Chapter 8

Fair Use Doctrine

§ 8:1 Overview

The doctrine of “fair use” exempts certain unauthorized uses of copyrighted material from infringement liability. The central concept underlying the doctrine—an assessment of the “fairness” of the use
in question, based on a balancing of several factors—is inherently subjective. As a result, what one judge in his or her personal view regards as a “fair use” may sharply contrast with what another judge down the hall may think. Because this area of copyright law is fact-driven, it is often difficult to predict whether a “fair use” defense will succeed or fail solely by reading the precedential tea leaves. For that reason, the fair use doctrine consistently creates difficult issues for you and your clients.

It is ironic, then, that “fair use” is the copyright issue most likely to confront an average copyright user. Fair use issues arise in a wide variety of everyday contexts, including the classroom, the boardroom, the record industry, the theater, and the movie industry. Even posting a copy of a Dilbert cartoon in one’s workplace cubicle potentially raises fair use issues. Typical fair use conflicts likely to arise in practice include:

- copying for educational purposes both in the classroom and the boardroom;
- quoting from copyrighted sources in reporting, reviews, and scholarly research;

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2. See, e.g., Ringgold v. Black Entm’t Television, Inc., 126 F.3d 70, 74 (2d Cir. 1997) (stating, in dictum, that posting a New Yorker cartoon on the refrigerator implicates a copyright holder’s exclusive rights, but also noting that such use would be protected by fair use doctrine).
4. Compare L.A. News Serv. v. CBS Broad., Inc., 305 F.3d 924 (9th Cir. 2002) (Court TV’s unauthorized use of footage from Rodney King riots was fair use, given its transformative nature due to editing for dramatic effect and inclusion in video montage), with L.A. News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir.) (TV news station’s unauthorized use of footage from Rodney King riots raised genuine material factual issues as to whether use was fair; fact that footage was used for news reporting not dispositive of fair use when plaintiff’s business was to provide news footage to TV stations for a fee), cert. denied, 522 U.S. 823 (1997); Bill Graham Archives, LLC v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006) [using “thumbnail”-sized reproductions of concert posters in an illustrated biography of the Grateful Dead was fair use]; Ty, Inc. v. Publ’ns Int’l Ltd., 292 F.3d 512 (7th Cir. 2002) [collector’s guide containing photographs of Beanie Babies was critical and evaluative, and constitutes fair use; book containing pictures of entire collection with little added commentary is not likely fair use], cert. denied, 537 U.S. 1110 (2003); Kane v. Comedy Partners, 68 U.S.P.Q.2d [BNA] 1748, 1750–53 (S.D.N.Y. 2003) [brief clip of
• uploading or downloading copyrighted material to or from a website;\textsuperscript{5}

• “sampling” copyrighted material in sound recordings or including copyrighted material as scenery in a motion picture or theater set;\textsuperscript{6} and

• use of copyrighted material in a parody.\textsuperscript{7}

§ 8:2 Weighing the Costs—How to Advise Clients

Given the subjective nature of the fair use doctrine, even in these recurring situations, its exact contours are difficult to define precisely.\textsuperscript{8} In order to formulate the proper advice for clients with “fair use” issues, it is important to weigh the costs of obtaining rights from the copyright owner against the unavoidable uncertainties that arise when asserting an intrinsically subjective and case-specific “fair use” defense.

The saga of James Smith illustrates the dangers that may befall those who wrongly predict that their actions are protected by the “fair use” defense. Mr. Smith owned a company called “Michigan Document Services,” whose business was devoted, in large part, to preparing “coursepacks” for use by students at the University of Michigan. Instead of paying licensing fees after the decision in Basic Books, Inc. v. Kinko’s Graphics Corp.,\textsuperscript{9} Mr. Smith risked litigating whether plaintiff’s cable show to mock public-access television programs was fair use because it constituted commentary and criticism); Williamson v. Pearson Educ., Inc., 60 U.S.P.Q.2d [BNA] 1723, 1727–28 [S.D.N.Y. 2001] [clearly attributed quotations from plaintiff’s work on General George S. Patton were fair use in defendant’s book]; Video-Cinema Films, Inc. v. CNN, Inc., 60 U.S.P.Q.2d [BNA] 1415, 1422 [S.D.N.Y. 2001] [use of ten- to twenty-second clips from Robert Mitchum’s films in television obituaries was fair use].

