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Lexis Practice Advisor Intellectual Property & Technology

Exclusive Rights and Limitations

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Overview

Section 106 of the 1976 Copyright Act confers six exclusive rights on the copyright owner. These rights include the exclusive power: to reproduce the work; to prepare derivative works based upon the work; to distribute copies of the work; to publicly display the work; to perform the work; and, in the case of sound recordings, to perform the work publicly by means of a digital audio transmission. Each exclusive right may be owned and enforced separately. These exclusive rights are limited, however. The doctrine of Fair Use, for example, permits a use of all or a portion of a copyrighted work that would otherwise violate a copyright owner's exclusive right if such use is for criticism, comment, news reporting, teaching, scholarship, or research. A determination of fair use depends on a four-factor balancing test and varies significantly based on the facts of the particular use. The First Sale doctrine limits the distribution right in that it provides the copyright owner with the right to control the initial distribution of the copyrighted work, but allows the owner of any lawful copy thereafter to dispose of it in any manner that they wish.

What are the Copyright Owner's Exclusive Rights?

Explanation of Exclusive Rights

Although people generally refer to owning "a" copyright in a work, in fact a copyright comprises a bundle of six separate and independent rights that are exclusively held by the copyright owner – i.e., a monopoly over those rights – for the period of time that the copyright remains in effect. Exclusivity means that only the copyright owner has the right "to do and to authorize" others to do any of the six activities enumerated in Section 106 of the Copyright Act. When someone other than the copyright holder engages in one of the activities without obtaining authorization from the copyright holder – without a license – copyright infringement occurs (unless the user can successfully establish fair use or other defense or exception to a claim of copyright infringement).

A copyright owner exclusively controls the right:

1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

4. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
5. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
6. in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

It is important to understand that the exclusive rights that comprise a copyright are "divisible" – meaning that each of the rights may be licensed and enforced separately. Thus, an author may assign to her publisher the exclusive rights "to reproduce the copyrighted work in copies" (i.e., make copies of the book) and "to distribute copies . . . to the public by sale" (i.e., sell the books to bookstores), but assign to a motion picture produce the exclusive rights "to prepare derivative works" (i.e., develop the book into a movie) and "to perform the copyrighted work publicly" (i.e., show the film in theaters).

Furthermore, each of the exclusive rights may be further divided. Thus, the author in the example above might license to one producer the right to produce a theatrical motion picture based on the book, and to a second producer the right to produce a television series based on the book.

As these examples suggest, more than one exclusive right may be implicated by a particular activity. Thus, allowing people to purchase and download a digital copy of a copyright-protected work without the permission of the copyright holder would simultaneously violate the copyright owner's exclusive rights of reproduction and distribution.

It is worth noting that Section 106 not only grants copyright owners the exclusive rights to "do" each of the activities in connection with their work, it also includes the right to "authorize" others to perform these acts. The legislative history of the statute suggests that the inclusion of the authorization right codifies principles of secondary liability for copyright infringement – i.e., contributory, vicarious and inducement liability.

For a more detailed discussion on ownership of individual rights, see Transfer of Ownership — Method of Transfer — Transfer of One or More Exclusive Rights.

The Right to Reproduce the Copyrighted Work

Perhaps the most basic and fundamental copyright is the right "to reproduce the copyrighted work in copies or phonorecords" granted pursuant to Section 106(1). Simply put, this is the right to make "copies," which the Copyright Act defines as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." As this definition suggests, courts have long held that "copies" include digital copies of works stored on electronic media. The right also includes the right to make "phonorecords," which are audio copies of a work that are not accompanied by a motion picture or other audiovisual work.

A work must be "fixed" in order to be eligible for copyright protection. Likewise, a copy must be fixed in order to infringe upon the reproduction right. The Copyright Act provides that "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord…is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101. Thus, for the reproduction right to be violated, the reproduction must be fixed in a material object for more than a transitory duration. The issue of what constitutes a "fixed" copy has become increasingly important in connection with litigation involving digital products, such as DVRs and streaming video devices, that employ buffer technology that make copies of digital works on electronic media that exist for transitory periods.

