

# Civil Liberties Defense Center

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This information has been compiled to give social justice activists a brief understanding of trademark and copyright law as it relates to common questions and concerns that arise in social justice organizing.

## Use of Corporate Logos

\*A logo can be trademarked or copyrighted, and is often both\*

### **United States Patent and Trademark Office**

Trademark FAQs: [http://www.uspto.gov/faq/trademarks.jsp#\\_Toc275426672](http://www.uspto.gov/faq/trademarks.jsp#_Toc275426672)

Trademark: “A trademark is a word, phrase, symbol or design, or a combination thereof, that identifies and distinguishes the source of the goods of one party from those of others.”

Copyright: “A copyright protects works of authorship, such as writings, music, and works of art that have been tangibly expressed.”

## **I. Trademark**

### **A. International Trademark Association**

1) Trademark Use:

<http://www.inta.org/TrademarkBasics/FactSheets/Pages/TrademarkUseFactSheet.aspx>

a) Use without trademark owner’s consent: “It is usually permissible to use another company’s trademark when referring to that company’s product in text, where it is being used to truthfully refer to that a product or service affiliated with that trademark. It may not be used in a way that might mislead others as to that company’s affiliation, sponsorship or endorsement of your company, products or services, such as using a logo instead of simply the text form of a trademark, or using the trademark more prominently or frequently than necessary.”

b) Online use: “Use of a trademark in text online is generally no different from use of a trademark in print. Certain uses of another’s trademark, however, such as in metatags, as wallpaper on a website, or as a keyword purchased from a search engine, might subject the user to legal liability.”

### **B. Digital Media Law Project**

1) Using the Trademarks of Others: <http://www.dmlp.org/legal-guide/using-trademarks-others>

a) “The good news is that courts have consistently protected the public’s right to use the trademarks of others in order to engage in criticism, commentary, news reporting and other

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forms of noncommercial expression. As long as what you're doing is really commentary, criticism, or reporting (etc.), and not a surreptitious attempt to sell goods or services, or to deceptively attract customers or readers you otherwise would not have had, you should be able to defeat a trademark claim brought against you. The bad news is that the law relating to this intersection of trademark law and free expression is complex and confusing. Neither Congress nor the courts have developed a simple and clear rule that protects your rights to use the trademarks of others for free speech purposes; instead they've developed a complex array of defenses to trademark claims that even lawyers find difficult to untangle.”

b) “...an obvious first line of defense in any trademark infringement lawsuit is that there is no likelihood of confusion. As a general matter, if you are reporting on, commenting on, or criticizing a trademark owner, most ordinary consumers will not be confused about whether the company or organization is the source or sponsor of your work. You can reduce the likelihood of confusion further by avoiding a website design that looks like the trademark owner's site or resembles its product packaging, and you should never festoon your website with a company's logo (but isolated use when relevant to a discussion is OK).”

c) “Federal and state dilution law protects a trademark owner against the whittling away of the distinctiveness of its famous trademark by association with other goods or services; it does not give a trademark owner the right to shut down all unflattering speech about it. If you do not associate a famous trademark with your own goods or services, then there can be no dilution...”

d) “The nominative fair use defense protects your ability to use a trademark to refer to a trademark owner or its goods or services for purposes of reporting, commentary, criticism, and parody, as well as for comparative advertising. Courts impose three requirements on defendants who want to take advantage of the nominative fair use defense: (1) the trademark owner, product, or service in question must not be readily identifiable without use of the trademark; (2) the defendant must use only as much of the mark as is necessary to identify the trademark owner, product, or service; and (3) the defendant must do nothing that would suggest sponsorship or endorsement by the trademark owner... (Note, however, that there is some question about whether using a logo, rather than just a textual reference, would qualify as a fair use under the three-part test outlined above.)”

e) “If someone sues you for trademark dilution, you can argue that your use of the famous trademark was ‘noncommercial.’ Congress created this defense, found at 15 U.S.C. § 1125(c)(3)(C), out of concern that dilution claims would impinge on the First Amendment rights of critics and commentators. Following Congress's lead, the courts have interpreted this defense broadly, holding that the term ‘noncommercial’ applies to any speech that does more than propose a commercial transaction. It is easier to show that your use of a trademark fits into this category than to show that it was not ‘in connection with a good or service.’ Under this test, if you use a trademark owner's famous trademark to report on, comment on, or criticize the

