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[What Is Fair Use?](#)

Thursday, March 13, 2014 by [Doron F. Eghbali](#)

Fair use is a limitation on the rights of copyright holders. One of the rights of a copyright holder is to have exclusive authority to reproduce the copyrighted work or authorize others to reproduce the copyrighted work. However, the "Fair Use Doctrine", under limited circumstances, permit non-copyright holders to use the copyrighted work without a need for permission to reproduce and pay anything to the holder of copyright. The legislature has codified and promulgated four factors to help determine fair use. This article expounds upon the four factors, to some extent.

FAIR USE DOCTRINE

17 USC Section 107 provides in pertinent part: "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The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

This is noteworthy that these four factors are not the only factors considered to determine fair use. The H Comm of the Judiciary, 87th Cong, 1st Sess (1961), Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, provides 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 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; and
- Incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported."

Even though there is no bright line as to what is fair use and what is not, it is educational and prudent to carefully review these four factors enunciated in 17 USC Section 107 on fair use.

1. PURPOSE AND CHARACTER OF USE

This factor requires the court to analyze whether the use is for commercial or non-profit educational purposes. The focus of this inquiry is whether the allegedly infringing work "merely 'supersedes the objects' of the original creation ... or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; ... whether and to what extent the new work is 'transformative.'" *Campbell v Acuff-Rose Music, Inc.* (1994) 510 US 569, 579, 114 S Ct 1164.

If the use of the new work is for the same essential purpose as the original work, the use is not likely to be a fair use. *Worldwide Church of God v Philadelphia Church of God, Inc.* (9th Cir 2000) 227 F3d 1110, 1117, cert denied (2001) 532 US 958.

2. THE NATURE OF THE COPYRIGHTED WORK

This second factor depends on whether the original work was informational or creative. It is more likely the use to be fair use if the copying or publishing is for factual or informational use rather than a creative work, such as a movie or a musical composition. *A&M Records, Inc. v Napster, Inc.* (9th Cir 2001) 239 F3d 1004, 1118; *Los Angeles News Serv. v Tullio* (9th Cir 1992) 973 F2d 791.



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In addition, in analyzing this factor, it is important to ascertain if the original work is published or not. The breadth of fair use is more expansive if the original copyrighted work is published *Religious Technol. Ctr. v Netcom On-Line Communication Servs., Inc.* (ND Cal 1995) 923 F Supp 1231, 1245).

Conversely, if the original work is unpublished, the defense of fair use becomes more untenable.

3. AMOUNT OF THE WORK USED

This third factor concerns not only the amount of the original work used; but also, whether the amount used constitutes "the heart" of the original work. Unsurprisingly, if the entire original work is used, in most cases, a fair use is not found. *Religious Technol. Ctr. v Netcom On-Line Communication Servs., Inc.* (ND Cal 1995) 923 F Supp 1231, 1246, citing *Harper & Row, Publishers, Inc. v Nation Enters.* (1985) 471 US 539, 564, 105 S Ct 2218. Moreover, "[c]opying even a small portion of a copyrighted work may exceed the boundaries of fair use if the material taken is the 'heart' of the work." *Los Angeles News Serv. v Tullio* (9th Cir 1992) 973 F2d 791, 798 (reproduction of most valuable part of certain news footage not protected by fair use doctrine).

4. EFFECT OF USE ON POTENTIAL MARKET OF THE ORIGINAL WORK

This fourth factor concerns the effect of the use on potential market or value of the original work. This factor is considered the salient fact among all the factors delineated in 17USC Section 107. "Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied." *Harper & Row, Publishers, Inc. v Nation Enters.* (1985) 471 US 539, 566, 105 S Ct 2218.

If the commercial use is more than mere copying of the entire original, (i.e., if the second use is transformative), market harm may not be inferred so readily. *Campbell v Acuff-Rose Music, Inc.* (1994) 510 US 569, 591, 114 S Ct 1164. Works that are transformative, such as parodies, are considered less likely to adversely affect the market for the original work than works that merely replicate the original. See *Kelly v Arriba Soft Corp.* (9th Cir 2003) 336 F3d 811.

SALIENT NOTE

This article NEITHER supplants NOR supplements such rarefied topic. In fact, this article ONLY provides a rudimentary overview of such esoteric topic.

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