Because the reproduction right grants the copyright owner the exclusive right to create, or to authorize the creation of, multiple copies of the copyrighted work, this right also empowers the copyright owner to prevent third parties from creating unauthorized copies of the copyrighted work.

The Right to Prepare Derivative Works Based Upon the Copyrighted Work

A derivative work is a "work based upon one or more preexisting works…." 17 U.S.C. § 101. A copyright owner has the exclusive right to create, or to authorize the creation of, derivative works based upon the copyrighted work. Thus, an owner is entitled to deny consent to the inclusion of its work in any compilation, adaptation, translation or other derivative work created by a third party.

By way of illustration, this right grants:

- an author of a novel the exclusive right to create a film based upon his or her novel;
- a photographer of a particular photograph the exclusive right to create a sculpture in the likeness of images in the photograph; and
- a software developer the exclusive right to develop the second generation of the software program.

There is some overlap between the right to prepare derivative works and the right to reproduce, because the derivative work – by definition – must include some elements of the original. However, there is no statutory requirement that the derivative work be "fixed." Thus, publicly performing a play based on a copyright-protected book would violate the author's right to prepare derivative works (as well as the public performance right), even if the play was never scripted or recorded.

The Right to Distribute Copies of the Copyrighted Work

The copyright owner has the exclusive right to sell, transmit, or otherwise distribute copies of the work, or to authorize the sale, transmission or other form of distribution of the work, to the public. Thus, the copyright owner may prevent distribution of unauthorized copies of the work.

The distribution right may be implicated even where the distributor is not responsible for the production of the infringing copies. As such, it is possible to infringe this right without also infringing the exclusive right to reproduce the work. For example, the seller of unauthorized copies of a book would be liable for violating the distribution right. If the seller also printed the unauthorized copies, he or she would infringe upon both the reproduction and distribution rights.

Only distributions "to the public" are covered by the Copyright Act. Thus, a person in possession of unauthorized copies of CDs will not violate the distribution right by handing out the copies to members of his or her family (although other rights may be implicated in connection with the copies).

The distribution right is limited by the First Sale Doctrine, which provides that the copyright owner has the right to control the initial distribution of the copyrighted work, but thereafter the owner of a lawful copy may dispose of it in any manner. For a more detailed discussion on the First Sale Doctrine, see First Sale Doctrine.

The Right to Publicly Perform the Copyrighted Work

Within the Copyright Act, "perform" means "to recite, render, play, dance or act [the work]…or, in the case of a motion picture or audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101. Thus, in copyright parlance, plays and films are "performed" in theaters and songs on the jukebox are "performed" in a restaurant.

The public performance right enables the copyright owner to control when the work is performed publicly. A work is performed "publicly" when it is performed (1) before a large group of unrelated people; (2) in a place that is open to the public; or (3) if it is transmitted or broadcast via radio or television. It is not required that the group of unrelated people be gathered in the same place to qualify as a public performance.

For example, showing a film at a restaurant to an unrelated group of people without the authorization of the copyright owner is an infringement of the public performance right. An unauthorized broadcast of a film on a cable network, where viewers are able to watch the film separately from their own homes and at different times, is likewise an infringement of this right.

While the rights to reproduce, to prepare derivative works and to distribute apply to all copyrighted works, the public performance right applies only to:

- literary works,
- musical works,
- dramatic works,
- choreographic works,
- pantomimes,
- motion pictures, and
- audiovisual works.

The Copyright Act also provides an exclusive right to perform the copyrighted work via digital audio transmission. This right applies only to sound recordings. Courts have held when Internet radio stations "stream" songs to their listeners, only the public performance right (and not the distribution right) is implicated. Likewise, courts have held that allowing users to download copies of songs to their computers (without contemporaneously playing the music) implicates only the reproduction and distribution rights, not the public performance right.

The Right to Publicly Display the Copyrighted Work

In addition to the public performance right, the following types of works are subject to a public display right:

- literary works,
- musical works,
- dramatic works,
- choreographic works,
- pantomimes,
- pictorial works,
- graphical works,
- sculptural works, and
- still images from motion pictures and other audiovisual works.

