

CASES CONTINUED

Fair Use. A movie company used a photo of a naked pregnant woman and superimposed the head of actor Leslie Nielsen. The photo was a parody using similar lighting and body positioning of a famous photograph taken by Annie Leibovitz of the actress Demi Moore for the cover of Vanity Fair magazine. Important factors: The movie company's use was transformative because it imitated the photographer's style for comic effect or ridicule. (*Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. N.Y. 1998).)

DISCLAIMER

Since the current copyright law was adopted, various organizations and scholars have established guidelines for educational uses. These guidelines are not part of the Copyright Act. However, the guidelines establish the standards for uses and copying in education. These guidelines, as well as other regulations and rules regarding educational uses are summarized in Chapter 7, which deals with academic and educational permissions.

FAIR USE



MEASURING FAIR USE

The Transformative Factor: The Purpose and Character of Your Use

Has the material you have taken from the original work been transformed by adding new expression or meaning?
Was value added to the original by creating new information, new aesthetics, new insights and understandings?

The Nature of the Copyrighted Work

Because the dissemination of facts or information benefits the public, you have more leeway to copy from factual works such as biographies than you do from fictional works such as plays or novels.

In addition, you will have a stronger case of fair use if the material copied is from a published work rather than an unpublished work. The scope of fair use is narrower for unpublished works because an author has the right to control the first public appearance of his expression.

The Amount and Substantiality of the Portion Taken

The less you take, the more likely that your copying will be excused as a fair use. However, even if you take a small portion of a work, your copying will not be a fair use if the portion taken is the "heart" of the work. In other words, you are more likely to run into problems if you take the most memorable aspect of a work. For example, it would probably not be a fair use to copy the opening guitar riff and the words "I can't get no satisfaction" from the song, "Satisfaction."

The Effect of the Use Upon the Potential Market

Another important fair use factor is whether your use deprives the copyright owner of income or undermines a new or potential market for the copyrighted work. Depriving a copyright owner of income is very likely to trigger a lawsuit. This is true even if you are not competing directly with the original work.

ACADEMIC RESOURCE COPYRIGHT

WMU Libraries:

eReserves
Email: lib-res@wmich.edu
Phone: (269) 387-5156
Website: <http://www.wmich.edu/library/access/coursereserve.php>

Legal Counsel:

Phone: (269) 387-1900

Office of Information Technology:

Phone: (269) 387-4086
Email: copyright-abuse@wmich.edu

WMU Web Information:

<http://www.wmich.edu/copyright>

WESTERN MICHIGAN UNIVERSITY



Academic Technology & Instructional Services
1343 Ellsworth Hall
Kalamazoo, MI 49008-5232
(269) 387-2847 (ATIS)
<http://atis.wmich.edu>

The preceding information was used with permission from NOLO from their book by Richard Stim (2004) *Getting permission: How to license & clear copyrighted materials online & off*, 194-200.

For other Nolo books useful in courses, visit www.nolo.com. For quantity discounts, email TradeCS@nolo.com.

ATIS

Academic Technology &
Instructional Services



Western Michigan University

WHAT IS FAIR USE?

FAIR USE CASE SUMMARIES



“Fair Use” is an exception to copyright infringement that allows someone to use copyrighted material without the permission of the copyright holder. There are not hard and fast rules to determine whether the use of material constitutes fair use. Fair use is determined based on a four factor test.

The first factor is the character of the use of copyrighted material. The scale of possible uses range from a commercial, for-profit use to non-profit educational use. To the extent the use is non-commercial, fair use is favored, and to the extent the use is commercial or for-profit, fair use is not favored. Use of the work for education, criticism, parody, or other “transformative” uses tend to be favored. Much of the use of copyrighted material on campus is for educational purposes and, by and large, this mitigates in favor of a given use as “fair use;” however, it is important to understand that there could be several types of use on campus that have a commercial component, for example performances at Miller Auditorium, book store promotions, and university advertisements all have a commercial aspect to them.

The second factor is the nature of the work to be used. Is the work a compilation of facts that does not involve a great degree of creative or imaginative input, or is the work one created with imagination and creativity? The less creative a work is, the more it is favored by fair use. Compilations of statistics and facts are subject to wide and freer use than creative works like songs or movies. Merely because a work is creative does not mean that fair use is defeated. However, it does mean that we need to be very careful about how much of the work is used and in what fashion it is used.

The third factor is the amount of the copyrighted work you will use. The more of a protected work that is used, the less the use is favored. Copying an entire book would exceed fair use unless the other factors mitigated strongly in favor of the use. However, copying a chapter of a book, or an entire article from a journal, for a non-commercial, educational purpose would probably be considered within the scope of fair use. Never use more of a work than you need to.

