

# FAIR USE CASE LAW GUIDELINE

## I. WHAT ARE COPYRIGHTS?

The federal Copyright Act, 17 U.S.C. § 101, *et. seq.*, grants a bundle of exclusive rights to the owner of the copyright in an original work of authorship. These rights include the right to “copy,” “distribute” and make “derivatives of” the work and, in the case of motion pictures and other audiovisual works, to “perform” and “display” the copyrighted work publicly. (17 U.S.C. §106.) The Copyright Act defines the exclusive right to “display” audiovisual work as showing individual images non-sequentially, and to “perform” such work as showing its images in any sequence. (17 U.S.C. §101.)

## II. HOW IS FAIR USE APPLIED?

The Copyright Act limits the exclusive rights by identifying several uses that will not constitute an infringement. The fair use of a copyrighted work, including use by reproduction, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. (17 U.S.C. §107.) The statute provides four factors to aid in determining whether a use qualifies as “fair use”:

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 potential market for or value of the copyrighted work. (17 U.S.C. §107.)

All four factors must be balanced together to determine whether the use is “fair.”

### **A. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes**

In evaluating the character and purpose of the use, unlike educational use, every commercial use is presumptively unfair. (*Sony Corp. of America v. Universal City Studios, Inc.* (1984) 464 U.S. 417, 451.) Fair use also presupposes good faith by the defendant. (*Harper Row, Publishers, Inc. v. Nation Enterprises* (1985) 471 U.S. 539, 562.)

A finding that the use is either wholly commercial or wholly non-commercial is important but does not end the inquiry as to the first factor. (*Campbell v. Acuff-Rose Music, Inc.* (1994) 510 U.S. 569, 579.) Rather, the inquiry is “whether the new work merely supersede[s] the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; in other words, whether and to what extent the new work is transformative.” (*Ibid.*) The more transformative the new work, the less important the other factors become.

(*Ibid.*) A secondary use is transformative if it is “productive and . . . employ[s] the quoted matter in a different manner or for a different purpose from the original.” (P. Leval, “Toward A Fair Use Standard” (1990) 105 Harv. L. Rev. 1105, 1111.)

## 1) Transformative Use

Whether a secondary use is transformative can significantly affect a fair use determination: transformative uses are more likely fair uses; non-transformative (or consumptive) uses are more likely not. However, while a more transformative use would be helpful in establishing fair use, it is not mandated.

There are many opinions in the Ninth Circuit, and other circuits, discussing uses that may inform any determination of fair use. In *Worldwide Church of God v. Philadelphia Church of God* (9<sup>th</sup> Cir. 2000) 227 F.3d 1110, a religious organization held the copyright in the book “Mystery of the Ages” (MOA). Another unrelated church began copying and distributing the entire book for its own religious and educational purposes. The court found that the secondary use was not transformative because, although it might be educational, no intellectual labor and judgment was used to create the copy and the copy superseded the original MOA. (*Id.* at p. 1117.) Where the secondary use is for the same intrinsic purpose as the original, such use seriously weakens the claim of fair use. (*Id.* at 1117.)

Similarly, in *Wall Data Inc. v. Los Angeles County Sheriff's Dept.* (9<sup>th</sup> Cir. 2006) 447 F.3d 796, the Sheriff's Department purchased 3,663 licenses to Wall Data's software, but, through the use of hard drive imaging, installed the software onto 6,007 computers. The Sheriff Department's use did not provide a new creative work, nor was there any advancement of public knowledge. (*Id.* at p. 778.) Thus, the court found that the use was not transformative because the copy was used for the identical purpose as the original software. (*Ibid.*)

In contrast, in *Perfect 10, Inc. v. Amazon.com, Inc.* (9<sup>th</sup> Cir. 2007) 487 F.3d 701, Google used thumbnails of Perfect 10 images for purposes of indexing in its search engine. Google used the entire image. The court found that the use of the thumbnails was “highly transformative” because, although the image was exactly the same, the transformative use (search indexing) was functionally different from the original use (entertainment). (*Id.* at p. 721.) Similarly, in *Kelly v. Arriba Soft Corp.* (9<sup>th</sup> Cir. 2003) 336 F.3d 811, 819, the court found that the secondary use of an entire image (as a thumbnail for a search engine) served a different function than the plaintiff artist's original use (as fine art) and was thus transformative. The use was not just a change in the form or medium, but was an entirely different use. (*Id.* at p. 819.)