Only unauthorized displays to the "public" may constitute infringement. The meaning of "public" is the same in this context as with respect to the right of public performance ((1) before a large group of unrelated people; (2) in a place that is open to the public; or (3) if it is transmitted or broadcast via radio or television). Both the display and the performance right can be infringed by directly performing or displaying the copyrighted work, or by doing so through the aid of a device or process (e.g., a television, radio or computer).

It is important to note the distinction between the right to reproduce and the right to display publicly. Where merely showing an image on a computer screen does not implicate the right to reproduce because it does not result in a duplication of the work that is fixed, it implicates the display right if the image is shown publicly.

The public display right is limited by a variant of the First Sale Doctrine encoded in Section 109(c) of the Copyright Act, which permits the lawful owner of a copy of a work to display that copy publicly. Thus, the owner of an authorized copy of a painting may display that copy in a gallery, even though the artist retains ownership of the copyright in the work. For a more detailed discussion on the First Sale Doctrine, see First Sale Doctrine.

Conducting a Fair Use Analysis

Fair use is probably the most oft-invoked defense to a claim for copyright infringement. Encoded in Section 107 of the Copyright Act, the fair use defense provides that even if a protected work is used without the permission of the copyright holder, the unauthorized use will not constitute an infringement if the use is a "fair use." The burden of establishing that a use is fair generally rests with the fair use proponent.

Whether a particular use is fair is a highly fact-intensive inquiry that weighs many different factors and depends on the unique facts and circumstances of each case. While Congress and the courts have provided certain guideposts and ground rules that help establish whether a particular use is a "fair use," it is often extremely difficult or even impossible to predict how a court will rule when presented with an untested fair use scenario. Exacerbating the uncertainty is the fact that the Supreme Court has instructed courts to make fair use decisions that further the ultimate goal of copyright pronounced in the US Constitution: to "promote progress of science and the arts" -- a determination that may differ depending on the subjective viewpoints of the court. Moreover, courts have observed that fair use is an “equitable rule of reason” and that outcomes may shift over time, as technological innovation and changes in cultural norms alter society's view of what is considered reasonable and acceptable behavior. Finally, the circumstances under which fair use may be invoked are limitless, with new creations constantly fueling additional fair use fact patterns. The point, of course, is that fair use, like many areas of law, is not black and white, which is why there are no shortage of lengthy court decisions, treatises and articles pontificating over the many fascinating, but often vexing, questions that are raised by a well-pled fair use defense.

That being said, copyright attorneys are often asked to evaluate whether, in their opinion, a particular use of a copyrighted work would be deemed to be a fair use and therefore non-infringing under the Copyright Act. This question may come from both copyright owners, considering whether to pursue action against an unauthorized use, and users of copyright-protected content who want to weigh their risks if they proceed without a license.

Performing a fair use analysis will help guide the client’s decision to:

1. seek a license from the copyright holder;
2. abandon the use altogether; or
3. use the copyrighted work and defend any claims under the banner of fair use.

When tasked with making a fair use evaluation, the following steps will help guide the analysis:

1. Review the Section 107 preamble and the four factors;
2. Review the lead fair uses cases from the Supreme Court and the Courts of Appeals, with particular emphasis on the circuit court that would decide your case on appeals
3. Identify the fair use decisions that share the most characteristics with your case;
4. Weigh your case in light of the above precedents; and
5. Decide whether to seek a license, abandon the use or go for fair use.

Section 107

The starting point for any fair use analysis is Section 107 of the Copyright Act. 17 U.S.C. § 107. This section contains a "preamble" followed by four "fair use factors" that courts are directed to consider (though not to the exclusion of other court-generated factors) when deciding whether a use is fair.

Preamble

The preamble to the fair use section provides:

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.