5. See infra note 8.

6. See id.

7. See infra section 8:5.5.


preparation of coursepacks under these circumstances constituted a “fair use” of the copyrighted materials. He lost at the district court level, but convinced a three-judge panel of the Sixth Circuit to reverse. The Sixth Circuit agreed to rehear the case en banc, and reversed the panel on the fair use question. The Circuit then remanded to the district court for findings as to damages. One may legitimately question whether, in light of the relative ease with which rights to the works could have been cleared, the costs of litigation were justified in this case.

Given the litigation uncertainties surrounding a “fair use” defense (and quite apart from the ultimate merits of whether a given use is fair), it may, as a practical matter, be cheaper to obtain a license than to litigate. Even if the copyright owner refuses to license the work, seeking a license as part of a good-faith effort to avoid litigation should not weigh against a finding of fair use.

§ 8:2.1 Fair Use Checklist

This chapter illustrates the common themes that courts consider in determining whether a given use is “fair.” Measuring a proposed use against these factors should give you and your client a yardstick with which to assess the risks of relying on a fair use defense in a given situation, or, conversely, of bringing an infringement claim against a user who seeks the shelter of the fair use defense. In determining whether a given use is “fair,” consideration should be given to the factors outlined in the checklist that follows. These factors are then discussed in greater detail in the rest of the chapter.

- Does the use infringe on exclusive rights protected by a valid copyright?
- Is the use of the work “commercial” or for nonprofit purposes, such as criticism, commentary, education, or reporting?

13. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 n.18 [1994]. But see L.A. News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119, 1122 [9th Cir.] (“fact that [defendant] KCAL had requested a license but had been refused one” weighs against fair use because it indicates the knowing exploitation of protected material], cert. denied, 522 U.S. 823 [1997].
Is the use "transformative"—that is, does the use impart some new expressive meaning by using the copyrighted material—or is the use a naked copy of the original?

Does the use impact an existing market for the copyrighted material, or one likely to be exploited in the future?

How readily available is the original work (that is, is it an out-of-print book or a current page from a website)?

How much of the copyrighted material is being used?

Is the use consistent with industry practices?

Has the user acted in the good-faith belief that the use is fair, or has the user knowingly infringed?  

§ 8:3 Basis of the Fair Use Doctrine

The fair use doctrine "creates a limited privilege in those other than the owner of a copyright to use the copyrighted material in a reasonable manner without the owner’s consent." It permits unauthorized uses that otherwise would constitute infringement but are deemed noninfringing because they advance the underlying constitutional purpose of copyright law: to promote broad public availability of literature, music, and other forms of creative arts. The constitutional principle underlying fair use—that the balancing of interests embodied in the copyright law requires that certain unauthorized uses of copyrighted works be permitted—has been applied by courts since the 1800s, although a "fair use" provision was not statutorily adopted in the United States until the 1976 Act.

Section 107 of the Act, which is intended to codify the judiciary’s historical approach to the fair use doctrine, provides that:

14. See NXIVM Corp. v. Ross Inst., 364 F.3d 471, 478 (2d Cir. 2004) (the "propriety" of defendant’s conduct in a fair use analysis must be considered, but is not dispositive); MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981) ("The court may also consider whether the paraphrasing and copying was done in good faith or with evasive motive."); Bill Graham Archives, LLC v. Dorling Kindersley Ltd., 386 F. Supp. 2d 324 (S.D.N.Y. 2005) (fact that defendants informed plaintiffs of intentions and made efforts to license images shows good faith effort that weighs in favor of fair use), aff’d, 448 F.3d 605 (2d Cir. 2006).

15. Fisher v. Dees, 794 F.2d 429, 435 (9th Cir. 1986).

16. The fair use doctrine is thought to have been enunciated for the first time in the United States by Justice Story in Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841); see also Rogers v. Koons, 960 F.2d 301, 308 (2d Cir.) (fair use doctrine is "of ancient lineage"), cert. denied, 506 U.S. 934 (1992).

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. 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.

§ 8:3.1 What Is the Purpose of the Fair Use Doctrine?