The transformative use in *Arriba* was distinguished from those cases dealing with reproducing music CDs in computer MP3 format because in those cases, both formats were used for consumptive, entertainment purposes. (*Kelly v. Arriba, supra*, 336 F.3d at p. 819, relying on *Infinity Broadcast Corp. v. Kirkwood* (2<sup>nd</sup> Cir. 1998) 150 F.3d 104, 108 [retransmission of radio broadcast

over telephone lines is not transformative]; *UMG Recordings, Inc. v. MP3.com, Inc.* (S.D.N.Y. 2000) 92 F. Supp. 2d 349, 251 [reproduction of audio CD into MP3 format not transformative].) In *Infinity Broadcast Corp., supra*, where the retransmitting was for a different purpose (advertising status versus entertainment), the court held that it was not transformative because the user could use both types of transmission for the same purpose.

However, in *Bill Graham Archives v. Dorling Kindersley Limited* (2<sup>nd</sup> Cir. 2006) 448 F.3d 605, the defendant used entire copies of individual Grateful Dead posters in connection with a biographical book about the band. The defendant reduced the size of the images and combined them with a timeline, textual material and original graphical artwork to create a collage of text and images. The court found that this use was transformative. (*Id.* at p. 612.)

## **2) Non-Profit or Educational Use**

The Copyright Act expressly recognizes that non-profit educational uses are intended to be included under the fair use exemption, and Congress has repeatedly expressed the importance of protecting educational uses as a goal of copyright law. However, the Supreme Court has stated that the “mere fact that a use is educational and not for profit does not insulate it from a finding of infringement.” (*Campbell v. Acuff-Rose Music, Inc., supra*, 510 U.S. at p. 584.) “The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” (*Harper & Row, Publishers, Inc. v. Nation Enterprises, supra*, 471 U.S. at p. 562.)

In *Worldwide Church of God, supra*, 227 F.3d at p. 1118, the Ninth Circuit recognized that religion, like academia, is not generally profit-driven. However, the court found that the defendant’s use of the copyrighted work “unquestionably profits” the defendant by providing at no cost to its members the core religious text. (*Ibid.*) The defendant profited and gained an advantage or benefit from its distribution and use without having to pay the copyright holder. (*Ibid.*) This weighed against fair use. (*Ibid.*; see also, *Television Digest, Inc. v. United States Telephone Assoc.* (D.D.C. 1993) 841 F. Supp. 5, 9 [educational and non-profit use disfavored fair use when defendant saved money by photocopying one subscription issue instead of ordering the number of subscriptions it required per reader].) Similarly, in *Wall Data Inc. v. Los Angeles County Sheriff’s Dept., supra*, 447 F.3d at p. 779, the Ninth Circuit found that the government agency’s copies of licensed software were “commercial” because they were made to save the expense of purchasing authorized copies. The Sheriff’s Department purchased a restricted license that had expressly prohibited use on multiple user arrangements. (*Ibid.*)

## **3) Good Faith**

The propriety of the defendant’s conduct and its good faith in copying and using content will be weighed as part of the first fair use factor. (*Harper & Row*

*Publishers, Inc. v. Nation Enterprises, supra*, 471 U.S. at pp. 562-563.) “Fair use distinguishes between a true scholar and a chiseler who infringes a work for personal profit.” (*Ibid.*) In *Nunez v. Caribbean Internat’l News Corp.* (1<sup>st</sup> Cir. 2000) 235 F.3d 18, 23, the court found that the defendant’s good faith balanced in favor of fair use because proper attribution was given, each copy was lawfully obtained, there was no intention to compete or supplement the plaintiff’s right of first publication, and the photographs were already available for general, unrestricted circulation.

