**17.22 Copyright—Affirmative Defense—Fair Use**

 One who is not the owner of the copyright may use the copyrighted work in a reasonable way under the circumstances without the consent of the copyright owner. Such use of a copyrighted work is called a fair use. The owner of a copyright cannot prevent others from making a fair use of the owner’s copyrighted work.

 The defendant contends that [he] [she] [other pronoun] made fair use of the copyrighted work for the purpose of [criticism] [comment] [news reporting] [teaching] [scholarship] [research] [other purpose alleged]. The defendant has the burden of proving this defense by a preponderance of the evidence.

 In determining whether the use made of the work was fair, you should consider the following factors:

1. the purpose and character of the use, including whether the 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;
4. the effect of the use upon the potential market for or value of the copyrighted work; and

 [(5)] [insert any other factor that bears on the issue of fair use].

 If you find that the defendant has proved by a preponderance of the evidence that the defendant made a fair use of the plaintiff’s work, your verdict should be for the defendant.

**Comment**

 “[T]he ‘fair use’ doctrine . . . [is] an ‘equitable rule of reason’ that ‘permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’” *Google LLC v. Oracle Am., Inc.*, \_\_\_ U.S. \_\_\_, 141 S. Ct. 1183, 1196 (2021) (quoting *Stewart v. Abend*; 495 U.S. 207, 236 (1990)); *see also McGucken v. Pub Ocean Ltd.*, 42 F.4th 1149, 1157 (9th Cir. 2022) (citing *id.*). “[T]he fair use of a copyrighted work . . . is not an infringement of copyright.” 17 U.S.C. § 107. However, this instruction may be necessary if the parties consent to the jury determining the fair use question.

 “The Supreme Court has held that “[f]air use is a mixed question of law and fact.” *Harper & Row, Publishers, Inc. v. Nation Enters*, 471 U.S. 539, 560-69 (1985). But “the ultimate question whether . . . facts show[ ] a ‘fair use’ is a legal question for judges to decide de novo.” *Google, LLC*, 141 S. Ct. at 1199 (approving the Federal Circuit’s approach of “leaving factual determinations to the jury and reviewing the ultimate question, a legal question, de novo”). “Fair use may depend on factual findings, but the ultimate question of whether facts indicate fair use is legal in nature.” *De Fontbrune v. Wofsy*, 39 F.4th 1214, 1226 (9th Cir. 2022) (citing *Google LLC*, 141 S. Ct. at 1199); *McGucke*n, 42 F.4th at 1158 (noting that each of the statutory factors encompasses legal and factual questions, for example, how much of the copyrighted work was copied is a factual question (citation omitted)). “Fair use is . . . often resolved at summary judgment” because the parties “often dispute only the legal significance to be drawn from facts.” *McGucken*, 42 F.4th at 1158.

 While fair use is generally an affirmative defense, *see* *Tresóna Multimedia, LLC v. Burbank High Sch. Music Ass’n*, 953 F.3d 638, 647-52 (9th Cir. 2020), it is treated differently in the context of “takedown cases under the Digital Millennium Copyright Act. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1152-53 (9th Cir. 2016) (noting that in DMCA cases, the copyright holder must have a good faith belief that allegedly infringing use was not fair use before sending a “takedown” notice). *See* Instruction 17.29 (Copyright—Affirmative Defense—Limitation on Liability for System Caching). “The fair use doctrine ‘permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’” *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1175 (9th Cir. 2013) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994)).

 The Supreme Court and the Ninth Circuit have applied the fair use doctrine and the statutory factors in the context of computer programs. *See Google LLC*, 141 S. Ct at 1196, 1200-09 (holding that when “Google reimplemented a user interface, taking only what was needed to allow users to put their accrued talents to work in a new and transformative program, Google’s copying on Sun Java API was fair use of that material as a matter of law”); s*ee also Sony Computer Ent., Inc. v. Connectix Corp.*, 203 F.3d 596, 600 n1., 602-10 (9th Cir. 2000) (applying the § 107 fair use factors and holding that “Connectix’s reverse engineering of Sony’s BIOS extracted from a Sony PlayStation console purchased by Connectix engineers is protected as a fair use”).

