

What types of uses does the fair use doctrine protect?

Written by Patrick McKay
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Answer: The language used by Congress in Title 17, Section 107 specifically lists "criticism, comment, news reporting, teaching, scholarship, and research" as examples of uses that might be protected under fair use. However, this list is non-exhaustive, and therefore a use not covered in one of the categories could nonetheless be successfully defended as a fair use. Conversely, not every use that falls within the listed categories will necessarily be found by a court to be fair. For example, not every use of another's work for research or educational purposes will be held to be a fair use. See *Encyclopaedia Britannica Educational Corp. v. Crooks*, 542 F.Supp. 1156 (W.D.N.Y.1982).

In considering a fair use defense to a claim of infringement, a court will focus its inquiry on the specific facts of the individual case. Therefore, it is very difficult to predict with accuracy what a court will do until it engages in the inquiry. A court will almost always use the four factors listed by Congress as a guide in its inquiry. The four factors listed are:

FACTOR 1: THE PURPOSE AND CHARACTER OF THE USE

This factor considers whether the use helps fulfill the intention of copyright law to stimulate creativity for the enrichment of the general public. The defendant must show how a use either advances knowledge or the progress of the arts through the addition of something new. The more transformative the use, the more likely it is to be fair, whereas if defendant merely reproduces plaintiff's work without putting it to a transformative use, the less likely this use will be held to be fair. Further, the more commercial defendant's use, the less likely such use will be fair.

FACTOR 2: THE NATURE OF THE COPYRIGHTED WORK

The more creative, and less purely factual, the copyrighted work, the stronger its protection. In order to prevent the private ownership of work that rightfully belongs in the public domain, facts and ideas are separate from copyright; only their particular expression or fixation merits such protection. Second, if a copyrighted work is unpublished, it will be harder to establish that defendant's use of it was fair. See *Salinger v. Random House, Inc.*, 650 F. Supp. 413 (S.D.N.Y. 1986), and in *New Era Publications Int'l v. Henry Holt & Co.*, 695 F. Supp. 1493 (S.D.N.Y. 1988). One commentator noted that "the original author's interest in controlling the circumstances of the first public revelation of his work, and his right, if he so chooses, [is to not] publish at all." While some argue that legal protection of unpublished works should come from the law of privacy rather than the law of copyright, Congress amended the Fair Use doctrine to explicitly note, "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

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FACTOR 3: THE AMOUNT AND SUBSTANTIALITY OF THE PORTION DEFENDANT USED

In general, the less of the copyrighted work that is used, the more likely the use will be considered fair. If, however, the defendant copied nearly all of, or the heart of, the copyrighted work, his or her use is less likely to be considered fair. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

FACTOR 4: THE EFFECT OF DEFENDANT'S USE ON THE POTENTIAL MARKET OF THE COPYRIGHTED WORK

This factor is generally held to be the most important factor. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985). This factor considers the effect that the defendant's use has on the copyright owner's ability to exploit his or her original work. The court will consider whether the use is a direct market substitute for the original work. The court may also consider whether harm to a potential market exists. The burden of proof here rests on the defendant for commercial uses, but on the copyright owner for noncommercial uses. See *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 451 (1984). It is important to note that courts recognize that some market harm may come from fair uses such as parodies or negative reviews, but that such market harm does not militate against a finding of fair use.