

"Beth" made the best of a bad situation when she contacted us. She was determined to be the best while studying law, because she wanted to be the best when she began to practice law. However, she quickly learned that diligence alone was not enough to make her "the best" at anything, because life gets in the way sometimes.

Circumstances can get in the way. Beth had to help a relative stay afloat throughout some sudden personal problems, and she found that she was falling behind in her class. Beth envisions herself as someone who *excels* instead of falling behind.

As a solution, she asked us to write some papers about the topics she had been studying. After using them for her reference, she sent this one back to us to publish as a writing sample:

## **An Analysis of the Fair Use Defense for Peer to Peer Networks**

### **Legal Analysis**

Fair use has been an important part of the legal copyright system. The doctrine of fair use allows courts to avoid overly rigid applications of copyright statutes. This is important so that the court does not stifle the creativity of the artists the law is meant to protect.<sup>1</sup> This doctrine originated in the courts of equity in England. It is used as a rule of reason, which is equitable and can be applied by the courts on a case-by-case basis. Over time, the fair-use doctrine has countered the concerns of copyright-holders regarding their proprietary control over the content of their works. Its use in this way, has led to extensive controversy and writings about the use of this doctrine.

An important concern with the doctrine of fair use is whether it can adequately accomplish the purpose for which it was designed. Specifically, can it balance the copyright

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<sup>1</sup> Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980).

system? One problem for the doctrine consists of the vagaries related to what constitutes fair use. The doctrine requires users and the courts to be embroiled in complex analyses with results that are unpredictable. Adding to this problem are the courts that generally prefer the doctrine to be somewhat vague. Most courts never provide a fair-use formula which can be applied to a variety of situations. Therefore, it is not surprising that the courts have been unable to arrive at a shared understanding with regard to the definition of fair use.

Some scholars and judges believe the open-ended nature of the fair-use doctrine is a virtue. However, there are many legal theorists that believe this is a flaw in the system. They contend that the uncertainty and ambiguity around fair-use lead to underutilization of the doctrine. This leaves many unsure regarding the precise nature of the doctrine. This causes the users of the copyrighted content to elect not to secure a license from the owners or not to use the content when this approach is cost-prohibitive.<sup>2</sup> This situation results in a legal system which does not meet its goal of fostering creativity regarding copyrighted content.<sup>3</sup>

Another issue related to the fair-use doctrine is that the legal climate has changed during the 21st century, and the best situation for its use is now a thing of history.<sup>4</sup> The judicial climate changed when the Digital Millennium Copyright Act came into being. This act prohibits users from illegally circumventing any technological protection measures which have been employed by the copyright holders for controlling access to the works which they own.<sup>5</sup> The act banned the provision and production of technologies, which allow circumvention of protection

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<sup>2</sup> Gideon Parchomovsky & Kevin A. Goldman, Fair Use Harbors, 93 VA. L. REV. 1483, 1497–1500 (2007).

<sup>3</sup> Wendy J. Gordon, Keynote: Fair Use: Threat or Threatened?, 55 CASE W. RES. L. REV. 903, 906 (2005)

<sup>4</sup> 5 Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

<sup>5</sup> 17 U.S.C. § 1201(a) (2006).

measures.<sup>6</sup> These prohibitions from the act changed the balance between users and holders of a copyright license. The Congress of the United States decided it would not recognize the fair use as a means of defending circumvention.<sup>7</sup> When Congress made this choice, there was a limit placed on the way in which fair use could be applied to digital media, which had been copyrighted. There was no provision made for fair use of content, which was guarded by technological protection measures.<sup>8</sup>

One needs to keep in mind when the First Amendment to the Constitution of the United States prohibited Congress from approving any law which would interfere with a citizen's freedom of speech there existed no email, text messaging, or other forms of electronic communications. In fact, there were no telephones or radios. When radios and telephones were introduced into society, these developments led to First Amendment issues. A similar occurrence is happening now with the advent of digital data and technological protection measures. Encryption is one of the measures for protection, which raises issues regarding fair use.

A wide range of solutions has been offered to remedy the problems which now exist with the fair-use doctrine. An example is establishing a Board which is responsible for cases involving the fair use. This board would have the authority to make rulings regarding fair use before legal action is taken.<sup>9</sup> Another solution is to have a regulatory agency which handles and governs the rules of fair use and can alter them for specific types of cases.<sup>10</sup>

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<sup>6</sup> *id.* § 1201(b).

<sup>7</sup> Jerome H. Reichman et al., A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works, 22 BERKELEY TECH. L.J. 981, 1004 (2007)

<sup>8</sup> Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001)

<sup>9</sup> Michael W. Carroll, Fixing Fair Use, 85 N.C. L. REV. 1087, 1090–91 (2007)

<sup>10</sup> Jason Mazzone, Administering Fair Use, 51 WM. & MARY L. REV. 395, 415–19 (2009)

Other solutions for the problem of the fair-use doctrine focus on the anti-circumvention laws within the Digital Millennium Copyright Act.<sup>11</sup> Some legal scholars have protested the laws which effectively banned fair use. These groups and individuals promote self-help strategies, which can defeat the technological protection measures. They insist that the DMCA must be altered to allow for fair use. There have even been suggestions that Internet users have a right to circumvent<sup>12</sup> the protection measures when it is necessary in order to establish fair use.<sup>13</sup>

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<sup>11</sup> ELEC. FRONTIER FOUND., UNINTENDED CONSEQUENCES: TEN YEARS UNDER THE DMCA 6–9 (2008), <http://www.eff.org/files/DMCAUnintended10.pdf>

<sup>12</sup> 13 Julie E. Cohen, Copyright and the Jurisprudence of Self-Help, 13 BERKELEY TECH. L.J. 1089, 1141 (1998).

<sup>13</sup> Julie E. Cohen, Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,” 97 MICH. L. REV. 462, 531–32 (1998)