A few things to keep in mind when digesting the preamble:

- Sections 106 and 106A (for visual artists) grant copyright holders the exclusive rights in their works. The preamble makes clear that, notwithstanding the exclusive right of copyright holders to prevent others from making unauthorized uses of their works, the "fair use" of those works is "not an infringement of copyright."
- The purposes enumerated in the preamble ("criticism, comments, news reporting…) are illustrative and not exhaustive. Many cases have found fair uses that do not involve these purposes.
- Though illustrative, the purposes enumerated in the preamble are often treated as quintessential fair uses with "favored" status.
- Courts treat fair use as an affirmative defense, so the burden rests on the fair use proponent to prove that its use is fair.

Fair Use Factors

Probably the most familiar and important aspect of the fair use analysis is the four factor test in Section 107, which provides:

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.

A few general notes to keep in mind when digesting the four factors:

- By stating that a determination regarding fair use "shall include" each of the four factors, Congress is indicating that (a) application of the four factors is obligatory, but (b) courts may consider other factors as well in performing its analysis.
- While courts are supposed to analyze and weigh all four factors, the first factor (purpose and character), followed by the fourth factor (market harm), tend to get the most attention.
- The four factors are not supposed to be "counted up," but each evaluated independently and then weighed together in a holistic manner. Even if the score is 3 factors to 1, the 1 factor may win out depending on the facts and circumstances of the case.
- The four factors are to be analyzed in light of the purposes of copyright as expressed in the U.S. Constitution: "To promote the Progress of Science and the useful Arts."

Purpose and Character

- Since the Supreme Court's 1994 decision in Campbell v. Acuff-Rose, 510 U.S. 569 (1994), courts applying the First Factor have mainly focused on two elements: (1) whether the new use is "transformative," and (2) whether the new use is of a commercial or non-commercial character.
- The test for determining whether a new use is "transformative" is "whether the new work merely supersedes the objects of the original creation, supplanting the original, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (internal citations, quotation marks and brackets omitted).
- In recent years, the transformative use test has been given far greater weight than commercial/noncommercial character. Some scholars and practitioners have argued that the transformative use test has "swallowed" the fair use test.
- The First Factor is often closely linked with the Fourth Factor (market harm), under the theory that the more transformative the new work, the less potential there is for undermining the market for the original.

Nature of the Copyrighted Work

- Whereas the First Factor looks at the purpose and character of the new work, the Second Factor looks at the copyrighted work and considers how close the work is to the core of copyright protection, with highly expressive, original and creative content (e.g., fiction) earning the highest level of protection, and content containing purely factual information (e.g., non-fiction) receiving the lowest.
- Unpublished works receive more protection than published works.
- The Second Factor generally receives the least amount of attention from courts and rarely controls the outcome of a case.

Amount and Substantiality

- The Third Factor looks at how much of the copyrighted work is used in relation to the copyrighted work as a whole.
- The general rule is that the more that is taken from the original work, the lower the likelihood that the use will be fair.
- The Third Factor (amount taken) is not considered in a vacuum, but is considered in light of the First Factor (purpose of the use). Thus, while it may be fair use for a parodist or critic to use a copyrighted work for the purpose of "conjuring up the original" in the mind of the audience, the Third Factor will begin to tilt against fair use if more is taken than needed to achieve that purpose.
- Courts have found that the use of an entire work may constitute fair use, including when the whole work is used for the purpose of reverse engineering source code, videotaping television programs for personal home use and copying web pages for a search engine index.

- The Third Factor examines both the quantity and quality of the amount taken. Thus, when the "heart of a work" is taken, even if it is a relatively small portion of the whole work, the Third Factor may weigh against fair use.

Market Harm

- The Fourth Factor looks at how the new use will impact the market for the original work. If the new use serves as a substitute or undermines the market for the original, the use is less likely to be fair; uses that serve a different purpose or audience are more likely to be fair.
- The test looks at the "potential market" for the original, which courts have interpreted to encompass "traditional, reasonable, or likely to be developed markets."
- Copyright owners need not demonstrate "actual" harm, such as direct evidence of lost sales or profits, but may demonstrate a likelihood that the new use will have an adverse effect on the market for the original.
- When considering market harm, courts look not only to the market harm that may flow from the particular use at issue, but consider the impact that a fair use determination will have on the market should the challenged use become "widespread."

