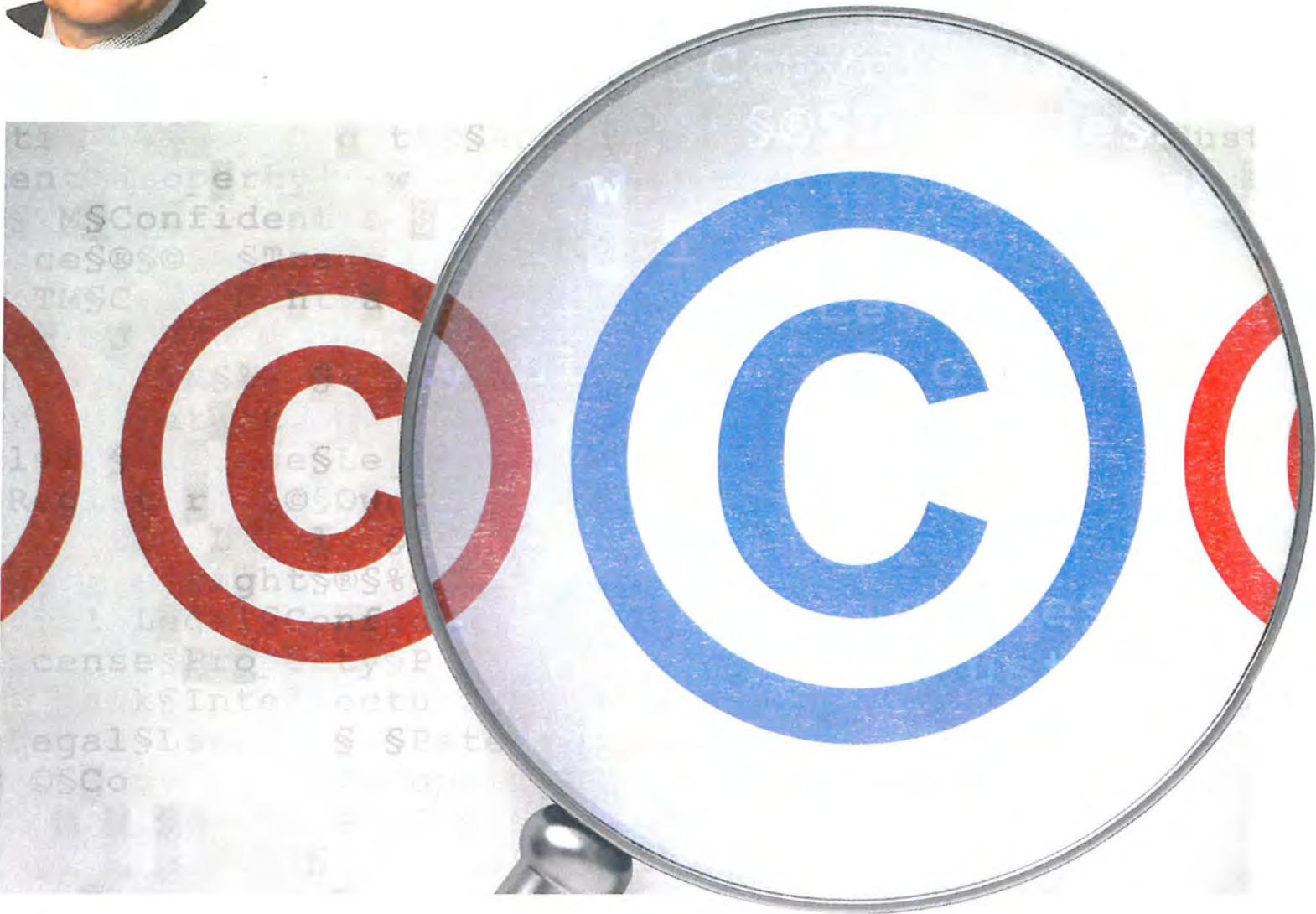




What You Need to Know about Fair Use

by Steve Gillen



Copyright protection is automatic in the US and most of the civilized countries of the world. Create a work of original expression, record it, and monopoly rights vest automatically. If that were all it took, though, pushing the envelope of art, science, or culture by publishing works that build upon what has come before would be impossible.

The doctrine of fair use, developed at common law in the US in an 1841 court case and written into the statutory law in 1978, provides critical protection for a publisher's right to criticize or comment on the existing body of literature. It is a vital component of your First Amendment free press rights. But as important as it is, it is equally complex and uncertain in application. Congress said in considering how best to write the fair use doctrine into law that the endless variety of situations and combinations

of circumstances that can arise in particular cases precluded the formulation of exact rules in the statute. Courts must be free to adapt the doctrine to particular situations on a case-by-case basis. And the courts have taken this instruction to heart. Indeed, one judge has summed up the state of the law, saying: "There are no absolute rules as to how much of a copyrighted work may be copied and still considered fair use."

How to Make Smart Fair-Use Decisions: Learn the Law and Apply the Examples; by Lee Wilson, an intellectual property lawyer; published in July 2006. This article looks at fair use in the context of two hypothetical situations to demonstrate how the application of statutory criteria to different sets of facts leads to different conclusions about the applicability of the fair use defense.

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Despite the uncertainty (or perhaps because of it), it is all the more important that you understand and make full use of the latitude the doctrine provides, without going so far as to risk the exposure that might come from pushing too near its outer limits. To this end, *IBPA Independent* has published no fewer than six articles by six different lawyers, covering this subject from a variety of perspectives. These articles are archived in a searchable database (ibpa-online.org/resources/independent-articles) and available to you at any time as a benefit of your membership in IBPA. Here is a summary of each:

Copyright Changes in the Works: Deciding Who Can Use What Without Permission; by Helen Sedwick, a writer and lawyer with 30 years of experience; published in October 2015. This article addresses the issue of orphan works and an effort undertaken by the Copyright Office to provide a framework for making them available beyond what can be done under fair use.

Fair Use and Other Aspects of Coping with Copyright Law; by Steve Gillen, a lawyer focusing his practice on publishing and media matters; published in June 2011. This article examines what is and isn't protected by copyright and the application of fair use in relation to text works, illustrations, and music and provides a list of practical pointers and guidelines.

Don't Run Afoul of Fair Use: Guidelines on Quoting and Copying; by Tad Crawford (publisher, author, and attorney) and Kay Murray (former general counsel of the Authors Guild); published in May 2002. This article examines fair use through the lens of a landmark Supreme Court case.

Kirsch's Publishing Law Update: Fair Use in a Photograph; by Jonathan Kirsch, publishing attorney and General Counsel of IBPA; published in January 2001. This article looks at the application of fair use to a unique set of facts involving a photograph contained in a political advertisement reproduced in a book critical of the ad.

Fair Use; by Ivan Hoffman, a writer and publishing lawyer; published in August 1998. This article takes a close look at each of the four elements to be considered in every fair use case. ●

Steve Gillen is a lawyer and partner in the intellectual property firm of Wood Herron & Evans and has focused his practice on publishing and media matters for 35 years. He is a member of IBPA, a frequent contributor to IBPA Independent, and author of the book Guide to Textbook Publishing Contracts© 2016. He can be reached at sgillen@whe-law.com or 513.707.0470.