That certain fair uses of copyrighted materials should be encouraged flows naturally from the copyright law’s constitutional mandate. Indeed, “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, ‘[t]o promote the Progress of Science and useful Arts.’”¹⁸ The fair use doctrine “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.”¹⁹ New uses that otherwise would be precluded by the author’s limited monopoly granted by the copyright law are permitted when they are “fair” uses.

[A] Balance in Copyright Law

The fair use doctrine is a means of balancing “the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other

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¹⁸. Campbell, 510 U.S. at 575 [citation omitted]; see also Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd., 996 F.2d 1366, 1374 [2d Cir. 1993] [key inquiry under § 107 is whether the unauthorized use “advance[s] the interests sought to be promoted by the copyright law”].

hand.” 20 Put another way, the doctrine is a recognition that the monopoly granted by the copyright law should extend only so far as is necessary to foster authors’ innovation and creativity. 21 Limiting copyright in this way preserves the incentive necessary to encourage authors to create new works, while simultaneously encouraging still other authors to make reasonable creative use of existing works.

[B] First Amendment Issues

The fair use doctrine serves the public interest in the reception and dissemination of information. 22 Accordingly, courts have held, at least implicitly, that First Amendment concerns are relevant in determining whether a use should be considered “fair.” 23 Because the doctrine accommodates First Amendment concerns, 23.1 however, most courts have not permitted defendants to raise the First Amendment as an independent defense to copyright infringement, 24 and the U.S.

21. “The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.” Id.
24. See Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd., 996 F.2d 1366, 1378 (2d Cir. 1993) [rejecting contention that “the First Amendment is broader than the fair use defense”]; New Era Publ’ns Int’l v. Henry Holt & Co., 873 F.2d 576, 584 (2d Cir. 1989) (“the fair use doctrine encompasses all claims of
Supreme Court has rejected an argument for broadening the fair use defense in cases implicating the First Amendment.\(^{25}\)

In *Online Policy Group v. Diebold, Inc.*, the court determined that the public interest warranted holding the unauthorized online publication of internal emails a fair use.\(^{25.1}\) The defendant’s emails discussed potential defects in its electronic voting machines, which clearly was a matter of considerable public interest.\(^{25.2}\) Publication of the emails was privileged as a fair use in light of the heightened public interest in legitimate elections and the lack of any profit motive on the part of plaintiff.\(^{25.3}\)

**§ 8:4 What Are the Elements of the Fair Use Defense?**

Section 107 of the 1976 Copyright Act includes both an introductory preamble, which sets forth examples of particular uses that are likely to be
deemed fair uses, and four specific but nonexclusive factors to be considered as part of the “equitable rule of reason” that is the fair use analysis. Although a defendant need not prevail on all four factors in order to establish the defense, each factor is to be considered by the court. Courts should not consider the factors in isolation, but should weigh them together. Some courts have resisted efforts to introduce non-statutory factors to buttress fair use defenses.

In *Ty, Inc. v. Publications Int’l Ltd.*, however, the Seventh Circuit departed markedly from the long line of cases that have held that courts should consider all four factors. Instead, Judge Posner characterized the first two factors as “empty,” concluded that the third factor was inapplicable with respect to the photograph of a stuffed toy, and stated that the fourth only “glances at” the all-important distinction he drew between substitute copying, which impairs the market for a work, and complementary copying, which does not. The Seventh Circuit eschewed the traditional analysis of all four factors in favor of asking the economic question of whether the defendant’s use of the copyrighted work was no more than was needed for the defendant to produce a “marketable” complementary product.

