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## **COPYRIGHT FAIR USE**

By: Jim Astrachan

“The fair use doctrine is not a license for corporate theft, empowering a court to ignore copyright whenever it determines the underlying work contains material of possible public importance. Indeed, we do not suppose that [ABC News] would embrace their own defense theory if another litigant sought to apply it to the ABC evening news.” Iowa State University Research Foundation v. ABC.

Goes to show that even ABC with its battalion of copyright lawyers doesn't always get fair use right. And it's critical to get it right. Why? Because when the fair use defense is asserted, there's an admission that copying took place. So if fair use fails, a finding of infringement follows.

The judicial doctrine of fair use is one of the most important limitations on the right of copyright owners to the exclusive use of their copyrighted works; so important that it was given statutory recognition in the 1976 Copyright Act. Often abused, frequently misunderstood and sometimes properly applied, the fair use defense to the act of copying a copyrighted work is worth understanding. And while the Copyright Act provides four factors for courts to consider, Congress wrote that, “the courts must be free to adopt the doctrine to particular situations on a case by case basis.” In other words, fair use is a bit of a moving target.

The four factors enumerated by the Act as especially relevant in determining whether the use was fair are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relationship to the copyrighted work as a whole; and (4) the effect on the potential market for or value of the copyrighted work. What does each mean?

1. Purpose of the use. Some uses are identified in the Act, such as news reporting, and education but the examples are not meant to be exhaustive, nor are the examples intended to create a presumption that the use is fair if the use fits the example. Likewise, commercial versus nonprofit use, once considered fatal to a conclusion of fair use, is no longer a one way ticket to defeat, but it is still a consideration. The crux of the profit versus nonprofit distinction is not whether the user's motivation is monetary gain, but whether the user will profit from its exploitation of the copyrighted work through avoidance of a license or some other fee, the payment of which would benefit the copyright owner.

2. Nature of the copyrighted work. Is the work fictional or factual; entertaining or functional? The law generally recognizes a greater need to allow publication of factual works than works of fiction or fantasy. Unpublished works are subject to a substantially lesser degree of freedom under fair use than are works that the author has already made available to the world. This results from the recognition that an author should be allowed to control the first public appearance of the work including the right not to publish the work or where the work will be published.

3. Amount and substantiality of the portion used. How much of the work, in relation to all of the work, was used? Was it fully copied, or was just enough used to make the desired point? There are times when even the use of a minute percentage will not qualify for fair use if the taken portion is the heart and soul of the work. Imagine that Beethoven's Fifth Symphony is protected by copyright and someone copies only the first five notes in their proper sequence. In an actual case, the taking of 55 seconds from a one hour and twenty-nine minute film was held to be qualitatively substantial and therefore not a fair use. The extent of the work *not* copied is not critical to the analysis. Extract the juice and leave behind the rind and pulp and infringement results.

4. Effect on the market. Does the copying create a substitute for the work in the market place? If so, this determination is likely the strongest indication that fair use will not be found, because fair use, when properly applied, is limited to copying that does not materially impair the marketability of the copied work. For example, when *The Nation* copied 300 critical words of Gerald Ford's upcoming memoirs under contract to be published by Harper & Row, the publisher backed out of the publishing deal and refused to pay Mr. Ford \$12,500. It's rare, though, for an infringement to present such clear evidence of adverse affect on the market. A use that affects derivative rights, such as the right to serialize or create screenplays, also will not be considered fair use because of its effect on the market for the underlying work.

Appellate courts disagree with trial courts, and judges sitting on appellate panels disagree among themselves, whether a fair use should be allowed as a defense to an infringement action. It is not surprising, then, that the cacophony of factors makes it tough for lawyers and publishers to judge whether a proposed use of another's work

will be fair. In the end, though, a critical aspect of copyright law demands fair use remain alive, and that is the need for authors to build on previous works and to aid the public interest in having available the fullest information on issues of public interest. Without fair use the rigid application of the copyright laws to prohibit all copying would serve to stifle the very creativity which the Copyright Act is designed to foster.

But even though fair use is a critical exception to the Act's rigid prohibition against copying, it is not easy to apply. Perhaps this is because fair use is an equitable doctrine, and equitable doctrines simply are not subject to hard and fast rules and bright line tests. Be careful.

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