As codified in the Copyright Act of 1976, the court must analyze [four] non-exhaustive factors in determining whether fair use applies.” *McGucken*, 42 F.4th at 1157; 17 U.S.C. § 107. The fifth numbered paragraph of this instruction reflects that the elements set forth in the statutory test of fair use in 17 U.S.C. § 107 are not exhaustive or exclusive. *See Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 627 (9th Cir. 2003) (“[W]e may not treat the [fair use] factors in isolation from one another.”), *overruling on other grounds recognized by Seltzer v. Green Day, Inc.,* 725 F.3d 1170, 1177 (9th Cir. 2013); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.,* 109 F.3d 1394, 1399 (9th Cir. 1997). In appropriate circumstances, the court may enumerate additional factors. *See Campbell v. Acuff Rose Music*, Inc., 510 U.S. 569, 585 n.18 (1994) (considering defendant’s state of mind/good faith as factor).

 For an analysis of the fair use factors, *see* *Google LLC*, 144 S. Ct. at 1201-08; *Campbel*, 510 U.S. at 578-94; *Harper & Row*, 471 U.S. at 560-69; *Tresóna*, 953 F.3d at 647-52

 The Supreme Court and the Ninth Circuit have considered the fair use factors in numerous cases. The following discussion includes a non-exhaustive list of cases that may help analyze the factors.

1. **Purpose and Character of the Defendant’s Use**, 17 U.S.C. § 107(1). The first factor focuses mainly on the degree to which the use is “transformative,” meaning “whether the new work merely supersedes 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.” *Campbell*, 510 U.S. at 579 (internal quotation marks, brackets, and citations omitted); *see also Google LLC*, 141 S. Ct. at 1203 (explaining that “‘transformative’ . . . .describe[s] a copying use that adds something new and important”); *Dr. Seuss, Enters., L.P. v. Comicmix LLC*, 983 F.3d 443, 445 (9th Cir. 2020) (discussing the benchmarks of transformative use). “Adding informative captions does not necessarily transform copyrighted works.” *De Fontbrune*, 39 F. 4th at 1225; *see Monge v. Maya Magazines, Inc.,* 688 F.3d 1164, 1176-77 (9th Cir. 2012) (concluding that publisher’s use of newsworthy wedding photographs of celebrities was not fair use because such use was, among other things, minimally transformative and indisputably commercial).

 Parody which “needs to mimic an original to make its point,” *Campbell*, 510 U.S. at 580-81, is regularly held transformative. *See, e.g., Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003) (concluding that “transform[ative] associations” with the Barbie doll constituted parody); *but see Dr. Seuss*, 983 F.3d at 452-53 (holding that infringing use was not parody and not transformative because it did not critique or ridicule the original).

 The first factor also considers “whether the use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C.§ 107(1). “If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weight against fair use, absent some other justification for copying.” *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith,* 143 S. Ct. 1272, 1282 (2023) (holding that commercial licensing to a magazine of an Andy Warhol silkscreen illustration derived from a copyrighted photo weighed against fair use under the “purpose and character” factor of the fair use defense). “The crux of the profit/nonprofit distinction is . . . whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” *Harper & Row*, 471 U.S. at 562; *see A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (“Commercial use does not require direct financial benefit, such use “weighs against a finding of fair use but is not conclusive”). “For-profit news articles are generally considered commercial uses.” *McGucken*, 42 F.4th at 1158.

Other cases that analyze the first factor include: *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 743 (9th Cir. 2019) (concluding website’s tagging of photos for searchable functionality was not transformative); *Tresóna*,953 F.3d at 648 (observing that use of song in show was for “nonprofit educational purposes and the resulting work was transformative”) (internal quotation marks and citation omitted); *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017) (concluding that removing objectionable content from film for streaming to customers is not transformative); *Seltzer*, 725 F.3d at 1176-77 (finding band’s use of artist’s original work in its four-minute concert video backdrop transformative because original work took on new and different meaning in video); *SOFA Entm’t, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1278 (9th Cir. 2013) (stating that use of seven- second television clip that introduces band as “biographical anchor” in musical about band supports finding of fair use); *Elvis Presley Enters.*, 349 F.3d at 629 (“Courts have described new works as ‘transformative’ when works use copyrighted material for purposes distinct from the purpose of original material.”).