27.1. See Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1163 [9th Cir. 2007].
27.2. See, e.g., Sony BMG Music Entm’t v. Tenenbaum, 672 F. Supp. 2d 217, 232–37 [D. Mass. 2009], denying motion for new trial on fair use issue, 2010 U.S. Dist. LEXIS 68642 [D. Mass. July 9, 2010]. In *Tennenbaum*, which involved a suit by recording companies against a defendant who had engaged in peer-to-peer music file sharing, the court was not persuaded by arguments that plaintiffs had assumed risks by releasing their works into an online environment; that defendant was “lured” into downloading activities; and that plaintiffs’ failure to offer timely and satisfactory paid alternatives to file-sharing was relevant.
27.4. *Id.* at 522–24. The case involved Publication Int’l Ltd.’s series of books that served as guides for collectors of Beanie Babies stuffed animals. They included unauthorized photographs of the animals, derivative works of the copyrighted originals. Because the court did not believe the defendant had, with regard to at least some of the book, copied more of the toys than was necessary to produce a collector’s guide, it reversed the district court’s holding that the photos were not a fair use. See also Batesville Servs. v. Funeral Depot, Inc., No. 1:02-cv-01011-DFH-TAB, 2004 U.S. Dist. LEXIS 24536, at *25–*26 [S.D. Ind. Nov. 10, 2004] (applying four statutory factors and *Ty, Inc.* “marketability test” to conclude that use was not fair because it substituted for authorized use of plaintiff’s photographs).
Because the fair use exception is an affirmative defense, the party asserting the exception bears the burden of persuasion at trial as to all issues in the fair use analysis. Courts are split as to whether the plaintiff or the defendant bears the burden on fair use at the preliminary injunction stage. Some courts hold that the burden remains on the defendant to establish that it is likely to prevail on the affirmative defense of fair use because the defendant will bear the burden at trial. Others hold that the plaintiff’s burden of showing a likelihood of success requires a likelihood of success not just on the prima facie case but also against any affirmative defenses as well, including fair use. The allocation of the burden can be critical because, at the preliminary stage, both sides may lack persuasive evidence regarding the extent to which the defendant’s use will affect the market for the plaintiff’s original or derivative works, arguably the single most important factor in the fair use analysis.

28. See Campbell, 510 U.S. at 590; Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 918 [2d Cir. 1994]. Cf. Sobhani v. @radical.media, Inc., 257 F. Supp. 2d 1234, 1238–39 [C.D. Cal. 2003] [rejecting plaintiff’s attempt to invoke fair use as a “sword,” rather than as a defense to an infringement claim, in order to claim copyright in an otherwise unauthorized derivative work].

28.1. See, e.g., Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1158 [9th Cir. 2007] [once plaintiff has carried burden of showing likelihood of success on merits, burden shifts to defendant to show likelihood that its fair use defense will succeed]; A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 n.3 [9th Cir. 2001] [declining to adopt defendant’s argument that burden of proof on fair use lay with plaintiff at preliminary injunction stage where record did not support fair use finding]; Video Pipeline, Inc. v. Buena Vista Home Entm’t, 192 F. Supp. 2d 321 [D.N.J. 2002] [burden of proof rests with defendant]; Hofheinz v. AMC Prods., Inc., 147 F. Supp. 2d 127, 137 [E.D.N.Y. 2001] [same]; Columbia Pictures Indus., Inc. v. Miramax Films Corp., 11 F. Supp. 2d 1179, 1189 [C.D. Cal. 1998] [same].


28.3. See, e.g., Columbia Pictures, 11 F. Supp. 2d at 1189 [effect on the market factor weighed against a finding of fair use where defendants failed to present any evidence on issue, even though court did not discuss any evidence that market could be harmed].

28.4. See generally infra section 8:4.5.
§ 8:4.1 Illustrative Purposes Set Out in Preamble to Section 107

Section 107 provides in its preamble that

the fair use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

The nonexclusive purposes listed in the preamble are illustrative of uses that typically are fair.29 Uses not listed in the preamble—for example, parody of a copyrighted work, use of a copyrighted work as evidence in a legal proceeding,29.1 by a law firm to assist in defense of its client,29.2 or for comparative advertising30—nonetheless may be deemed a noninfringing fair use.

On the other hand, that the use arguably falls within one of the purposes listed in the preamble does not automatically shield the user from liability if the use does not otherwise pass muster under the specific fair use factors.31 The court in Los Angeles Times v. Free Republic,32 for example, squarely rejected a fair use defense despite the defendant’s contention that its use was news-related.33 There,

29. See Campbell, 510 U.S. at 577–78 [examples listed in preamble are “illustrative and not limitative”] [citations omitted].
29.1. Bond v. Blum, 317 F.3d 385 [4th Cir. 2003] [fair use to use plaintiff’s copyrighted manuscript of autobiographical story about murdering his father as evidence against him in child custody hearing].
30. See Sony Computer Entm’t Am., Inc. v. Bleem, 214 F.3d 1022 [9th Cir. 2000] [use of screen shots in comparative advertising]; Triangle Publ’ns, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171 [5th Cir. 1980] [display of magazine cover].
33. See also Fitzgerald v. CBS Broad., Inc., 491 F. Supp. 2d 177, 184, 189 [D. Mass. 2007] (granting summary judgment to plaintiff where, even though defendant news organization’s unauthorized use of copyrighted photograph in television broadcast was “news reporting,” use was not fair,
the website operator had allowed subscribers to post stories from various newspapers and then encouraged discussion fora to critique the supposed biases of the articles’ authors.