The fourth factor is the impact the use would have on the market for the protected work if the use were widespread. Put more simply, this factor asks if the copyright holder’s interests would be hurt by the use. This is a tricky factor since in some circumstances it is very important, and in others, it matters not at all. If the work is one that is popular, timely, current, or for some other reason is profitable, fair use is disfavored. For example, if a new Harry Potter book is printed, it obviously has very hot commercial market. Copying entire chapters, even for use in a non-profit commercial setting, may exceed fair use. If everyone copied only a few chapters, enough copies may be able to be compiled such that people could avoid buying the book and instead

assemble their own copy. The essential question is, could this use result in someone not buying the materials? For example, copying one article from the New York Times, would probably not stop a student from buying a full newspaper if he or she was otherwise inclined to do so. However, copying the entire paper for a class would not constitute fair use.

Keep in mind that there are other circumstances where, even though fair use may not apply, there may be some other exception to copyright protection that applies. For example, a movie may be shown in its entirety if it’s in a face to face instructional setting. You may consult with the Office of the Vice President for Legal Affairs and General Counsel if you have questions about your use.

Cases Involving Text

Not a fair use. A company published a book of trivia questions about the events and characters of the “Seinfeld” television series. The book included questions based upon events and characters in 84 “Seinfeld” episodes and used actual dialogue from the show in 41 of the book’s questions. Important factors: As in the “Twin Peaks” case, the book affected the owner’s right to make derivative “Seinfeld” works such as trivia books. (Castle Rock Entertainment, Inc. v. Carol Publ. Group, 150 F.3d 132 (2d Cir. 1998).)

Fair use. Publisher Larry Flynt made disparaging statements about the Reverend Jerry Falwell on one page of Hustler magazine. Rev. Falwell made several hundred thousand copies of the page and distributed them as part of a fund-raising effort. Important factors: Rev. Falwell’s copying did not diminish the sales of the magazine (since it was already off the market) and would not adversely affect the marketability of back issues. (Hustler Magazine, Inc. v. Moral Majority, Inc., 606 F. Supp. 1526 (C.D. Cal. 1985).)

Artwork and Audio Visual Cases

Not a fair use. A television news program copied one minute and 15 seconds from a 72-minute Charlie Chaplin film and used it in a news report about Chaplin’s death. Important factors: The court felt that the portions taken were substantial and part of the “heart” of the film. (Roy Export Co. Estab. of Vaduz v. Columbia Broadcasting Sys., Inc., 672 F.2d 1095, 1100 (2d Cir. 1982).)

Fair use. The makers of a movie biography of Muhammad Ali used 41 seconds from a boxing match film in their biography. Important factors: A small portion of the film was taken and the purpose was informational. (Monster Communications, Inc. v. Turner Broadcasting Sys. Inc., 935 F. Supp. 490 (S.D. N.Y. 1996).)

Not a fair use. In one case an artist used a copyrighted photograph without permission as the basis for wood sculptures, copying all of the elements of the photo. The artist earned several hundred thousand dollars selling the

sculptures. When the photographer sued, the artist claimed his sculptures were a fair use because the photographer would never have considered making sculptures. The court disagreed, stating that it did not matter whether the photographer had considered making sculptures; what mattered was that a potential market for sculptures of the photograph existed. (Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992))

Internet Cases

Not a fair use. Entire publications of the Church of Scientology were posted on the Internet by several individuals without Church permission. Important factors: Fair use is intended to permit the borrowing of portions of a work, not complete works. (Religious Technology Center v. Lerma, 40 U.S.P.Q. 2d 1569 (E.D. Va. 1996).)

Fair use. The Washington Post used three brief quotations from Church of Scientology texts posted on the Internet (see previous case). Important factors: Only a small portion of the work was excerpted and the purpose was for news commentary. (Religious Technology Center v. Pagliarina, 908 F. Supp 1353 (E.D. Va. 1995).)

Music Cases

Fair use. A person running for political office used 15 seconds of his opponent’s campaign song in a political ad. Important factors: A small portion of the song was used and the purpose was for purposes of political debate. (Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957 (D. N.H. 1978).)

Fair use. A television film crew, covering an Italian festival in Manhattan, recorded a band playing a portion of a copyrighted song “Dove sta Zaza.” The music was replayed during a news broadcast. Important factors: Only a portion of the song was used, it was incidental to the news event and did not result in any actual damage to the composer or to the market for the work. (Italian Book Corp, v. American Broadcasting Co., 458 F. Supp. 65 (S.D. N.Y. 1978).)

Summaries of Parody Cases

Not a fair use. An author mimicked the style of a Dr. Seuss book while re-telling the facts of the O.J. Simpson murder trial in The Cat NOT in the Hat! A Parody by Dr. Juice. The Ninth Circuit Court of Appeals determined that the book was a satire, not a parody, because the book did not poke fun at or ridicule Dr. Seuss. Instead, it merely used the Dr. Seuss characters and style to tell the story of the murder. Important factors: The author’s work was nontransformative and commercial. (Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997).)