

## The Fair Use Defense for Copyright Copying: Fair Play?

Ever wonder how someone is able to copy or use copyright content without permission?

The Fair Use defense is a complete defense to copyright infringement and basically provides protection for such conduct based on the use of the copyrighted work as serving the public interest. It is meant to be used to encourage criticism, parody or commentary of copyrighted works. This defense continues to be a hot topic, particularly in light of the growing development and wide use of the Internet and digital technology. Content owners argue to protect their right to control the copying, publication and dissemination of their works to the public, while users argue that over-reaching copyright laws would hinder and restrict the development of new works in music, entertainment and technology.

But what is the significance to the public interest? Does it justify the risk of unauthorized reproduction and distribution instantly destroying the market for a work? Should we tighten the parameters of unauthorized uses of copyrighted content, or should we expand the notions of fair use because of the increase potential of vast new applications resulting from digital technology? Understanding the components of the Fair Use defense and which of these four factors are given greatest weight in the copyright fair use analysis is key to understanding the key arguments and emerging trends in the successful application of the defense.

Classic examples of fair use are where a work is used "for purposes such as criticism, comment, news reporting, teaching...scholarship or research." 17 U.S.C. Section 107. The Copyright Act provides four non-exclusive factors to be considered in assessing whether a use is "fair":

1. The purpose and character of the use, including whether the use is noncommercial or for non-profit educational purposes and whether the use is consumptive or transformative;
2. The nature of the copyrighted work, i.e. whether the underlying work is a highly protected create work or a less protected creative work;
3. The amount and substantiality of the portion of the underlying work used in relation to the whole, i.e., whether the amount used, even if small, consists of the essence of the protected work; and
4. The effect of the use upon the potential market for the underlying work. Id.

Most would agree that the fourth factor has been deemed the most important factor in recent times. Where a use replaced or seriously interfered with a commercial opportunity of the copyright owner, courts relied on this factor most to find that a use was not "fair." More recent technology cases, however, have invoked the first factor. Presumably, the public interest is served by giving great fair use weight to a use that is "transformative," or, recasts the original work and creates an entirely new work despite providing a major economic benefit to the new user, and a major economic cost to the copyright owner.

As many uses of copyrighted works in the "Digital Age" are in new creative markets, inherent pressure appears to be leading to a vastly expanding concept of fair use. However, it is difficult

to predict how a court will assess any given situation in applying or interpreting the Fair Use defense. It is therefore advisable to obtain permission whenever possible. Because this sometimes can be tricky, the services of an attorney specializing in this area of the law could prove to be invaluable.