The court rejected the defendant’s contention that, by encouraging others to post criticism of the articles, its use was “transformative,” and therefore more likely to be considered fair. The court also found that the use was commercial, and that the use, if permitted, would impair the plaintiff’s ability to license its works. Finally, although the court found that one factor—the factual nature of the news reports that were copied—favored the defendant, all the rest of the factors weighed against a finding of fair use.

§ 8:4.2 Factor One: Type of Unauthorized Use

The first fair use factor set forth in section 107 requires consideration of “[t]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” As the statutory language indicates, of particular importance here is whether the use at issue is commercial. Although the commercial nature of a use is not determinative, courts typically are less willing to deem a use fair when it is commercial and profit-seeking in nature. There is no bright-line rule as to the significance of a “commercial” use; most activities involve some potential for compensation or financial reward. The relevant inquiry with respect to commerciality is not simply “whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."

in part because of adverse effect on plaintiff’s limited market); Byrne v. British Broad. Corp., 132 F. Supp. 2d 229, 234 (S.D.N.Y. 2001) (denying defendant BBC’s partial motion for summary judgment in case involving BBC’s broadcasting of copyrighted song on television news program, and stating that “[n]ot all unlicensed uses of copyrighted material for inclusion in broadcasts that present material of interest to the public are protected by the fair use doctrine, even if they are labeled ‘news reporting’ by defendants”).

34. Free Republic, 54 U.S.P.Q.2d at 1464 (“[V]erbatim posting of plaintiffs’ articles is ‘more than necessary’ to further defendants’ critical purpose.”).
35. Id. at 1464–66.
37. Id.
39. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) (“The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.”).
40. Id.
A use need not involve direct financial gain or payment to be held "commercial." For example, the Ninth Circuit in A&M Records, Inc. v. Napster, Inc.,\(^{41}\) held that individual users who located and swapped copyrighted songs and sound recordings by means of an online service engaged in a commercial use, despite the absence of any payment to the individual users, because "repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies."\(^{42}\) In another case, the Ninth Circuit held that the unauthorized copying and distribution of approximately 30,000 copies of a spiritual text to followers of a religious organization was not a fair use, in part because the organization "profited" from the use by acquiring at no cost a text essential to its observance and by attracting new church members who contributed to the organization by tithing.\(^{43}\)

Similarly, a company was held to make commercial use of a pamphlet when it included a free copy with every computer it sold.\(^{43.1}\)

In considering the "purpose and character" of the use under section 107(1), courts also place great emphasis on whether a work is "transformative"—that is, whether the use "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."\(^{44}\) Such a work is a more likely candidate for the fair use exception than one which, "[r]ather than making some contribution of new intellectual value and thereby fostering the advancement of the arts and sciences, . . . is likely to be used simply for the same intrinsic purpose as the original."\(^{45}\) This distinction is consistent with the constitutional purpose of the copyright law: the encouragement of creativity.

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42. Id. at 1015.
44. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 [1994] (the "central purpose" of the first § 107 inquiry is to determine if the use is "transformative"); see also Pierre N. Leval, Toward a Fair Use Standard, 103 HARV. L. REV. 1105, 1111 (1990) (discussing the importance of "transformative" use in the fair use analysis).
Transformative uses have been held to include: a rap group’s bawdy parody of a famous rock-and-roll ballad;\(^{47}\) the reprinting of copyrighted modeling photographs of a Puerto Rican beauty queen as part of an informative newspaper article;\(^{48}\) the use of photographs of Beanie Babies in an evaluative and critical collector’s guide;\(^{48.1}\) the use of ten- to twenty-second clips from a famous actor’s films in for-profit television news reports of his death;\(^{48.2}\) the display of “thumbnail” images of copyrighted photographs in search engine results;\(^{48.3}\) a biography’s placement of thumbnail images of artistic concert posters along a timeline to serve as “historical artifacts”;\(^{48.4}\) a painting’s use of a portion of a photo advertisement for Gucci sandals in a montage of pop culture images;\(^{48.5}\) the uploading of student papers to an online technology system designed to detect plagiarism by comparison

\(^{47}\) *Campbell*, 510 U.S. at 569.