**2. Nature of Copyrighted Work:** The second factor considers “the nature of the copyrighted work.” 17 U.S.C. § 107. This factor “typically has not been terribly significant in the overall fair use balancing.” *Dr. Seuss*, 983 F.3d at 456 (citation omitted); *see also* *Campbell*, 510 U.S. at 586 (considering whether work is factual or creative in nature and whether it was published) (citation omitted); *Seltzer*, 725 F.3d at 1178 (noting that prior publication by original author tends to support finding of fair use); *Napster*, 239 F.3d at 1016 (stating that use of copyrighted creative work cuts against fair use finding); *Sony Computer Ent. Am. Inc. v.* *Bleem*, 214 F.3d at 1028 (explaining that nature of copyrighted work is most relevant when “the original material and the copy are of a different nature”).

**3. Amount and Substantiality of the Portion Used.:** The third factor concerns “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). This factor considers “the quantitative amount and the qualitative value of the original work used in relation to the justification for that use.” *Dr. Seuss*, 983 F.3d at 456; *see also* *Campbell*, 510 U.S. at 586-88 (explaining importance of quantity of materials used, as well as their quality and importance). “This factor weighs against fair use if the infringer published ‘the heart’ of an ‘individual copyrighted picture’ without justification.” *McGucken*, 42 F.4d at 1162 (quoting *Monge*, 688 F.3d at 1178); *see* *Tresóna,* 953 F.3d at 651 (noting that although “qualitatively significant” portion of original work was used, because of transformative nature of new material, this factor “did not weigh against fair use”); *Seltzer*, 725 F.3d at 1178-79 (addressing when original works are copied in full because they are “not meaningfully divisible”); *Bleem*, 214 F.3d at 1028 (noting that fair use finding is not likely when there is high degree of copying and “essence” of copyrighted work and copy are similar).

**4.** **The Market** **Effect.** The fourth factor concerns the “effect of the use upon the potential market for or the value of the copyrighted work.” 17 U.S.C. § 107(4). This factor includes (1) the “extent of the market harm caused by the particular actions of the alleged infringer,” and (2) “whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original” and the “market for the derivative works.” *Campbell*, 510 U.S. at 590-91 (citations omitted).

 The effect of the defendant’s infringing work on the market for, or value of, the plaintiff’s copyrighted work is the most important fair use factor. *Harper & Row*, 471 U.S. at 566; *SOFA Ent., Inc.*, 709 F.3d at 1280 (explaining that this factor favors finding of fair use when use “advances [the alleged infringers’] own original creation without any reasonable threat to [the original author’s] business model”); *Monge*, 688 F.3d at 1181 (emphasizing that potential market exists independent of the copyright owner’s present intent not to publish copyrighted work); *Bleem*, 214 F.3d at 1026-27 (noting that the market effect “factor may be the most important, [but] all factors must be considered, and the commercial nature of the copies is just one element”; use for comparative advertising can support first fair use factor but negate fourth fair use factor); *Dr. Seuss*, 109 F.3d at 1403 (balancing public benefit that will result from the defendant’s use against personal gain the copyright owner will receive if use is denied); *Triad Sys. Corp.*, 64 F.3d at 1336-37 (noting that when defendant’s work competes in same market it is less likely fair use).

**5. Additional Factors:** *See* *Campbell*, 510 U.S. at 585 n.18 (considering the defendant’s state of mind and explaining that permission is not necessary if use is fair); *Harper & Row*, 471 U.S. at 562 (explaining that the propriety of the defendant’s conduct is relevant to the character of the use because fair use presupposes good faith and fair dealing) (quotation marks and citation omitted); *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) (“courts may weigh ‘the propriety of the defendant’s conduct’ in the equitable balance of a fair use determination” (citation omitted)).

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