

Summary of Fair Use Doctrine

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First Factor (Nature of Use)

Spectrum of commercial to educational uses, where commercial uses are less fair and educational uses are more fair. Some courts treat commercial uses as presumptively unfair (Sony), but Campbell rejected this presumption.

Courts will also consider if the use is transformative or just redistributive. Transformative uses “add something new, with a further purpose or different character, altering the first with new expression, meaning or message” (Campbell). Rarely, courts do not require adding something new if the use has a different purpose (Kelly v. Arriba, but compare Texaco). Transformative uses are more likely to be fair use, and the other three factors are less important (Campbell).

Second Factor (Nature of Work).

Spectrum of fact to fiction, where taking factual works is more fair and taking fiction is less fair.

Some courts deem taking unpublished works presumptively unfair (Harper & Row), but §107 was amended to supersede this presumption.

Some courts treat fact/fiction and published/unpublished as two separate sub-factors.

Third Factor (Amount/Substantiality of Portion Taken).

Some courts say that taking the entire work is presumptively unfair. Taking the “heart of the work,” even if a small amount, usually isn’t fair.

Fourth Factor (Market Effect).

The fourth factor is routinely characterized as the most important factor (Harper & Row). The factor evaluates (1) whether unrestricted and widespread conduct like the defendant’s would substantively and adversely impact the market, and (2) the harm to the market for derivative works when these derivative markets are “traditional, reasonable, or likely to be developed markets” (Texaco), but some courts give the copyright owner the option not to pursue a market (Castle Rock). Increasing demand for the underlying work doesn’t mitigate harm to a derivative market (Harper & Row; Napster).