

## ***What's so Fair about Fair Use?***

### **Do You Remember...**

1991- Naked Gun advertisement with Leslie Nielsen's head superimposed on the body of a pregnant woman to look like the Demi Moore Vanity Fair spread?

1997- The "Cat NOT in the Hat" book accounting the OJ Simpson murder trial?

1998- The Seinfeld Aptitude Test trivia book based on the TV series?

These are three examples of copyright infringement where the defendants tried Fair Use to escape the infringement claims. In brief - Successful, Unsuccessful, Unsuccessful.

Fair Use is a popular defense to copyright infringement that constitutes a legal license to use the work of another. Although it was only added to the Copyright Act a little over twenty years ago, it now encompasses about half of the Copyright Act.

It's a squishy area and is very difficult to set precise bounds - and both Congress and the Courts have had difficulty setting good examples. Terms like "fair" tend to be highly subjective and depend on who is sitting on the opposite side of the table.

The copyright law is founded on the notion that society benefits by giving authors and artists an economic incentive to produce their works under copyright protection. It is carefully balanced by the proposition that all works are based on previous work and that the public benefits by using prior works to create new works.

The statutory test for fair use is found in the Copyright Act §107: "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

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potential market for or value of the copyrighted work." clear-cut test - this isn't it. But, we can apply a little more substance to each factor.

1) Purpose and character of use - Actual circumstances surrounding copying, including whether use is commercial or nonprofit, educational, archiving, spontaneous copying, number of copies subscribed, ease of licensing, value obtained by user, good faith, public benefit/private gain, transformative use, reasonable and customary practice.

2) Nature of the Copyrighted work - purpose and intention of work, extent of factual nature

3) Amount and Substantiality of Portion Used - amount taken as compared to copyrighted work as a whole. Consider if material used was reasonable in relation to the purpose of copying. Partial or limited reproduction of another's work may be permitted under this doctrine.

4) Effect upon Potential Market or Value - look at precise copyrighted works and recognize the distinctive nature and history of the potential market for/or value of these particular works. Should look not only at infringer's conduct, but whether unrestricted and widespread conduct of that sort would have a substantially adverse impact on potential market. Does infringing work compete with copyright owner's market or does it seek a market that the copyright owner does not desire? This factor applies only if impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets. Also looks at possible alternatives, such as the Copyright Clearance Center.

All the factors are explored, and the results weighed together in light of the purposes of copyright law. How the factors get weighed is up to the person making the decision.

The fair use doctrine has gone in a lot of directions, and the latest decisions seem to be place a large emphasis on the concept of "transformative use", which is encapsulated in factor one. This has been defined as a use that is productive and uses the copied matter in a different manner or for a different purpose than the original. Essentially, does the new work have a distinguishable expression meaning or message?

In general, the courts give more leeway where the use advances public interests such as education. Certain groups are given "greater" leeway, including schools, churches, and libraries - but not complete immunity. The statute also permits making a backup copy of a program; just don't start selling those copies!

Looking at the recent fair use cases, some tendencies emerge. If you make the judge laugh, you stand a better chance of winning. But, the problem with parody is that if the judge doesn't think it's funny - better have a back-up plan. Look at the Jordan's Furniture ads that mock other commercials. If they ever end up in court, a fair use defense will be certainly be raised and will probably win. (No sure things in the law.)

Attorneys tend to be overprotective, but if you are considering using a work that is from another source (even if there is no copyright notice) you should try to obtain written permission, provide attribution, or make your work an original expression. This is especially true if the work has some commercial nature. Otherwise, hope the judge is in a good mood and has a great sense of humor.