Making fair use make more sense: A white paper
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I've noticed that the first thing most people think of when trying to decide if they can use a copyrighted work is usually the fair use exception. And indeed, even though the law has many other exceptions built into it, there is a very good reason this one is so famous: Fair use is an incredibly powerful tool for people who want to use and expand on copyrighted works. Indeed, it is special among the other copyright exceptions because it isn't specifically targeted at one kind of use. Instead, fair use is purposely open ended to permit many different kinds of uses. One downside of this however, is that it can be difficult for anyone — lawyer and nonlawyer alike — to figure what is/isn't fair use under the law.

In this white paper, I will review the fair use statute, go over its famous “four factor test,” and offer some suggestions about how to think through each part. Importantly, I will not conduct a comprehensive deconstruction/examination of fair use. Such a task is far beyond the scope of this paper — Copyright scholars have written entire treatises on the topic, and I cannot replicate those works. Instead, my goal is to help you become more comfortable with the confusing concepts around this exception so you can make your own arguments for or against fair use.


First, let's look at the statute.

17 USC § 107 reads:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Before we dive into the four factors, I want to address a couple other features of this statute. First, notice that it lists “criticism, comment, news reporting, teaching, scholarship, or research” as examples of fair uses. This suggests that things like scholarship and criticism are at the heart of what this statute is trying to protect and are more likely to be fair use than other uses. Of course, these certainly are not de facto fair use. It would not be fair, for example, for scholars to reproduce entire books online as part of their research. Instead, it’s important to remember that you probably have a stronger argument for fair use when something is for education, criticism, etc., than with uses that serve other purposes.

Next, look at the statute’s final paragraph. It tells us that publication status alone is not enough to prevent a fair use claim. This passage highlights just how powerful fair use can be. In the past, authors had a near absolute right over their unpublished works. Today, however, while it is still difficult to make a fair use claim over an unpublished work, 107 nevertheless ensures that these works are fair game for fair use, just like published works.

**Breaking down the factors**

Now let’s look at each of the factors individually.

**Factor 1: What are you doing with your copy?**

The first factor is: “The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purpose.” With this factor, we look at why you’re using a copyrighted work and what you’re doing with it. You should think about questions like: Why do you want to copy this work? Are you changing the original at all, or just making a verbatim reproduction? If you are changing it, how much?

One thing people consider with Factor 1 is if and how much a use is “transformative.” The idea behind “transformative use” is that when something does more than simply copy the original, but instead changes it in some way, is more likely to be fair use than an exact copy would be.
The Supreme Court focused on transformative use in the famous fair use case, *Campbell v. Acuff-Rose Music.* In *Acuff-Rose,* it wrote that something is transformative if it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” While something does not have to be transformative to constitute fair use, transformative works “lie at the heart of the fair use doctrine.” So, if your use is transformative, that weighs in your favor.

Importantly, there is no definition for what is transformative, and courts sometimes understand this term to be more expansive than you may first realize. Consider the 2nd Circuit’s opinion in *Authors Guild v. Hathitrust* [the Hathitrust decision]. The court wrote that “a use is transformative if it does something more than repackage or republish the original copyrighted work.” It went on to hold that Hathitrust’s addition of full text search to the copyrighted works was “quintessentially transformative.” Interestingly, this was true even though Hathitrust copied the works in its database verbatim and in their entirety. Because “there [was] no evidence that the Authors write with the purpose of enabling text searches of their books” and “full-text search adds a great deal” to the underlying works, Hathitrust’s collection was a transformative use.

So, think about whether your use is transformative. If it is, this will help you make a stronger fair use claim. If it isn’t transformative, that doesn’t entirely prevent fair use, but it makes your fair use argument weaker.

**Factor 2: What kind of work are you copying?**

The second factor is: “the nature of the copyrighted work.” This factor looks at whether the original work was fiction or nonfiction and published or unpublished. Generally, works that are fiction and/or unpublished receive greater protection than nonfiction and/or published works. This seems intuitive. Here, courts recognize that some works are closer to the core of copyright than others. Since facts are unprotectable, and since copyright protects original, creative works, it makes sense that fiction works receive stronger protection than nonfiction works. Similarly, since copyright gives authors the right to distribute copies of their works to the public, it makes sense that the law would give greater protection to unpublished works, even though the law doesn’t completely bar using those works.

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1. *510 U.S. 569.*
2. *Id* at 579.
3. *Id.* at 579.
4. *755 F.3d 87, 96 (2014).*
Nevertheless, this factor is probably the least important factor. It is rarely determinative, and courts frequently seem to dismiss it. Accordingly, you’re probably not going to win or lose a case based on this factor, but it could help tip the balance in one direction.

Factor 3: How much are you copying?