\(^{48}\) Nunez v. Caribbean Int’l News Corp., 235 F.3d 18, 23 [1st Cir. 2000]; see also Bill Graham Archives, LLC v. Dorling Kindersley Ltd., 448 F.3d 605 [2d Cir. 2006] [inclusion of “thumbnail-sized reproductions of concert posters in illustrated biography of the Grateful Dead].

\(^{48.1}\) Ty, Inc. v. Publ’ns Int’l Ltd., 292 F.3d 512 [7th Cir. 2002], cert. denied, 537 U.S. 1110 [2003]; see also NXIVM Corp. v. Ross Inst., 364 F.3d 471, 477–78 [2d Cir. 2004] [use of quotes from business-training-seminar manuals transformative where websites contained critical analyses of seminars].

\(^{48.2}\) Video-Cinema Films, Inc. v. CNN, Inc., 60 U.S.P.Q.2d (BNA) 1415, 1420 [S.D.N.Y. 2001]; see also L.A. News Serv. v. CBS Broad., Inc., 305 F.3d 924, 941–42 [9th Cir. 2002] [inclusion of a clip in video montage was transformative, whereas rebroadcasts of three-second clip to promote defendant’s coverage was a “less transformative use”].

\(^{48.3}\) Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165–66 [9th Cir. 2007] [in light of image search’s “great value to the public,” use of thumbnails is a “highly transformative” fair use]; Kelly v. Arriba Soft Corp., 336 F.3d 811 [9th Cir. 2003]. But see Batesville Servs. v. Funeral Depot, Inc., No. 1:02-cv-01011-DFH-TAB, 2004 U.S. Dist. LEXIS 24336, at *21–22 [S.D. Ind. Nov. 10, 2004] [no transformative use when high-resolution photographs were used by defendant].

\(^{48.4}\) Bill Graham Archives, 448 F.3d at 609–11 [use of posters to mark significant Grateful Dead concert events differs from images’ original artistic and promotional purpose]; see also Bouchat v. Baltimore Ravens Ltd. P’ship, 2010 U.S. App. LEXIS 18355, at *25–27 [4th Cir. Sept. 2, 2010] [noncommercial display of football team’s historical logo in lobby open to public documents past use] [citing Bill Graham Archives]; Warren Publ’g Co. v. Spurlock, 645 F. Supp. 2d 402, 417–22 [E.D. Pa. 2009] [use of art originally published on covers of monster magazines in book reviewing career of artist was transformative] [citing Bill Graham Archives].

\(^{48.5}\) Blanch v. Koons, 467 F.3d 244, 251–53 [2d Cir. 2006] [famed artist’s copying of advertisement’s photographic depiction of female legs transformative where image used as “fodder for his commentary on . . . mass media,” and artist changed image’s colors, background against which it was displayed, medium and other details of objects in image].
with other digitized content; a hip-hop group’s sampling, with a different theme, mood, and tone, the refrain “Bow wow wow, yippie yo, yippie yea” and other elements from a well-known funk song; and the use in a film documentary of a fifty-nine-second clip from a 1950s “B” horror movie. Courts have rejected claims of transformative use where defendants: displayed copyrighted eyewear in a magazine advertisement for clothing; used copyrighted music and lyrics to create “karaoke” versions of songs; retransmitted copyrighted sound recordings in an online medium; created and “streamed” movie trailers to online video retailers who paid in proportion to their customers’ usage; used lengthy clips of Elvis Presley performances in a purportedly biographical work; used a short clip of musical performance, despite addition of introductory interview, where footage was otherwise identical; used a song about an underground Irish nationalist group in a news story about suspected Irish gunrunners;
copied photographs from design books in creating a historical reference book of design patterns; 51.5 created bowdlerized versions of movies for family viewing; 51.6 publicly performed copyrighted musical works by streaming them as free previews of ringtones and ringback tones from a website offering cellular phone services; 51.7 created a Harry Potter encyclopedia that quoted from J.K. Rowling's novels for their inherent entertainment and aesthetic value; 51.8 issued a U.S. postage stamp depicting a copyrighted Korean War memorial sculpture, devoid of any commentary or criticism and sharing the sculpture's purpose of honoring war veterans; 51.9 simply repackaged a copyrighted translation of a religious homily in a new medium (the Internet) for the instruction of believers; 51.10 asserted during litigation that the primary purpose for publishing an unauthorized novel was to critique the author and his characters; 51.11 used file-sharing software to download and distribute copyrighted music files even if for arguably noncommercial reasons because there was no “public benefit or transformative purpose that would trigger the core concerns of [fair use]”; 51.12 depicted football team's identifying logo on players' helmets and at stadium in historical highlight films; 51.13 and reproduced animated television characters, without additional text or commentary, in print magazines. 52