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trademark owner or its goods or services, your use is likely ‘noncommercial,’ even if you host advertising or link to commercial sites.”

f) “Trademark law does not permit a trademark owner to use its trademark rights to silence commentary and criticism. As with news reporting, courts recognize the important First Amendment values at stake and usually deny efforts by trademark owners to encroach on legitimate commentary and criticism. There are several legal bases for this result: there is no risk of confusion between the commentator and the trademark owner, and nominative fair use may protect this use of the trademark owner's mark. Additionally, courts are likely to find that your use of a trademark in commentary or criticism is ‘not in connection with a good or service’ and ‘noncommercial’ (the argument is especially strong for the latter category). But note that some courts may find your use of a trademark for criticism and commentary to be commercial if you host advertising or link to commercial websites. In any event, to defeat a trademark dilution claim, you do not even need to show that your use is noncommercial. The federal dilution statute creates a categorical exemption for ‘criticizing . . . or commenting upon the famous mark owner or the goods or services of the famous mark owner.’ 15 U.S.C. § 1125(c)(3)(A)(ii). The issue of logos comes up with commentary and criticism as well. As with news reporting, using a logo to illustrate or liven up criticism or commentary is probably OK from a trademark perspective.”

g) “Courts generally recognize that parody is entitled to First Amendment protection in a trademark infringement lawsuit, and the federal dilution statute expressly exempts parody from dilution claims. See 15 U.S.C. § 1125(c)(3)(A)(ii). In addition, a number of courts have held that parodies are ‘noncommercial’ uses exempted by the federal dilution statute. However, simply labeling your work ‘parody’ will not be enough to defeat an otherwise legitimate claim of trademark infringement or dilution. The courts take a relatively narrow view of what qualifies as a ‘successful’ parody. A parody must walk the fine line between evoking the original (i.e., the trademark) and making clear that it is not the original (i.e., it is something new commenting on or criticizing the trademark owner). Moreover, the parody must be aimed at the trademark owner or its goods or services, not at an unrelated third party or issue. In the final analysis, if your parody confuses consumers, and they believe that the trademark owner is the source or sponsor of the parody, then you may be liable for infringement or dilution.”

**C. Overview of Trademark Law:** <http://cyber.law.harvard.edu/metaschool/fisher/domain/tm.htm>

## II. Copyright

### A. Copyright.gov

1) Fair use: <http://www.copyright.gov/fls/fl102.html>

a) “The 1961 Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law cites examples of activities that courts have regarded as fair use: ‘quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a

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scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.”

- 2) § 107. Limitations on exclusive rights: Fair use: <http://www.copyright.gov/title17/92chap1.html#107>
- a) “Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  - (2) the nature of the copyrighted work;
  - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  - (4) the effect of the use upon the potential market for or value of the copyrighted work.
- The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”

## B. Copyright and Fair Use, Stanford University Libraries

- 1) What Is Fair Use? <http://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/>
- a) “In its most general sense, a fair use is any copying of copyrighted material done for a limited and ‘transformative’ purpose, such as to comment upon, criticize, or parody a copyrighted work. Such uses can be done without permission from the copyright owner... Most fair use analysis falls into two categories: (1) commentary and criticism, or (2) parody.”
- 2) Measuring Fair Use: <http://fairuse.stanford.edu/overview/fair-use/four-factors/>
- a) The four factors judges consider are:
- the purpose and character of your use
  - the nature of the copyrighted work
  - the amount and substantiality of the portion taken, and
  - the effect of the use upon the potential market.

## C. NOLO

- 1) The “Fair Use” Rule: When Use of Copyrighted Material is Acceptable:  
<http://www.nolo.com/legal-encyclopedia/fair-use-rule-copyright-material-30100.html>

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a) “Subject to some general limitations discussed later in this article, the following types of uses are usually deemed fair uses:

- Criticism and comment -- for example, quoting or excerpting a work in a review or criticism for purposes of illustration or comment.

- News reporting -- for example, summarizing an address or article, with brief quotations, in a news report.

- Research and scholarship -- for example, quoting a short passage in a scholarly, scientific, or technical work for illustration or clarification of the author's observations.

- Nonprofit educational uses -- for example, photocopying of limited portions of written works by teachers for classroom use.

- Parody -- that is, a work that ridicules another, usually well-known, work by imitating it in a comic way.

In most other situations, copying is not legally a fair use. Without an author's permission, such a use violates the author's copyright.”