Factor 3 is: “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” This factor looks at how much of a work you are copying and how important that part is to the original work. Generally, copying less of something weighs more toward fair use than copying more. However, there is no bright-line rule for how much copying fair use allows. Sometimes you’ll hear people say something like “as long as you copy less than 10%, you’re safe,” but this simply isn’t true. In fact, in some cases you can copy an entire work and still have a valid fair use claim, and in others you can copy very little and still infringe.

When trying to determine how much copying is still fair use, you have to consider at least two different things. First, you need to think of this factor together with what you are doing with the copyrighted work (Factor 1). Ask: Does the amount you’re copying make sense for what you want to do with it? If so, then it’s more likely to be ok under fair use. Conversely, if you’re copying is more than you really need, then it’s less likely to be fair.

To understand this a bit better, let’s look at Weird Al Yankovic’s song parodies. Weird Al is famous for recreating the music from the songs he parodies almost exactly and often uses some of original the lyrics as well. So, he copies 100% of the music and some percentage of the words. Nevertheless, his parodies almost certainly qualify as fair uses. This is because fair use strongly supports transformative uses like parodies, and Weird Al and the percentage of the original that he uses fits what he is doing. That is, he needs to copy the whole song for his transformative use to work.

Second, you need to think about how important the part you’re copying is to the original work. The statute tells us to look at the “substantiality of the portion” copied, but the term people often use with this is the “heart of the work.” Imagine a book that is 100 pages long, but has 1 extremely famous and important page, and you copy that page. Even though you’re only copying 1% of the total work, which would normally weigh toward fair use, it weighs against in this case because of the importance of that 1 page to the overall book.

So, think about how much you’re copying, how important that part is to the original work, and whether the amount you’re copying serves your reason for copying it.
Factor 4: What is the effect on the market?

Finally, the fourth factor is: “The effect of the use upon the potential market for or value of the copyrighted work.” This factor is both very important and often quite difficult to understand.

One way to think about Factor 4 is to consider whether a use is a “market substitute” for the original work. To help understand this, look at this quote from the Hathitrust decision: “A fair use must not excessively damage the market for the original by providing the public with a substitute for that original work.”\(^5\) So, you can think of questions like: Does your use do the exact same thing as the original, so that someone could use your work instead of the original? Or does it do something different, so there is room in the market for both?

Again, let’s look at Weird Al’s parodies. Even though his music is almost exactly identical to the originals, the parodies and the originals serve different purposes, and consumers do not get the same experience from both. So, this factor would weigh toward fair use for Weird Al because his parodies are not substitutes, but instead are totally new works.

Moreover, some fair uses can and do harm the market for the original. Take, for example, the work of film critics. Critics often use clips from movies in their reviews, and negative reviews can discourage people from seeing those movies. But this is ok because the law supports criticism. Someone couldn’t watch those clips and read the reviews as a substitute for seeing the movie. At the same time, if that same critic posts an entire movie online, that would not be protected by fair use in part because it unfairly harms the market for the original — People would not need to pay to see the movie anymore. Even if the critic provides valid criticism, this would still not be fair use.

So, this factor asks us to consider whether a use unfairly harms the market that belongs to the original work. If it does, then this will weigh heavily against fair use. However, if it is not a substitute for the original, this will weigh in favor of fair use.

Resources for further research

I often tell people that the downside of trying to do legal research is that it can be quite difficult. Fair use is a huge subject, and it is constantly changing as new cases come out and refine our understanding of how to apply the fair use factors. At the same time, however, the good part about conducting legal research is that there are a lot of tools to help, and this

\(^5\) 755 F.3d at 95-96.
is certainly true in the fair use space. Below I will list a few great resources for researching
fair use law.

First, one of the best resources available is the Fair Use Index from the Copyright Office. As
the name suggests, this is a searchable index of fair use cases going all the way back to the
first one, Folsom v. Marsh. Importantly, this index is not comprehensive. Instead, it provides
a list of important fair use decisions covering a variety of topics across the different federal
courts. Additionally, it does not include the full text of these cases, but has summaries of
them. As such, it is a great starting point for your fair use research. If you want to find the
full text of those cases, you can look on Google Scholar.

Second, the Stanford Copyright and Fair Use Center has a great overview of the fair use
factors that can give you additional help in applying the factors.

Third, if you like infographics, Harvard’s Office for Scholarly Communication has this nice
one on fair use.

Fourth, this guide from the University of Texas has a good breakdown of the fair use factors
analysis.

Conclusion

Ultimately, if there is one lesson you can take from this white paper, it is this: There is
rarely a 100%, slam dunk case either for or against fair use. There are always arguments on
both sides of an issue, and courts have told us repeatedly that we need to look at each fair
use claim on a case-by-case basis. So don’t worry if you can think of arguments against fair
use for your situation. Instead, focus on the four factors and think hard about how your use
fits under this framework.