

Action Speaks: What is Fair Use?

background reading from *The Public Domain: How To Find and Use Copyright-Free Writings, Music, Art and More*, Stephen Fishman, 2004.

1. What Is the Fair Use Privilege?

The purpose of the copyright laws is to advance the progress of knowledge by giving authors an economic incentive to create new works. Authors and their heirs are automatically granted the exclusive right to reproduce, adapt, perform, and display their works for many years; they are in effect, granted a monopoly over the use of their work.

However, there are situations where strict enforcement of an author's monopoly would hinder, rather than promote, the growth of knowledge. An obvious example is that of a researcher or scholar whose own work depends on the ability to refer to and quote from prior works. No author could create a new work if she were first required to repeat the research of every author who had gone before her.

2. When Is a Use a Fair Use?

The following four factors must be considered to determine whether an intended use of a copyrighted work is a fair use:

- the purpose and character of the use
- the type of work involved
- the amount and importance of the material used, and
- the effect of the use upon the market for the copyrighted work.

These factors are intended to be a highly flexible set of general guidelines. The

courts do not apply them in a mechanical or numerical way. For example, a use is not always fair if three of the four factors above are met. Moreover, not all factors are equally important in every case and it's up to the courts to decide what weight to give them. This makes determining whether a use is a fair use a highly subjective and unpredictable exercise.

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EXAMPLE 1: In 1980, a professional photographer named Art Rogers made a photograph of a man and his wife holding eight puppies. Rogers owned the copyright in the photo and exhibited and licensed it many times. Well-known artist and sculptor Jeff Koons obtained a copy of the photo and decided to recreate it as a sculpture. He gave the photo to artisans in his employ who proceeded to make four astonishingly faithful three-dimensional copies out of wood. Koons sold three of the sculptures for \$367,000. Rogers filed suit claiming that Koons had infringed on his copyright in his photo by creating the sculptures without his permission.

The Purpose and Character of the Use:

The Type of Work Involved:

The Amount and Importance of The Material Used:

Koons claimed the sculptures were a fair use. The court disagreed, concluding that all four fair use factors discussed above went against a finding of fair use.

Purpose and character of the use: The court concluded that the main reason Koons had the sculptures created was to sell them and make a lot of money. This militated against a finding of fair use.

Type of work involved: The photo was a creative and imaginative work, not a factual work like a biography. This also weighed against fair use.

Amount and importance of material used: Koons copied virtually the entire photo. This also weighed against fair use.

The effect of the use on the market value of the original: Although Koons's sculpture was in a different medium than Rogers's photo, the court held that it did have a detrimental impact on the potential market for the photo. The court reasoned that the existence of Koons's sculpture made it less likely that any other artist would be willing to pay Rogers for permission to make another sculpture based on the photo.