

GIFs and Copyright:

With Money Comes the Laws



GIFs and “Fair Use”

- GIF's usually survive the four-factor “Fair Use” test because of the unsubstantial amount of work used, and transformative nature
- If a GIF is affecting a copyright holder financially, or profiting from their name/likeness, there would be a strong argument AGAINST “Fair Use”

GIF's, or short looping video clips, ubiquitously populate the Internet and have quickly become a new form of communication unto themselves. Usually these short looping videos borrow clips from popular television shows, movies, or video of cultural figures, or in other words, copyright protected materials. For the most part copyright holders of these borrowed-from properties have ignored the possible infringements of these GIFs because most are seen as “fair use” (not to mention the sheer volume to police). A key element of “fair use” however is the commercial nature of the work in question. Up until now the vast majority of GIFs created by individuals were not commercial in nature, however that may be beginning to change with a \$72 million round of funding raised this week by the Internet's main GIF creating and search engine GIPHY. GIFs just became big business, and with money always come laws.

When assessing whether something is protected under “fair use” four factors are looked at: 1) Amount and substantiality of the portion taken; 2) Purpose and character of your use; 3) Nature of the copyrighted work; and 4) Effect of the use upon the potential market. GIFs are normally seen as “fair use” because of a few key features. First, they are usually very short, favoring fair use because a very unsubstantial portion of the larger copyrighted work is used. Second, the purpose of the GIFs is usually satirical or parodic, favoring fair use because the meaning is different than that of the original work. Third, the nature of GIFs is normally to alter the original video in some way, (looping, speeding up/slowing down, adding text, color filters, etc) what is called “transformative”. This favors fair use because the GIFs add new expression or meaning to the original works. Finally, there is usually little to no effect on the potential market of the original work these GIFs borrow from because there are no real avenues to monetize said GIFs, they are works the original copyright holders clearly would not make, or they even give more popularity and market presence to the original work. While the first two elements, and their current analysis as it applies to GIFs, is not likely to change, what is at increasingly changing is the third and fourth factor; the presence of money.

...copyright holders should be aware of the fact that “fair use” is an exemption to infringement, not a right in and of itself

Increasingly GIFs are being used by mainstream media entities such as BuzzFeed, Deadspin and Huffington Post. The White House even used GIFs including clips of popular movies and TV shows to illustrate their immigration policies, and other news releases. This combined with the fact the main internet site for creation and searching of GIFs, GIFY, recently raised \$72 million in a round of funding, proves that GIFs are not only being used in a more commercial nature, but also that investors see a significant financial interest in them. As copyright holders from borrow-from works being to realize there is a financial interest in short looping videos using their copyrighted materials, they will also begin to realize there is money being left on the table, which is being grabbed by people other than themselves.

As copyright holders begin to realize they may be missing out on revenue, the question becomes how to assert their rights. As mentioned above, the first two parts of the fair use analysis as it applies to GIFs are not likely to change. The closest case we have to a ruling about fair use and something like GIFs is a 2013 case where the showing of a 7-second video clip of the Ed Sullivan Show during a Broadway play was held to be protected “fair use” because of the extremely short duration compared to the original work as a whole. When GIFs include an individual such as a public figure, they could assert a misappropriation of name or likeness cause of action. In all other cases, copyright holders should be aware of the fact that “fair use” is an exemption to copyright infringement, not a right in and of itself; defendant must prove fair use, not the plaintiff proving there is a lack of it. Therefore, in this age of rapid dissemination of potentially infringing material, and the growing monetization of it, copyright holders must be equal parts educated on the law, and vigilant about exercising their rights.



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