
**EXCEPTIONS AND LIMITATIONS ON EXCLUSIVE COPYRIGHT: US DOCTRINE OF
FAIR USE**

Ivona Sekulovska, M.Sc

Ministry of Culture, Republic of Macedonia ivona.sekulovska@gmail.com

Mirjana Sekulovska, Ph.D

Faculty of Tourism and Hospitality – Ohrid, Republic of Macedonia mirjana.sek@gmail.com

Abstract: In order to encourage and reward creative works, there is the existence of copyright and related rights. Copyright is a set of rights granted to authors, artists and other creators to protect their literary and artistic creations, usually called works. Copyright owners are granted with certain economic and moral rights. The copyright owner is the person who has the exclusive rights to exploit the work and generally, it is illegal for anyone to use the copyrighted work without seeking permission from the copyright owner. However, in order to maintain the balance between the legitimate interests of the right holders and the general public, there must be a number of limitations and exceptions to the exclusive rights of the copyright owner. In the USA, or specifically in the US Copyright Act of 1976, such exceptions and limitations are provided within the Fair Use Doctrine that is incorporated in the Section 107. Hence, in this paper will be analyzed this Fair Use doctrine, which is some kind of open system for finding limitations and exceptions to the exclusive rights that the law grants to the authors of creative works. Guided by this doctrine, the judiciary is determining whether the use of a copyrighted work is fair or not, in each particular case. Thus, in this paper will also be described how the fair use is measured in respect of the four statutory fair use factors under the US Copyright Law with special emphasis to the first factor (The Purpose and Character of the Use – The Transformative Factor) and how this reflects to the goal of achieving the abovementioned balance.

Keywords: copyright, law, fair use, transformative, exceptions, limitations.

1. US DOCTRINE OF FAIR USE

In its most general sense, a fair use is the use of copyrighted work for a limited and particular purposes. Usually the purposes such as research, criticism or comment are deemed as non-infringing. US copyright law grant the authors of a work a bundle of rights, which stands against any infringements of their copyrighted work, including the right to reproduce and distribute the work. But the aforementioned uses can be done without permission from the copyright owner, and thus to be considered as non-infringing. So the fair use doctrine, as opposite to the copyright owner's rights, is a defense against a claim of copyright infringement.

The U.S. general doctrine of fair use is codified in s. 107 of the United States Copyright Act 1976.⁶⁷ Considering the fair use concept, section 107 allows for finding of limitations on the exclusive rights provided for in the s. 106 of the Copyright Act.⁶⁸ The purpose and character of the use is determined by the four factors of the doctrine, which the courts are required to consider. The House Report states that “since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.”⁶⁹ In this regard, in the US Copyright Act is included a non-exhaustive list of uses, plus the words “shall include” point out that the factors of the doctrine are not exhaustive either. The anticipated factors in the Act serve only as a general rules and since other considerations are permissible, there are varied court decisions. The courts are free to take into account non-statutory factors whenever they appear relevant and the weight given to a certain factor depends on the courts perception of the facts in any particular case. This is because the judges and lawmakers who created the fair use exception did no limit its definition and wanted it to have an expansive meaning open to interpretation, just like “free speech” has. Most fair use analysis falls in the categories of commentary and criticism or parody. To achieve these purposes you must reproduce the original work and fair use principles allow you to.

2. DETERMINING FAIR USE: THE FOUR FACTORS

⁶⁷ U.S. Copyright Act, section 107. Limitations on exclusive rights: Fair us.

⁶⁸ Ibid, section 106, Exclusive rights in copyrighted works.

⁶⁹ US House of Representatives, Report No. 1476, 94th Congress, 2nd Session, Copyright Law Revision, p.65.

Twelfth International Scientific Conference
KNOWLEDGE WITHOUT BORDERS
31.3-2.4.2017, Vrnjacka Banja, Serbia

The fair use is derived from the judiciary, but now is set forth in the U.S. law. The U.S. Copyright Act provides that “[...] the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means [...], for purposes such as criticism, comment, news reporting, teaching [...], scholarship, or research, is not an infringement of copyright.”⁷⁰ This act provides that the fairness and non-infringing nature of these uses is depending on the following four factors: the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work.

