

FAIR USE OF COPYRIGHTED MATERIAL

The term “fair use” refers to a doctrine in copyright law in which certain limited copying of copyrighted material can occur without infringing the copyright. The fair use doctrine has gained importance in view of the increased ease with which copyrighted material can be, and is, accessed and copied. A particularly important factor in the increase in copying is the growing practice of downloading of material from the internet. Consequently, it is important for individuals to have a basic understanding of the fair use doctrine, and this article supplies a basic outline of that doctrine.

The doctrine of fair use has been codified as follows at 17 USC §107:

107. Limitations on exclusive rights: Fair use

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 a particular case is a fair use the factors to be considered shall include - -

- (1) the purpose and character of use, including whether the 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The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

In fair use determinations, the statute favors certain purposes: criticism, comment, news reporting, teaching, scholarship and research. The statute clarifies that copying of an unpublished work does not automatically fall outside the scope of fair use. Finally the statute lists four factors to be considered when adjudging whether a given case of copying is fair use.

However, the statute is by no means a complete statement of the fair use doctrine. For one thing, it does not overrule or displace any judicial law, but is intended as a restatement of that law. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976). Further, Congress intended the courts to continue the judicial tradition of fair use adjudication. *Campbell v. Acuff-Rose Music*, 510 US 569 127 L Ed 2d 500, 29 USPQ 2d 1961 (1994, US). Additionally, the listed fair use factors are neither all-inclusive nor are they exactly defined. *Nimmer on Copyright § 13.05[A]*. For these reasons, knowing judicial law on fair use is necessary despite the existence of the statute. In fact, *Nimmer*, at §13.05[A][5] views the four factors as being so elastic as to be of doubtful value in resolving the more difficult fair use questions. Nonetheless, a discussion of the four fair use factors follows. This discussion gives a general background of fair use and hopefully alerts readers to cases where legal advice is needed before using copyrighted material.

First Factor – Purpose and Character of Use

A number of sub factors affect the character and purpose of copying, the first being whether the copier's use is "productive." Copying is productive if it adds value to the original work, whereas merely reproducing part of a work tends not to be fair use. Generally speaking, if the copied material is blended into a further work, there is a "productive use" that contributes favorably to a finding of fair use. A second sub factor is whether the copier's work performs the same function as the original work. If the copier's work performs a different function, there is a greater likelihood that the copier's work is fair use. For example, where the original work is a song sheet for use in musical performances, printing the song's chorus lyrics in a literary magazine article is not for the same purpose and is deemed fair use. See *Karll v. Curtis Publishing Co.* 39 F Supp 836, 51 USPQ 50 (ED Wisc 1941). A third sub factor is the propriety of the copier's purpose. If the copier is responding to unjustified behavior on the part of the copyright owner, then a finding of fair use is more likely. See *Key Maps v. Pruitt*, 470 F Supp 33, 203 USPQ 282 (1978 SD Texas). Additionally, if the copyrighted work contains inaccurate, unfair or derogatory information, the fair use doctrine tends to expand for the purposes of comment and critique. In contrast, it is possible for a defendant's inappropriate behavior to defeat the fair use defense, as where a defendant obtains the copied material by foul means.

The aforementioned sub factors are to be considered in addition to the fact that 17 USC § 107 broadens the fair use defense where copying is for the purposes of criticism, comment, news reporting, teaching, scholarship and research. Another general rule is that commercial use of copyrighted material has a strong tendency to be outside the scope of fair use.

Second Factor – Nature of the Copyrighted Work

One key sub factor in the nature of a work is whether the work has been published. Generally, the author's right to control the first publication of a work overrides an attempt at a fair use defense. Another sub factor is whether the work is a factual work, as opposed to a work of fantasy or fiction. The scope of permissible fair use is greater with respect to factual works, which are considered normally to have less creativity than works of fantasy or fiction. Within a factual work, the scope of fair use is more limited as to analysis and conclusions than to purely informational statements. A third sub factor is whether the work is readily available. Generally, a fair use defense is less likely to succeed where the copied work is not out of print or is otherwise commercially available.

Third Factor – Amount and Substantiality of the Portion Copied

One aspect of this factor is simply the proportion of the copyrighted work that is copied. The outer limits of this aspect can be illustrated by noting that copying a 300 word paragraph from Tolstoy's *War and Peace* would be fair use whereas copying the whole of a 300 word written joke would not.

Generally, the proportion of a work that may be copied within fair use varies more with the nature of the work and the character of the portion that is copied, so that a purely quantitative analysis of copying is a poor predictor of what will be considered fair use. For example, copying about 1.4 % of a published magazine article was deemed fair use in *Consumers Union of the US v General Signal Corp* 724 F2d 1044, 221 USPQ 400 (2d Cir 1983), whereas copying about one-tenth this percentage of unpublished letters was not fair use in *Harper and Row, Publishers, Inc. v. Nation Enterprises*, 471 US 539, 85 L Ed 2d 588, 225 USPQ 1073 (1985, US). As another example, copying four “signature” bars of a song was not deemed fair use but copying 15 seconds of a song for a political advertisement was deemed fair use. See *Robertson v Batten, Barton, Durstine & Osborn, Inc.* 146 F. Supp 795, 111 USPQ 358 (1956 DC Cal) and *HustlerMagazine, Inc. v Moral Majority, Inc.* 606 F Supp 1526, 226 USPQ 721 (1985 CD Cal).

The proportion of an allegedly infringing work that is comprised of copied material can also be a factor in determining whether there is fair use. Thus, if this work is made up largely of copied material, there is evidence of the substantiality of the copied material and fair use is less likely to be found. However, the fact that copied material is a small proportion of the allegedly infringing work will not aid a claim of fair use. *Harper & Row, supra*.

Fourth Factor – Effect of Use on Copyright Owner’s Potential Market

General Rule: To negate a claim of fair use, one only needs to show that if the challenged use were widespread, it would harm the potential market for copyrighted work. One considers not only harm to potential marketing of the original work, but also harm to potential marketing of derivative works. *Harper and Row, supra*. “Potential” is a key word in that the copyright owner’s **opportunity** to profit is protected.

In considering the effect of the copier’s actions on the potential market, the law looks only to the copier’s use of copyrighted material, and not any associated uncopied material. The copier’s disparaging or unfavorable reference to the copyrighted work is not a factor in fair use determinations, although libel and slander may be a separate ground for relief.

Conclusion

As noted above, the fair use factors are not exactly defined. Generally a judicial decision in the fair use area of the law can be relied upon only for a very narrow, specific set of circumstances. Thus it is impossible to set forth concise, clear, dependable and generally applicable rules to discern when the fair use doctrine applies. Obviously though, the fair use doctrine does apply to many instances of copying, and your local intellectual property counsel can assist in devising a copying strategy that falls within fair use parameters.