



4 factors courts consider when deciding on fair use

A guide to fair use of copyrighted materials.

BY ALLEN GRODSKY

The Copyright Act gives authors of certain-works (such as books, music, movies, etc.) the exclusive right to use those works. In other words—with one surprisingly large exception—nobody can use copyrighted works without permission of the author. The exception to the rule of exclusive right is fair use, a statutorily created exception which, in certain circumstances, allows anybody to use portions of a copyrighted work without permission and without having to compensate the author of the work.

The concept behind fair use is that it is reasonable to permit some limited use of copyrighted material to allow comment on, or criticism of, prior works. The determination of what is and is not a fair use requires a balancing of four factors. There is no objective, black and white test for fair use, and that leads to a substantial amount of litigation on the subject.

The four factors are as follows:

1. **“The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”** (11 U.S.C. § 107(1)): The critical element of this first factor is whether the new work is “transformative,” that is, whether the new work adds something new, with a new purpose or character, creating a new expression, meaning or message. For example, if one were to take a short clip of a movie and use it in a review of that movie, it would be transforming the use of the clip, using it to comment on or criticize the movie. But if you take somebody’s painting and put an image of it on a t-shirt, that doesn’t really transform the original use at all.

The more transformative the new work, the more likely fair use applies

2. **“The nature of the copyrighted work”** (11 U.S.C. § 107(2)): It is more difficult to establish fair use of creative works than of informational or functional works. However, this factor has typically not been significant in fair use decisions and there have been many cases finding fair use of creative works.
3. **“The amount and substantiality of the portion used in relation to the copyrighted work as a whole”** (17 U.S.C. 107(3)): The user of the copyrighted work must use only so much of the work as is necessary. For example, a movie reviewer does not need to reproduce the entire movie to make his or her point. On the other hand, a parodist must use enough of the original work to make it clear what he or she is making fun of. Thus, the more of the copyrighted work that is used (especially when it is not necessary to use that amount), the less likely fair use will be found.
4. **“The effect of the use upon the potential market for or value of the copyrighted work”** (17 U.S.C. 107(4)): The critical issue for the fourth factor is whether the new work has a tendency to supplant or substitute for the original work or its derivatives. In other words, if consumers are likely to buy the new work as a substitute for the copyrighted work, the use is likely not a fair use. The burden is on the defendant to bring forward evidence that poten-

tial markets will not be harmed. On the other hand, the fact that consumers buy less of the copyrighted work because the new work criticizes or ridicules it is not a factor that militates against fair use.

Courts do not tally these factors to see who has the most in his or her favor. Rather, each are weighed together, on a case by case basis with an eye towards the policy underlying copyright law.

There are several typical examples of potential fair use: documentaries (that use movie or music clips), criticism (such as a review) and parodies. In later articles, I will discuss how the principles of fair use apply to those specific areas.

Allen Grodsky’s firm, Grodsky & Olecki, is an entertainment, intellectual property, and business litigation firm based in Santa Monica.