To determine whether a use is fair or not, it is not enough to apply just one factor, but all four factors. Even if your use is found fair in regard of one factor, for example if it is commercial or educational, the court still needs to apply the other factors and further to balance the weight between them. It means that the court need to find balance between the purpose and character of the use, the nature of the copyrighted work, the amount or substantiality of the portion used, and the potential impact of the use on the market or value of the work, and then to make the decision. Nevertheless, these factors are only a guidelines that courts are free to adapt in each separate case, which means that the outcome of any case is hardly predictable. But at the same time, this approach is crucial for the law and its adaptation on the new innovative environment, changing technologies, higher educational applications, practices etc. At the end, to get a definitive conclusion, the court is not obliged to find that all of the factors weight against or in favor of fair use, nor that their weight is equalized. The relevance and weight of the factors depend on the relative appreciation of the court. The overall and complete analysis and evaluation of the factors should be the key to a definitive answer on whether the particular use qualifies as a fair use. Due to the fact that a judgment for or against fair use is actually affected by the jury or the judge’s individual sense of right and wrong, no wonder that many fair use cases conflict and contradict one another. There are however, some uses which are usually found fair when applying the fair use test, including “small excerpts in a review or criticism for purposes of illustration or comment; a parody which incorporates some elements (but not all) of the work being parodied; quotations from a speech, address, or position paper in a news report; and limited copying made by a student for academic work.”⁷¹

Many people believe it is permissible to use a work or portion of it, as long as they cite the source of the use. This is false. The provided acknowledgment of the source material, for example the photographer’s name as the author of the original work, may have a positive effect, but it will in no way exclude the possibility of infringement. The acknowledgments could also encourage additional legal claims, such as invasion of privacy, violation of the right of publicity etc. The U.S. case law has proved that it is often difficult to conclude whether a particular use is fair or not. A statement that the new work is disassociated from the borrowed work is a disclaimer. So, you can write a book or record a film and put a statement that they are not associated with or endorsed by the copyright owners of the source material. Such disclaimer could also have a positive impact on the court’s interpretation of the use, but in any case, the disclaimer won’t make any difference if the fair use factors weight in finding copyright infringement. In most cases, when you think that your defense to copyright infringement could rely on the fair use doctrine, the right course may be to consult a copyright attorney. However, deliberately the safest thing to do when wishing to use a copyrighted work is to seek permission of the copyright owner.

2.1. The Purpose and Character of the Use – The Transformative Factor

In determining whether the use made of a work is a fair use, according to the first factor, the courts should consider “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”⁷² When applying the first factor, at issue is whether the used work or a portion of the work is merely a copied verbatim into the second work or it has been used to create something new. The question is whether there has been added a new information, expression, understanding, insight, aesthetic to the original work, or to put this in one word, whether the use of the work is transformative. So, anyone who wishes to use an already existing work or a portion from it, should think about these questions. Whereas the finding of fair use depends on evaluation of all four factors, not all nonprofit educational uses are fair, despite the fact that the first factor indicates that these uses or purposes are generally favored over the uses of a commercial nature. But besides the nonprofit educational purposes, the Copyright Act in addition, explicitly lists several purposes that are appropriate for fair use, such as criticism, comment, news reporting, teaching, scholarship, or research, which

⁷⁰ U.S. Copyright Act, section 107 (internal quotation omitted).

⁷¹ Tysver. D.A., *Fair use in Copyright Law*, BitLaw, available at: http://www.bitlaw.com/copyright/fair_use.html.

⁷² U.S. Copyright Act, section 107.

Twelfth International Scientific Conference
KNOWLEDGE WITHOUT BORDERS
31.3-2.4.2017, Vrnjacka Banja, Serbia

subsequently means that limiting the purpose to some of these activities, more or less will be in favor of claiming fair use.

The doctrine leaves room for broad interpretation of this factor, so the courts also favor uses that are transformative, or that are not merely copies and reproductions of the original work. When the copyrighted work is transformed, such as in the case of “quotations incorporated into a paper, or perhaps pieces of a work mixed into a multimedia product for your own teaching needs or included in commentary or criticism of the original,”⁷³ the fair use is more likely to be found.