#### **4) Public Interest**

The extent to which the allegedly infringing use promotes the purposes of copyright and serves the interests of the public must be weighed in the fair use analysis. (*Campbell v. Acuff-Rose Music, Inc., supra*, 510 U.S. at p. 579; *Harper & Row, Publishers, Inc. v. Nation Enterprises, supra*, 471 U.S. at pp. 556-557; *Perfect 10, Inc. v. Amazon.com, Inc., supra*, 487 F.3d at p. 722.) For example, the use of images for indexing in Google’s search engine provides great value to the public. (*Perfect 10, Inc. v. Amazon.com, supra*, 487 F.3d at p. 722; *see also, Newport-Mesa Unified School Dist. v. State of California Department of Education*, (C.D. Cal. 2005) 371 F. Supp. 2d 1170, 1177 [“Even if use is not transformative, copying can be fair use when it is in the public interest,” (citing *Sony Corp. of America*, 464 U.S. at p. 455 fn.40 [making copy for the convenience of a blind person is fair use]); *American Geophysical Union v. Texaco Inc.*, (2<sup>nd</sup> Cir. 1994) 60 F.3d 913, 922 [courts more willing to find secondary use fair when it produces a value that benefits the broader public interest].)

In *Newport-Mesa Unified School Dist. v. State of California Department of Education, supra*, 371 F. Supp. 2d at p.1177, the court found that there was a legislated public interest in the appropriate education of special education students and that such interest was served by allowing copying of completed copyrighted test protocols to parents. The court noted that FERPA allows parents to inspect and review education records, including test protocols. (*Id.* at p. 1177 fn.6.) Thus, allowing parents to receive a copy of the test protocol was a fair use.

#### **B. Nature of the Copyrighted Work**

There is a greater need to disseminate factual works than works of fiction or fantasy, and copyright law thus allows greater secondary use of factual works. (*Harper & Row, Publishers, Inc. v. Nation Enterprises, supra*, 471 U.S. at p. 563.) By contrast, “[w]orks that are creative in nature are closer to the core of intended copyright protection than are more fact-based works.” (*Kelly v. Arriba, supra*, 336 F.3d at p. 820 [citations omitted].) The scope of fair use is also narrower with respect to unpublished works because the author’s right of first publication weighs against fair use of the work before its release. (*Ibid.*; *Harper & Row, supra*, at p. 564.)

### C. Amount and Substantiality of Portion of Work Used

This factor concerns the amount and substantiality of the portion of the copyrighted work used in relation to the copyrighted work as a whole. The question is whether the quantity and value of the materials used are reasonable in relation to the purpose of the copying. (*Campbell v. Acuff-Rose, supra*, 510 U.S. at p. 586.) Although a fair use finding is not precluded by using the entire copyrighted work, doing so may weigh against a finding of fair use, especially where the secondary use serves the same function as the original use. (*Worldwide Church of God v. Philadelphia Church of God, supra*, 227 F.3d at p. 1118.) In *Worldwide Church*, the defendant copied a religious book for religious use. Even though the secondary use was nonprofit/religious, the court held that the use of the entire work for the same purpose weighed against fair use. The *Wall Data* court made the same finding where the Sheriff's Department copied the entire software program and used it for the same purpose as its original use. (*Wall Data Inc. v. Los Angeles County Sheriff's Dept, supra*, 447 F.3d at p. 780.)

In contrast, in *Kelly v. Arriba, supra*, 336 F.3d at p. 821, where the secondary uses were transformative, the court recognized that when the secondary user copies only as much as is necessary for its intended use, even if that amount is the entire content, this factor will be weighed as neutral – neither for nor against fair use. The *Arriba* court found that while Arriba copied entire images to allow users to identify the content in a visual computer search, such copying of the entire copyrighted work was necessary to permit identification and serve the secondary use. (*Ibid.*; see also, *Perfect 10, Inc. v. Amazon.com, Inc., supra*, 487 F.3d at p. 724 [third factor weighed as neutral in fair use analysis regarding use of entire image for thumbnail in Google search]; *Nunez v. Caribbean Internat'l News Corp., supra*, 235 F.3d at p. 24 [newspaper use of entire image was neutral in fair use analysis when it would have been useless to the story to use less than the entire photo]; *cf.*, *Newport-Mesa Unified School Dist. v. State of California Department of Education, supra*, 371 F. Supp. 2d at p. 2005 [factor favored fair use where amount copied was no more than necessary to assess the special education student's educational needs].)

Both the *Arriba* and *Perfect 10* courts placed significance on the fact that although the alleged infringer used the entire image, it degraded the image quality from a full image to a thumbnail image, which makes the content unusable for the original use. (*Kelly v. Arriba, supra*, 336 F.3d at 821 [“The thumbnails would not be a substitute for the full-sized images because the thumbnails lose their clarity when enlarged.”]; *Perfect 10, Inc. v. Amazon.com, Inc., supra*, 487 F.3d at p. 724 [same].)