51.5. Schiffer Publ'g, Ltd. v. Chronicle Books, LLC, 73 U.S.P.Q.2d (BNA) 1090, 1100 [E.D. Pa. 2004] [use not transformative because both books shared the common purpose of informing designers, artists, and art enthusiasts about patterns and fabrics].

51.6. Clean Flicks of Colo., LLC, v. Soderbergh, 433 F. Supp. 2d 1236, 1241-42 [D. Colo. 2006] [edited copies of DVD movies that deleted offensive material were not transformative].


51.9. Gaylord v. United States, 595 F.3d 1364, 1373-74 (Fed. Cir. 2010). That the image used on the stamp captured the war memorial after a snowfall did not render the stamp transformative. “Nature's decision to snow cannot deprive [the copyright owner] of an otherwise valid right to exclude.” Id. at 1374.


51.11. Salinger v. Colting, 607 F.3d 68, 83 [2010] [case involved J.D. Salinger’s The Catcher in the Rye; prelitigation statements had referred to different, nontransformative, purposes].


Whether in the context of the first factor or throughout the fair use analysis, courts also will consider whether the challenged use results in a public benefit because it serves the public interest. A use that results in an increase in creative expression or otherwise provides great value to the public may be seen as promoting the purposes of copyright. In such case, the commercial nature of the use may be outweighed by its serving the interests of the public.

Under this first factor, based on language in *Harper & Row Publishers, Inc. v. Nation Enterprises*, some courts will consider, as a subfactor, the “propriety” of the actions of the alleged infringer, potentially making a finding of fair use less likely where a copy of a copyrighted work is purloined or where the putative infringer otherwise acts in bad faith. There also are suggestions, however, that the fair use analysis ought not to consider an alleged infringer’s motives. If a use is otherwise fair, that a defendant did not seek permission before using the work will not, in and of itself, weigh against a finding of fair use or otherwise constitute evidence of “bad faith” sufficient to transform an otherwise fair use into an infringing one.

52.1. Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523 (9th Cir. 1992) (court “free to consider public benefit” from a use, public benefit “need not be tangible or direct” but may arise because use serves “public interest”).

52.2. Id. (defendant’s disassembly of object code resulted in increase of independently designed video game programs). Cf. Sony Computer Entm’t v. Bleem, 214 F.3d 1022, 1027 (9th Cir. 2000) (copying of advertisements for comparative purposes “redounds greatly” to benefit of purchasing public).

52.3. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1166 (9th Cir. 2007) (search engine “promotes the purposes of copyright and serves the interest of the public”; value outweighed superseding and commercial nature of use).


52.5. See, e.g., NXIVM Corp., 364 F.3d at 477–78 (2d Cir. 2004) [considering propriety of actions in fair use analysis]; L.A. News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119, 1122 (9th Cir. 1997) [defendant’s conduct relevant where defendant may have knowingly exploited a work that could have been obtained for a fee]; Field v. Google, 412 F. Supp. 2d 1106, 1122–23 (D. Nev. 2006) [in comparing parties’ conduct, expressly considering additional factor of good faith, which weighed in defendant’s favor].

