# COPYRIGHT—AFFIRMATIVE DEFENSE—FAIR USE (17 U.S.C. § 107)

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 if it would advance the public interest. 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.

Defendant contends that defendant 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

Fair use is generally an affirmative defense. *See e.g. Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1068 (9th Cir. 2014). However, in Digital Millennium Copyright Act “takedown” cases, fair use is “treated differently than traditional affirmative defenses.” *Lenz v. Universal Music Corp*., 815 F.3d 1145, 1152-53 (9th Cir. 2016) (noting that in DMCA cases, copyright holder must have good faith belief that allegedly infringing use was not fair use before sending “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 first paragraph of this instruction describing the effect of a fair use finding is drawn from *Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1336 (9th Cir. 1995) (holding that fair use permits use of copyrighted material in reasonable manner without consent of copyright owner), *superseded by statute as stated in Apple Inc. v. Psystar Corp*., 658 F.3d 1150, 1158-59 (9th Cir. 2011). The fifth numbered paragraph of this instruction reflects the fact that the elements set forth in the statutory test of fair use in 17 U.S.C. § 107 are by no means 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*, 510 U.S. at 585 n.18 (considering defendant’s state of mind/good faith as factor).

For an analysis of the fair use factors, *see Campbell v. Acuff-Rose Music, Inc*., 510 U.S. 569, 578-94 (1994); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560-69 (1985); *Tresóna Multimedia, LLC v. Burbank High School Music Ass’n*, 953 F.3d 638, 647-52 (9th Cir. 2020). The instruction provided here is a basic instruction that could be supplemented by the court to suggest how the presence or absence of any particular factor may tend to support or detract from a finding of fair use. Similarly, the court may find it appropriate to supplement this instruction to suggest to the jury how to weigh the factors. *See Dr. Seuss Enters.*, 109 F.3d at 1399 (“Congress viewed these four criteria as guidelines for ‘balancing the equities,’ not as ‘definitive or determinative’ tests.” (citation omitted)).

The Ninth Circuit has considered numerous cases involving application of the fair use factors. The following citations identify cases that might be consulted concerning facts helpful to assessing whether a particular fair use factor exists:

1. **Purpose and Character of the Defendant’s Use**, including whether such use is of a commercial nature or is for nonprofit educational purposes: *Campbell*, 510 U.S. at 579-80, 583, 588 (explaining that the purpose of this element is to investigate the commercial nature of the use, whether the use was transformative, whether the use tended to supplant or supersede the infringed work, and whether the use parodied or “conjure[d] up” the infringed work); *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); *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); *Tresóna Multimedia, LLC v. Burbank High School Music Ass’n*, 953 F.3d at 648 (observing that use of song in show was for “nonprofit educational purposes and the resulting work was transformative”); *Disney Enterprises, 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); *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); *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); *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.”); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (stating that commercial use does not require direct financial benefit and that “commercial use weighs against a finding of fair use but is not conclusive”); *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596, 606-07 (9th Cir. 2000) (finding that computer virtual game station was fair use of reverse-engineered television game console because it was transformative and done to produce compatible product); *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1121 (9th Cir. 1997) (examining whether unauthorized use of news report by defendant news station competed with infringed work); *Dr. Seuss Entprs., L.P. v. ComicMix LLC*, 983 F.3d 443, 452–53 (9th Cir. 2020) (holding that infringing use was not parody and thus not transformative because it did not critique or ridicule the original). Generally, “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Campbell*, 510 U.S. at 579. “[P]arody has an obvious claim to transformative value.” *Id*.
2. **Nature of Copyrighted Work:** 17 U.S.C. § 107 (“The fact that a work is unpublished shall not itself bar a finding of fair use.”); *Campbell*, 510 U.S. at 586 (considering whether work is factual or creative in nature and whether it was published); *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); *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”); *L.A. News Serv.*, 108 F.3d at 1122 (reasoning that fair use finding is strongly favored when infringed work is informational, factual and news); *Sega Enters. Ltd. v. Accolade, Inc*., 977 F.2d 1510, 1524 (9th Cir. 1992) (examining fictitious or functional nature of work and “idea/expression distinction” with regard to utilitarian articles); *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 970 (9th Cir. 1992) (recognizing that audiovisual displays created by device that can alter features of copyrighted video game are not derivative in nature because “technology often advances by improvement rather than replacement”).
3. **Amount and Substantiality of Portion of Infringed Work Used by Infringing Work in Relation to the Copyrighted Work as a Whole:** *Campbell*, 510 U.S. at 586-88 (explaining importance of quantity of materials used, as well as their quality and importance); *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); *Connectix Corp.*, 203 F.3d at 606-07 (considering whether use occurs in reverse engineering of copyrighted work to gain access to unprotected functional elements of software); *Dr. Seuss Enters.*, 109 F.3d at 1402 (expressing that focus of this factor is question of substantial similarity and whether use was “reasonable in relation to the purpose of the copying” rather than whether use was fair); *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”).
4. **Effect of Use of Infringing Work on the Potential Market for or Value of the Copyrighted Work:** *Campbell*, 510 U.S. at 590-91, n.21 (assessing harm use can cause to plaintiff’s market and market effect if others also infringe through such use; considering if use displaces or substitutes for original work; examining effect of use on derivative market for protected work; noting that “the importance of this [fourth] factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors”); *Harper & Row, Publishers*, 471 U.S. at 566 (noting that effect of defendant’s infringing work on market for or value of plaintiff’s work is most important of fair use factors); *SOFA Entm’t, 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 copyright owner’s present intent not to publish copyrighted work); *Bleem*, 214 F.3d at 1026-27 (noting that effect on market “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 Enters.*, 109 F.3d at 1403 (balancing public benefit that will result from defendant’s use against personal gain 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); *Tresóna*, 953 F.3d at 651 (commenting that due to transformative nature of newly created work, consumer interested in original work would not substitute the newly created work); *ComicMix LLC*, 983 F.3d at 458–61 (explaining that market harm to plaintiff is not presumed but defendant bears burden of proof on this element).
5. **Additional Factors:** *Campbell*, 510 U.S. at 585 n.18 (considering defendant’s state of mind and explaining that permission is not necessary if use is fair); *Harper & Row, Publishers*, 471 U.S. at 562 (stating fair use presupposes good faith and fair dealing); *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)).

The Ninth Circuit has considered a number of cases involving copying of computer software. In all cases, the trial courts appropriately made use of the four-factor test for fair use. *See, e.g.*, *Connectix Corp.*, 203 F.3d at 608; *Triad Sys. Corp.*, 64 F.3d at 1336-37.

Parody often presents difficulties because the success of its imitative character depends on its ability to “conjure up” the original work that it parodies. This may create an issue of fair use. *See, e.g.*, *Campbell*, 510 U.S. at 588-89 (explaining importance of context when evaluating parodies and how parodies usually serve different market functions than original); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003); *Dr. Seuss Enters.*, 109 F.3d at 1399-1401.

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