2.2. The Transformative Factor (roots of its acceptance)

In a 1994 case, the US Supreme Court emphasized the first factor as being a primary indicator of fair use. Like we said, when determining whether the use is fair or not, courts are required to consider four factors. The first factor, “the purpose and character of the use”, was considered by the Supreme Court in the case *Campbell v. Acuff-Rose Music* (disputed was the rap version of the used parts from the Roy Orbison’s song “Pretty Woman”). The Court decided that the use of the copyrighted work was fair, because it situated the work in a new context. The Court elaborated:

The central purpose of this investigation is to see, in Justice Story's words, 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; it asks, in other words, whether and to what extent the new work is "transformative." [...]⁷⁴

As a relevant criterion for the Court, in finding fair use, the term “transformative” derived from a 1990 law review article by judge Pierre N. Leval, who stated that “it is not sufficient simply to conclude whether or not justification exists,”⁷⁵ Judge Leval believed that “the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.”⁷⁶

This means that transformativeness should not be measured upon the appearance of the artwork, but on whether it has a different meaning or carries a new message. When analyzing more broadly, even the original work is itself a copy, in the sense that every artwork is inspiration and representation from something original outside the representation itself, even if the original is existing only in the author’s mind before it is fixed. But if we take the previous premise for granted, the fair use test loses its meaning, especially when transformativeness is perceived by the viewer’s perspective. The viewer can always be supportive of transformative uses and see some different meanings in them, and thus to find a new artwork transformative, which in some instances might deny the aim of the fair use doctrine or the copyright law in general. The viewer’s perspective, could also be quite opposite, which nevertheless might be detrimental to the aim of the doctrine and the law. This is important to be mentioned, because the perspective of the different types of viewers i.e. audience, is a significant segment in measuring the fair use factors. This can be better seen if we dig closely in the sphere of appropriation art.

In the US case law, the Second Circuit in the case *Rogers v. Koons*, has concluded that there would be no boundary to the application of the fair use defense, if the use of the original work could be justified as fair merely on the basis of the defendant’s statements and claims to a different artistic use of the work. A decision could not be made without considering the perspective and evidence of the viewers, as a wider public awareness. In this case, the court held that Koons’s work was not a fair use. However, fourteen years later in *Blanch v. Koons*,⁷⁷ a case involving the same appropriation artist Jeff Koons, the court was focusing on the interpretation of Koon’s use, as a defendant. The Second Circuit pointed out his efforts to add a new meaning in the work and to engage new viewers who can interpret and understand the meaning. It is obvious that there is no rule in this regard, and this is as a result of the fair use doctrine breadth.

3. CONCLUSION

⁷³ Crews. K.D., *Fair Use*, Columbia University Libraries, available at: <https://copyright.columbia.edu/basics/fair-use.html>.

⁷⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, at 579 (1994) (internal quotation omitted).

⁷⁵ Leval. P.N., *Toward a Fair Use Standard*, Harvard Law Review, Vol. 103, No. 5, 1990, at *1111, p. 4.

⁷⁶ *Ibid.*

⁷⁷ See *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

Twelfth International Scientific Conference
KNOWLEDGE WITHOUT BORDERS
31.3-2.4.2017, Vrnjacka Banja, Serbia

As a conclusion, speaking of the fair use doctrine, what is remarkable to be noticed is that this doctrine allows the courts to freely decide if and when a use of a copyrighted work is infringing the rights of the copyright holder. This leads to insufficient case law in the field of copyright and further to countless legal disputes since the fair use test applies on every new purpose of a use of a copyrighted work. In my opinion, one thing that at least in this context could improve the application of the fair use test could be the requirement that every new purpose of a use should satisfy the four fair use factors simultaneously, and not just some of them. However, we should bear in mind that there is no such system of protecting copyrights and providing for their exceptions, i.e. copyright law that will be good enough to satisfy the both sides of the balancing process, because each new system or method will have its own strengths and weaknesses. Subsequently, the balance between the copyright holders and the content users, could never be fully and constantly achieved and maintained. On top of it, given the nature of copyright and the subject matter it regulates, there always be satisfied and dissatisfied party, as there is in every other sphere of the law and lawsuits in general.

REFERENCES

- [1] S. Copyright Act, Section 106 and Section 107
- [2] US House of Representatives, Report No. 1476, 94th Congress, 2nd Session, Copyright Law Revision
- [3] Leval. P.N., *Toward a Fair Use Standard*, Harvard Law Review, Vol. 103, No. 5, 1990
- [4] Tysver. D.A., Fair use in Copyright Law, BitLaw, available at: http://www.bitlaw.com/copyright/fair_use.html
- [5] Crews. K.D., Fair Use, Columbia University Libraries, available at: <https://copyright.columbia.edu/basics/fair-use.html>
- [6] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)
- [7] Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)