Tips on Advising Clients on Fair Use

Clients wishing to use a copyrighted work may seek your advice as to whether the use is a fair use, and thus non-infringing.

Generally speaking, clients interested in using a third party's copyrighted work must decide whether to:

- seek permission from the owner,
- abandon the proposed use, or
- use the work without permission and hope for the best (i.e. that the owner doesn't make a claim, but if it does, that the use is fair).

Which course of action to take depends on a number of factors, including:

- the merits of a fair use defense,
- the ability to adjust the proposed use to strengthen the client's fair use argument,
- the anticipated distribution/audience of the use,
- the litigiousness of the copyright owner,
- the client's potential exposure from a lawsuit,
- the client's ability to obtain a license from the copyright owner for a reasonable fee,
- the client's tolerance for risk and litigation, and
- the client's ultimate objective.

Because fair use is such a malleable doctrine, the ultimate decision of which path to take is a business judgment to be made by your client.

To aid clients in this process, you should consider the following:

(1) Given the client's proposed use, is permission even necessary?

Certain uses may be permissible on grounds other than fair use. For instance, works that are not subject to copyright protection at all—such as works in the public domain (e.g., works published before 1923 or works with expired copyright terms) or works created by the federal government—may be freely used without permission. For a more detailed discussion on works in the public domain, see Works in the Public Domain.

In addition, some copyright owners choose to license their works through various types of public copyright licenses, such as open-source software licenses or Creative Commons licenses. Such licenses generally permit the public at large to copy, distribute, and/or modify a copyrighted work under certain specified conditions. You might advise your client to research whether the type of use being considered is also available pursuant to one of these licenses. If your client wishes to use such a work, you should advise your client about the importance of complying with the license terms. Often, this includes providing attribution to the copyright owner and a link to the terms of the license.

(2) What is the likelihood that the proposed use is fair?

Using the four fair use factors in Section 107 of the Copyright Act and fair use case law, you should analyze the strength of the argument that the proposed use is fair. Where the fair use analysis weighs in favor of your client, it may reduce the likelihood of receiving a claim from the copyright owner. However, fair use is merely a defense to an infringement claim. It does not preclude the copyright owner from bringing a claim against the use. The client should understand that fair use decisions are often impossible to predict, so there is always a risk of an adverse ruling even when the factors seem to stack up in the client's favor. For a more detailed discussion on analyzing the the fair use factors, see the Fair Use Factors above.

(3) Are there ways to strengthen the fair use defense by modifying the proposed use?

You and your client should consider whether modifications may be made to the proposed use that will strengthen the fair use argument. For example, if the client is using unlicensed video footage, is there a way to limit the amount taken while still meeting the client's goals? Are there ways to make the proposed use more "transformative," either by further altering or commenting upon the original? These types of discussions give copyright practitioners an opportunity to collaborate with their clients in creatively thinking about the project.

(4) Who will see the proposed use?

When weighing the risks of whether to rely on fair use, it is important to consider who is likely to become aware of the proposed use. A different level of risk applies to the use of a photograph in a live, unrecorded presentation, than to the same use in a presentation that is recorded and widely distributed on the Internet.

(5) Is the copyright owner likely to assert a claim?

Irrespective of the strength of your client's fair use defense, the copyright owner may always assert a claim either by sending a cease and desist letter or filing a lawsuit. Thus, you should consider the likelihood of the copyright owner filing suit—for instance, has the copyright owner been particularly litigious in the past, or regularly licensed the work at issue? Would your client's use of the work offend the copyright owner (as with parodies or satires) or compete in the same market as the copyrighted work? Such uses are more likely come to the copyright owner's attention, and potentially trigger litigation. Even if your client ultimately prevails "on the merits," it is important to advise the client regarding the costs that will be incurred to get to that result.

(6) What is the client's exposure in a copyright infringement lawsuit?