In *Sony Corp. of America v. Universal City Studios, Inc., supra*, 464 U.S. at pp. 449-450, the Supreme Court found that recording television programs on Betamax machines for personal use at a later time constituted “time-shifting” that resulted in no harm to the copyright holder. “Time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced does not have the ordinary

effect of militating against a finding of fair use.” (*Ibid.*; but see, *Television Digest, Inc., v. United States Telephone Assoc., supra*, 841 F. Supp. at p. 10 [time-shifting theory inapplicable to newsletter because newsletter can be read at anytime, and copying is not necessary to time-shift].)

A similar concept that addresses the transfer of content from one device to another is “space-shifting.” In *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.* (9<sup>th</sup> Cir. 1999) 180 F.3d 1072, 1079, the court held that a portable MP3 device that allowed copies of files that already resided on a user’s hard drive to be copied onto the portable device, was simply “space-shifting” such that it constituted permitted noncommercial personal use under the Audio Home Recording Act. (17 U.S.C. §1008.) Section 1008 provides an exemption to copyright infringement for use of a digital audio recording device for noncommercial use by a consumer.

In *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9<sup>th</sup> Cir. 2001), Napster tried to bring itself within this same exemption when it provided an internet site that allowed users to download MP3 music files to listen to files it already owned on audio CD. However, the site simultaneously allowed distribution of the material to the general public. The court held that “space-shifting” has only been permitted when the copyrighted material was exposed only to the original user. (*Id.* See also *UMG Recordings, Inc. v. MP3.com., Inc.*, *supra*, 92 F. Supp. 2d at p. 349 [commercial service that allowed purchasers of music CDs to store music on central server for listening convenience not fair use].)

#### **D. Effect on the Potential Market for or Value of the Copyrighted Work**

The fourth factor considers the effect of the use upon the potential market for or value of the copyrighted work. A transformative work is less likely to have an adverse impact on the market for, or value of, the original than a work that merely supersedes the use of the copyrighted work. (*Kelly v. Arriba, supra*, 336 F.3d at p. 821 (citing *Campbell v. Acuff-Rose, supra*, 510 U.S. at p. 591).)

Analysis of this factor does not focus on whether the secondary use suppresses or even destroys the market for the original or its potential derivatives, but upon whether the secondary use usurps the market for the original work. (*A. V. v. iParadigms, LLC.*, (4<sup>th</sup> Cir. 2009) 562 F.3d 630, 643 [finding fair use where for-profit company enabled teachers to copy entire student papers because secondary use was to scan for plagiarism, which did not usurp “market” for original student use for course credit].) The fair use doctrine protects against a republication that merely offers the same work in a secondary packaging because potential customers, having read the secondary work, will no longer be inclined to purchase again content they already have consumed. (*Ibid.*)

In *Kelly v. Arriba*, *supra*, 336 F.3d at p. 821, the court found that Arriba's use of images in its thumbnails did not harm either the market for Kelly's original fine art images or their value. The court reasoned that Arriba's search engine would guide users to Kelly's website to see the full sized images, which they could then purchase. The thumbnails would not substitute for the full-sized images because the smaller images lose clarity when enlarged, and there was no way to view, create or sell a clear, full-sized image without going to Kelly's site. Thus, the court found that this factor weighed in support of fair use. *Id.*

In *Newport-Mesa Unified School District v. State of California Department of Education*, *supra*, 371 F. Supp. 2d at pp.1178-79, the court found that widespread public access to test protocols could have a detrimental effect on the test's market value. However, it determined that there was no evidence of any risk of widespread public access or an adverse market effect by permitting distribution of copies to parents. (*Ibid.*) In contrast, in *Television Digest, Inc., United States Telephone Assoc.*, *supra*, 841 F. Supp. at pp. 10-11, concerning copies of a newsletter for internal routing, the court found that to the extent the internal routing to individuals represented additional, potential subscriptions, it constituted a negative effect on the market. The court rejected the defendant's argument that it would not have purchased any additional subscriptions if it could not have made copies because the defendant already had saved substantial sums on subscriptions that otherwise would have been required. (*Ibid.*)