

The Basics of "Fair Use"

Fair use is a defense that a party raises when accused of copyright infringement of another's work. It is a subjective determination based upon the facts and circumstances of each individual situation. However, the Copyright Act provides guidance by stating that the fair use of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching...scholarship or research" is not copyright infringement. Similar to the determination of copyright infringement, there is no bright line rule that determines if an unauthorized use of a work qualifies for the fair use exception. However, the Copyright Act states four primary factors that are weighed in each situation to determine if an unauthorized use is a fair use.

First, the purpose and character of the use is examined, including whether such use is of a commercial nature or is for nonprofit educational purposes. In general, the more commercial the production that uses the copyrighted work, the less likely the use is going to be considered to be a fair use.

Second, the nature of the (original) copyrighted work is considered. The more creative the original work, e.g., a novel, script, film, painting, poem, etc., the less likely the unauthorized use of that work will be considered a fair use. On the other hand, the more factual the information, e.g., an almanac or an encyclopedia, the more the use would be considered a fair use.

Third, the amount and substantiality of the portion used of the copyrighted work is compared to the copyrighted work as a whole. Courts will first look to how much of the copyrighted work is used. The more taken from the copyrighted work, for example, if one hundred percent of a copyrighted work is used, the less the use is fair. Courts then look to the new work created by the party claiming fair use. The more the copyrighted work comprises the new work, the less the use will be considered a fair use. Although the amount taken from a copyrighted work is examined, the inquiry is also qualitative. The more an unauthorized use is the "heart" of the original copyrighted work, the less the use is a fair one, even if the use is quantitatively small.

The fourth factor considered is the effect of the use upon the potential market for or value of the copyrighted work. The Copyright Act doesn't state which of the four factors is the most important, but courts generally have given this factor the greatest weight in deciding whether a use is a fair use or not. Even so, all four factors are evaluated and considered in every case. In determining the effect of an alleged unauthorized use on the market or value of another's work, courts consider whether the alleged unauthorized use diminishes the potential future sales of the copyrighted work, whether it interferes with the marketability of the work or if it, in effect, supplants the market demand for the original work.

Although the four factors provide a framework for understanding fair use, it's impossible to prospectively determine whether any given unauthorized use will be considered by the courts to be a fair use. On one end of the spectrum is the unauthorized taking of: (1) a

miniscule amount of (2) a noncreative work (3) that is placed within a noncommercial use (4) that does not affect the market for the copyrighted work. At the other end is the taking of: (1) a large amount of (2) a creative work (3) that is placed within a commercial work (4) that affects the market for the copyrighted work. Naturally, most situations fall somewhere in between these two extremes and there is no bright line rule as to what point an unauthorized use becomes a fair use, but it depends upon the facts and circumstances of each particular situation. However, the basic idea underlying fair use is that it is an attempt to balance the copyright owner's right to be compensated for the copyrighted work with society's interest in the widest dissemination of ideas and information.