A client must consider its potential exposure in the event he or she is sued for copyright infringement. If the fair use defense fails, the client may be required to pay the plaintiff its actual damages resulting from the infringement and to disgorge any profits that were attributable to the infringement. In the alternative, the client may have to pay statutory damages, which can go as high as $150,000 per infringed work. Irrespective of the ultimate outcome of the lawsuit, the client will have to cover its costs and attorneys' fees to defend against the infringement claim and assert the fair use defense. It is important to note that the Copyright Act contains a "fee shifting" provision that allows the prevailing party in a copyright lawsuit, including a defendant who successfully asserts a fair use defense, to seek an award of attorneys' fees. The potential of

obtaining attorney's fees from the other side mitigates somewhat the risks of defending against a copyright lawsuit with a strong fair use defense.

(7) What are the risks associated with seeking permission?

Seeking permission to use a copyrighted work has its own set of risks, including that:

- obtaining a license may be costly,
- the copyright owner may insist on burdensome conditions to the license,
- the copyright owner may refuse to license the work outright, or
- ascertaining or locating the copyright owner may be difficult or impractical.

Note that if your client requests permission to use the work and the copyright owner refuses, such refusal will not weigh against a finding of fair use. However, your client's use of the work in the face of the owner's refusal raises the likelihood of a claim being brought. Thus, when seeking permission, your client should be prepared to abandon use of the work if denied a license or if it is unwilling to comply with any burdensome requests.

Note also that, in some circumstances, such as with parodies, a copyright owner's unwillingness to grant a license may be indicative of a fair use. See Campbell v. Acuff-Rose ("The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.").

(8) Does your client have the stomach to litigate?

Aside from the "direct" costs of attorneys fees and potential damage awards, litigation can be costly in other regards, including in terms of opportunity costs, emotional energy and public perception. A client should be aware of these risks before deciding to proceed with the unlicensed use of a work, especially when backed by a tenuous fair use position.

(9) What are your client's objectives in using the work?

It is important to consider the client's objectives in using the work. Perhaps the client has invested in a new technology (e.g., Google's mass digitization of books or DISH's ad-skipping DVR technology) and wishes to shape the boundaries of fair use jurisprudence, by either having its use go unchallenged or prevailing in a lawsuit. Such a benefit may, from the client's perspective, outweigh any risks.

Leading Fair Use Cases

When it comes to fair use, knowing the facts and law of the leading cases is imperative to providing sound counsel to your clients. The following list of cases in not intended to be exhaustive, but represents some of the most important fair use cases that, in my experience, often help guide courts and counsel when faced with difficult fact patterns:

Supreme Court

The Supreme Court has dealt with fair use on a number of occasions, but its most important pronouncements regarding fair use flow from the following trio:

1. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984), which held that the manufacture and distribution of a videocassette recorder used by people at home to "time shift" copyright-protected television broadcasts is a fair use.

2. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985), which held that a magazine's publication of short excerpts from the unpublished memoirs of President Harry Truman was not fair use because the magazine published the "heart" of the memoirs and thereby undercut potential sales.
3. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), which held that a hip-hop group's use of the famous guitar riff and lyrical refrain from Roy Orbison's "Pretty Woman" was fair use because the group was parodying Orbison's original song (although the Court remanded for a trial to determine whether the group's use of the riff went too far).

Circuit Cases

There is little debate that most of the important fair use decisions tend to come out of the Second and Ninth Circuits, which is no surprise given that New York City and Los Angeles are the media, technology and entertainment capitals of the world. Below is a sampling of some of the leading fair use cases to come out of those and other circuits:

