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Fair Use

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By Jen Dukarski, MPA Deputy General Counsel

You just found the perfect accompaniment for your piece. It may be an image taken from Facebook or a short video found on YouTube. You take the material and run with it thinking, “not a big deal; it’s fair use.” But is it?

What is Fair Use?

Copyright law tends to favor the journalist and embrace the need for reporting and social commentary. But as the nature of media has evolved to embrace access to materials on the internet, the risks have also increased. To be confident in using materials, a fair use assessment is recommended.

The U.S. Copyright Act establishes four factors that must be balanced determine if the use of a copyrighted work is a “fair” use. These include:

- 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.

No single category rules the day. You have to consider all four factors for each clip, video, book quote, or online content that is used.

1. The Purpose and Character of the Use.

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The first factor looks at the way the material is being used. When material is used for the journalistic tasks of criticism, comment and scholarship, it is more likely to be a fair use. In the past, courts often looked to whether the use was for the good of public or for private commercial gain. Although that test is still applied, courts have become more accepting of companies making money using other's copyrighted material. The Ninth Circuit Court of Appeals found in favor of South Park when it created a parody of Samwell's "What What" song in its 2008 episode titled "Canada on Strike." In the famous episode, the character Butters made his own version of the song to become an internet sensation. The episode, lampooning the song, critiqued the viral video culture, ultimately establishing that for-profit use (by Viacom) wasn't a barrier to succeeding on fair use.

2. The Nature of the Copyrighted Work.

This factor looks at the characteristics and attributes of the work itself and is one of the least analyzed factors. Generally courts tend to give greater protection to creative works and thus use of nonfiction works are more likely to be found fair use than use of works of fiction.

3. The Amount or Substantiality of the Portion Used.

In a nutshell: the less that a work is used, the more likely it is to be found a fair use. The "amount" used is usually evaluated relative to the length of the entire original and in light of the amount needed to serve a proper objective. But the test isn't just a percentage test. Copying the central piece or the "heart of the word" of an article may be copyright infringement even if it is a small part of the overall work. On the other hand, if commentary or criticism is the central aspect of the copying, copying significant amounts of the work may be necessary to convey the message. In a 1995 case, the Washington Post used three small quotes from Church of Scientology texts that were found on the internet. The Virginia court determined that only a small amount of material had been used from the Scientology doctrine and, when paired with the use as commentary, it was fair use.

4. The Effect of the Use on the Potential Market for or Value of the Work.

The effect of the use on the potential market has been considered the single most important element of fair use. This factor assesses whether widespread distribution of an article containing copyright work would harm the potential market for the original work through diminished potential sales and theft of the original work's market. To some degree, this depends upon the purpose of the copying. If the purpose is commercial, it is easier for the copyright holder to demonstrate an adverse market impact. Conversely, noncommercial uses, such as research or scholarship, make it more difficult for the copyright holder to demonstrate adverse market impact. The fact that the copyright holder doesn't market a similar product and that the copy from which the copy is made is lawfully acquired also favor a finding of fair use.

As you can see, determining "fair use" involves subjective judgments such that it is difficult to say with certainty that a particular use is fair use or copyright infringement. Nonetheless, working with your Butzel counsel in applying these factors are important to confidently using other individual's copyright protected work.

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Jennifer Dukarski

734.213.3427

dukarski@butzel.com