

Copyright Infringement and Fair Use Defense

The United States Copyright law represents a bargain between creators and the public. Congress granted certain exclusive rights to creators and authors for a limited time period; in exchange, the public receives an increase in creative works and expressive ideas that benefit society as a whole. As part of the bargain, U.S. copyright law recognizes some limitations on the exclusive rights of copyright holders. One of the most important limitations is the doctrine of fair use, which was developed over the years as courts tried to balance the rights of copyright owners with society's interest in allowing copying in certain, limited circumstances. Although the doctrine of fair use was originally created by the judiciary, it is now set forth in the Copyright Act. A use of a copyrighted work that is considered to be "fair use" is not infringement. Although there are no automatic classes of fair uses, courts tend to find fair use where there is a socially beneficial use of a copyrighted work.

Section 107 of the Copyright Act of 1976

Although the fair use defense was available for many years, the doctrine was first codified by Congress in Section 107 of the Copyright Act of 1976. Section 107 gives a non-exhaustive list of examples of when the fair use defense might be successful. The list includes criticism, comment, scholarship, research, news reporting, and teaching as uses that may be fair. The list also gives four guiding factors courts consider in deciding whether a use is fair or not.

Four Factors

Under the Copyright Act, four factors are to be considered in order to determine whether a specific action is to be considered a "fair use." Courts consider all four of the following factors when analyzing fair use cases; no single factor by itself is sufficient to prove or disprove fair use:

- the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

Purpose and Character of Use

The first fair use factor, the purpose and character of use of the original copyrighted work, evaluates a new work by taking into consideration whether it was created for commercial purposes. Not every commercial use is presumptively an unfair use, but there is a preference that fair use will be granted to those works that are created for noncommercial or

educational purposes. Additionally, courts determine whether the new work has a different purpose or different character than that of the original copyrighted work.

Nature of Copyrighted Work

The second fair use factor is the nature of the copyrighted work. This factor recognizes that certain types of works are more deserving of copyright protection than other types of works. The scope of fair use is greater for an “informational work” that is designed to inform or educate than it is for a more “creative work.”

Amount and Substantiality of the Portion Used of the Copyrighted Work

The third fair use factor analyzes the amount and substantiality of the copying in relation to the copyrighted work as a whole. The vital determination is whether the quality and value of the material copied from the original copyrighted work is “reasonable” in relation to the purpose of copying. This factor evaluates not only the quantity that has been copied but also the quality and importance of the copied material. The courts evaluate whether the user of the original copyrighted material has taken more of the original work than was necessary to achieve the purpose for which the material was copied.

Effect Upon Potential Market or Value of the Copyrighted Work

The fourth fair use factor, the effect upon the potential market or value of the copyrighted work, analyzes the extent of harm that is caused by the new work to the market or potential market for the original copyrighted work. This factor evaluates the “potential” as well as “actual” financial harm that is or may be done to the original copyrighted work as well any harm that may be caused to any existing or possible future derivative works. Although this factor does not presume that all commercial gain will automatically be an unfair use, it does establish a high threshold of proof for the copier to demonstrate that the underlying work was not financially damaged.

Fair Use Activities

Most fair use analysis falls into two categories — commentary and criticism or parody. The underlying rationale of allowing copyrighted works to be used as part of a commentary or criticism is that the public benefits from a review, which is enhanced by including some of the copyrighted material. A parody is a work that ridicules another, usually well-known work, by imitating it in a comic way. Unlike other forms of fair use, a fairly extensive use of the original work is permitted in a parody in order to “conjure up” the original.

The following are some traditional activities where the fair use doctrine

has been held to apply:

- *small excerpts in a review or criticism for purposes of illustration or comment.

- *a parody which incorporates some, but not all, elements of the work being parodied.

- *quotations from a speech, address, or position paper in a news report.

- *limited copying made by a student for academic work.

The following are some nontraditional activities where the fair use doctrine may apply:

- *time-shifting, or private, noncommercial home taping of television programs with a VCR to permit later viewing.

- *format shifting of content owned by a consumer in one format, such as an audio CD, to another format, such as MP3, for the consumer's own personal use.

There is much litigation in the area of copyright infringement and the fair use doctrine is confusing at best. Before you rely upon a determination that you are using copyrighted material on a "fair use" basis, it is recommended that you seek the advice of independent intellectual property counsel and review your case on a use by use basis, as every use of copyrighted material must have an independent determination of fair use or permission to use must be obtained from the creator.

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