1. Using a copyright-protected work as a "biographical anchor" may be transformative and a fair use. Sofa Entm't, Inc. v. Dodger Prods., 709 F.3d 1273 (9th Cir. Cal. 2013) (use of video clip from Ed Sullivan Show in live-stage production about The Jersey Boys was fair use); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006) (reproduction of reduced-size Grateful Dead concert posters within book was fair use).
2. "Appropriation art" may or may not constitute fair use depending on the parodic purpose of the use, the extent to which the use is deemed to be transformative and other amorphous factors. Cariou v. Prince, 714 F. 3d 694 (2d Cir. 2013) (certain paintings appropriating photographs of "rasta" men were sufficiently transformative to constitute fair use even though they did not comment on the original photographs; remanding to determine whether other paintings were transformative enough to constitute fair use); Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006) (artist's collage appropriating photographs of women's legs from glossy fashion magazine was sufficiently transformative because of artist's social commentary); Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992) (same artist's sculpture modeling a photograph of couple holding a "string of puppies" was not transformative because the court did not accept artist's stated commentary purpose).
3. A trivia game based on the popular television series Seinfeld, which lifted dialogue from the show and used other expressive elements, was not fair use because, among other things, it negatively impacted the producer's market for derivative works. Castle Rock Ent. v. Carol Pub. Group, Inc., 150 F.3d 132 (2d Cir. 1998).
4. A book mimicking the style of Cat in the Hat to retell the story of the O.J. Simpson murder trial was satire, not parody, and not fair use, because it did not poke fun at the Dr. Seuss book but used its entertainment value to push commercial sales of the new book. Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997).
5. An oil company's reproduction and archival storage of scientific journal articles for the purpose of future retrieval and reference was not a fair use in light of a developing market for the licensing of individual articles. American Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1995).
6. A copy shop that creates and sells "course packs" to students for university classes is not fair use. Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381 (6th Cir. 1996).
7. A search engine's reproduction of entire web pages and digital images on the Internet for the purpose of building a search index and/or "thumbnails" that point to the location of the content is fair use. Perfect 10 v. Amazon.com, 508 F.3d 1146 (9th Cir. 2007); Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).
8. "Intermediate copying" of the entire source code of a computer program for the purpose of viewing the code's expression and creating a new, non-infringing program, is fair use. Sony Computer, Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000); Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1993).

First Sale Doctrine

Copyright owners hold the exclusive right "to distribute" their copyright-protected works. However, an important exception to this exclusive right is the First Sale Doctrine. Embodied in Section 109(a) of the Copyright Act, the First Sale Doctrine allows the purchaser of an authorized copy of a work to dispose of it in the manner of his or her choosing. This right extends only to that particular copy.

By way of illustration, the First Sale Doctrine would permit:

- The owner of DVDs and video games to sell them at a garage sale;
- The owner of a particular copy of a novel to sell that copy at a used bookstore; and
- The owner of a painting to sell the painting at an auction.

This provision of the Copyright Act requires that the particular copy at issue be "lawfully made under this Title," meaning that the copy must be an authorized copy. 17 U.S.C. § 109(A).The U.S. Supreme Court has recently ruled that the copy need not be made domestically in order to meet this requirement. Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351 (U.S. 2013). Thus, under the First Sale Doctrine, copies lawfully made and sold abroad may also be disposed of at the discretion of the owner, without any geographic limitation.

Droit de suite is an exception to the First Sale Doctrine that enables the creator of a work of fine art to receive a royalty on the resale price of his or her work, giving the artist the opportunity to benefit from the increase in the work's value. It is generally accepted throughout Europe, but in the U.S., it is only recognized in California. In California, the artist receives 5% of the sale price if "the seller resides in California, or the sale takes place in California." Cal. Civ. Code § 986.

In passing the Digital Millennium Copyright Act in 1998, Congress declined to amend the First Sale Doctrine to apply to distribution of digital copies. Therefore, at present, this right does not apply to transfers of digital copies. In passing the Digital Millennium Copyright Act in 1998, Congress declined to amend the First Sale Doctrine to apply to distribution of digital copies. Therefore, at present, this right does not apply to transfers of digital copies. This was recently confirmed by a federal court in New York, which held that an online service had committed copyright infringement by allowing users to purchase and sell songs that had been lawfully purchased on Apple's iTunes Store. See Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013). The court found that the First Sale Doctrine did not protect the service from infringement because, from a technological perspective, the online transactions resulted in the unauthorized reproduction of the digital files, not in the transfer of the same digital files from one person to the next. Interestingly, however, the court signaled that the First Sale Doctrine likely would permit a person to buy or sell the actual media or device (e.g., an iPod or USB thumb drive) containing lawfully-obtained digital files.