts of them, are copied.
4. **The effect of the use upon the potential market for or value of the copyrighted work**. If copying of a work will prevent the owner of the copyright from profiting from it, even if such profit is only potential, the copying is less justified. This factor may tip the balance in favor of fair use where there are no other known copies of the work in existence, where the copyright owner is unidentifiable, or where there is no ready market by which copies can be sold.

None of these factors is determinative standing alone. In evaluating these four factors, a court must undertake a "sensitive balancing of interests." *Financial Information, Inc. v. Moody's Inv. Serv.*, 751 F.2d 501 (2d Cir. 1984).

So too, when you seek to infringe someone's copyright, you should perform your own "balancing of interests" analysis. Consider whether your use is similar enough to one of the purposes listed in the statute. Then go through each of the factors, asking whether that factor balances in your favor or against you.

If you can't convince yourself that you pass the fair use test, don't infringe.

One final note: If you use open source software such as Linux, fair use is generally not an issue. An open source license safeguards **the rights of anyone, anywhere, for any purpose whatsoever, to use, copy, modify and distribute (sell *or* give away) the software, and to have the source code that makes those things possible.** All uses are licensed by the copyright owner, so you don't need to defend your use with the fair use doctrine. This is yet another reason why free and open source software is better than proprietary software.

With proprietary software, be careful to have a valid fair use argument if you do anything not permitted by the license. With free and open source software, enjoy your broad and comprehensive fair use rights.

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