

The Key Dimensions of the Fair Use Defense

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A principal defense in copyright litigation is the fair use exception to copyright found in Section 107 of the Copyright Statute, 17 U.S.C. §107. When evaluating the statutory factors, the key dimensions or aspects of the factual inquiry appear to be transformation, commercial use and market value.

The fair use exception permits reproduction of copyrighted material "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107. This list of purposes is not exhaustive, but merely illustrative of the types of uses that may be deemed fair use.

The fair use doctrine involves a mixed question of law and fact based on a set of statutory factors. These factors are:

"(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.

None of these factors is deemed determinative and must be balanced together in making the analysis. Generally, the most critical evidence addresses three key dimensions or aspects of the fair use inquiry: transformation, commercial use and market value.

Sundeman v. The Seajay Society, Inc., 142 F.3d 194 (4th Cir. 1998), applied the fair use defense to the unauthorized reproduction of unpublished works of Marjorie Kinnan Rawlings Baskin ("Rawlings"), the author of *The Yearling* and other noted books. The Seajay Society, an organization dedicated to enhancing awareness of South Carolina culture, obtained some of Rawling's unpublished works, including Rawling's first novel, *Blood of My Blood*. Dr. Anne

Blythe received a copy of the unpublished novel from Seajay, presented an analysis of Blood of My Blood at a Rawlings Society symposium, quoting about four to six percent of the text, and submitted her paper for publication.

The plaintiffs sought damages and injunctive relief for (1) the copy of Blood of My Blood given by Seajay to Blythe; (2) a partial copy given by Seajay to the University of Florida; (3) Blythe's presentation which quoted from the work; (4) Blythe's attempt to publish her presentation; and (5) further dissemination of the unpublished novel. Seajay conceded that the copies it made of Blood of My Blood constituted copyright infringement unless they were protected by the fair use exception.

Moving beyond an obvious discussion of the four statutory factors, the case reveals three key dimensions that can be used to shape any fair use analysis. Most fair use questions can be resolved by focusing your litigation strategy on these factual issues.

(1) Transformation. The first dimension involves the character of the use: Whether the work is transformative or merely supersedes the original. A work is transformative if it adds something new to the original. Although such transformation is not absolutely necessary for a finding of fair use, it does further the purpose of the Copyright Laws and weighs in favor of a finding of fair use.

(2) Commercial Use. The second key dimension is the purpose of the use: Whether the defendant intended to profit from the use without proper payment. Again, this factor is not conclusive. Although most of the statutory examples of fair use typically involve some profit motive in our country, the lack of commercial purpose favors a finding of fair use.

(3) Market Value. The third key dimension is the effect on the value of the original: Whether the defendant's work will impair the market value of the original work. Any use that supplants the market for the original is unlikely to be considered a fair use.

The facts presented on these dimensions in the Seajay case supported a finding of fair use. The Blythe presentation was transformative in that it involved a scholarly appraisal of the work. Although Blythe may have hoped to get royalties for her presentation, her efforts were

never published and merely served to benefit the development of the arts. Finally, the presentation would not interfere with sales of the original or inhibit demand for derivative works.

In Michaels v. Internet Entertainment Group, Inc., 5 F. Supp. 2d 823 (C.D. Cal. 1998), the defendant argued that it should be permitted by the doctrine of fair use to show excerpts of a sexually explicit video featuring the rock star Bret Michaels and television star Pamela Anderson Lee on its Internet site. The Court concluded that the display of short segments of the video would not be fair use. The result is easily reached based on the facts relating to each of three dimensions discussed above.

The excerpts of the Michaels/Lee video did not involve any transformation of the original work. The defendant's proposed use would be commercial, since it built its subscriber base by offering short video clips for adult entertainment. Finally, the segments of the video were likely to propagate quickly online and saturate the potential market for the copyrighted work.

In Leibovitz v. Paramount Pictures Corporation, 137 F.3d 109 (2d Cir. 1998), well-known photographer, Annie Leibovitz, claimed that an advertisement for the movie "Naked Gun 33 1/3: The Final Insult" infringed her photograph of Demi Moore on the August 1991 cover of Vanity Fair. The defendant's photograph featured the face of actor Leslie Nielsen superimposed on the naked body of a pregnant woman posed to look like Moore in the Leibovitz photograph. Following the Supreme Court's decision in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), the Court concluded that the Paramount advertisement was fair use.

The evidence on the dimensions noted above supported a finding of fair use, but was not as definitive as the evidence in Seajay or Michaels. The Paramount advertisement was transformative because the parody was a new work which commented on the original, and was not merely a copy of the original. Further, Leibovitz conceded that the defendant's work would not interfere with the potential market for her photograph or for derivative works based on it. Finally, the court discounted the commercial nature of the use. After Campbell, it can no longer be said that every commercial use of copyrighted material is presumptively unfair. The commercial nature of the use is merely a factor for consideration. The fact that the Paramount

advertisement promoted a commercial product weighed against a finding a fair use, but the weigh of the evidence on transformation and market value markedly favored the defendant. The Court gave little weight to the evidence relating to the nature of the plaintiff's use or the amount of the taking, both of which seemed to favor Leibovitz.

The key dimensions used to evaluate the fair use factors appear to be transformation, commercial use and market value. By focusing their arguments and evidence on these key dimensions, litigators will increase their chances of success when addressing the fair use defense.