52.6. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 n.18 [1994] [suggesting that extent to which “good faith” ought to be taken into account in fair use analysis is unresolved]; NXIVM Corp., 364 F.3d at 485 [fair use is a statutory “right” and alleged infringer’s motive has “no rational bearing” on analysis] (Jacobs, J., concurring).

52.7. See Campbell, 510 U.S. at 585 n.18 (“If the use is otherwise fair, then no permission need be sought or granted.”); Blanch v. Koons, 467 F.3d 244, 255–56 [2d Cir. 2006] [no controlling authority that failure to ask for permission constitutes “bad faith”]; Castle Rock Entm’t v. Carol Publ’g Group, 150 F.3d 132, 146 [2d Cir. 1998] [being denied permission to use work is irrelevant to a finding of fair use].

(Keller/Cunard, Rel. #11, 11/10)
§ 8:4.3 Factor Two: Distinction Between Fanciful and Factual Copyrighted Works

"The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy," and accordingly, a use is more likely to be deemed fair when it is of a factual work as opposed to a fictional or creative work. Works that have been found to be creative or imaginative under this factor include: sound recordings of popular songs, a religious text that embodies "creativity, imagination and originality," even though believers might regard the work as "factual," and a feature-length "B" horror film.

That a work is creative rather than factual will not, however, preclude a finding of fair use. Where the copying is deemed "transformative" under the first factor, less weight may be accorded to a finding that the copied work is "creative." In addition, the unpublished nature of a copied work may affect a court's fair use analysis. The U.S. Supreme Court has stated that "[t]he scope of fair use is narrower with respect to unpublished works" because an "author’s right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use." Responding to a trend in case law that appeared to be

55. Napster, Inc., 239 F.3d at 1016. The underlying musical compositions embodied within sound recordings are also deemed to be expressive and creative for purposes of the second fair use factor. United States v. ASCAP, 599 F. Supp. 2d 415, 430 [S.D.N.Y. 2009].
57.1. See Blanch v. Koons, 467 F.3d 244, 257 [2d Cir. 2006] (“[T]he second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose.”) (quoting Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 [2d Cir. 2006]).
59. Id. at 555. But see A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630, 641 [4th Cir. 2009] (uploading of students’ papers to online technology system designed to detect plagiarism by comparison with other digitized content did not violate students’ right to control first public appearance of works, because use was not a public dissemination and did not have “intended purpose” or “incidental effect” of “supplanting plaintiffs’ rights to first publication”) (quoting Harper & Row).
establishing a *per se* rule against fair use of unpublished works, Congress in 1992 added the following language to section 107 of the Copyright Act: “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 [fair use] factors.”

In the aftermath of this amendment, some courts have dealt more flexibly with defenses of fair use of unpublished works.

### § 8:4.4 Factor Three: Amount of the Work That Can Be Used

Determination of the “amount and substantiality of the portion used in relation to the copyrighted work as a whole” can involve both qualitative and quantitative analysis. Although unauthorized use of all, or a significant portion, of a work almost always will preclude a finding of fair use, use of even a small portion of a work may be deemed unfair if that portion constitutes the qualitative “heart” of the work. In *Harper v. Row*, for example, the defendant magazine had “scooped” a competitor by printing unauthorized excerpts from former President Gerald Ford’s unpublished memoirs. Even though the defendant had reproduced only 300 words from a manuscript of 200,000 words, those excerpts, which recounted Ford’s pardon of Richard Nixon, represented “essentially the heart” of the manuscript.

In all cases, the amount of copying permitted will depend on the amount needed to further the “purpose and character” of the use.

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60. See, e.g., *Salinger v. Random House, Inc.*, 811 F.2d 90, 95 [2d Cir. 1987] (holding that a biographer’s substantial quotation and paraphrase from unpublished letters that had been deposited in research archives were not a fair use, and stating that “unpublished letters normally enjoy insulation from fair use copying”), rev’d 650 F. Supp. 413 [S.D.N.Y. 1986], cert. denied, 484 U.S. 890 (1987).


62. For a more detailed discussion of fair use of unpublished works, see section 6:1.2[B][1].


64. *See Harper v. Row*, 471 U.S. at 564–65. *But see Ty, Inc. v. Publ’ns Int’l Ltd.*, 292 F.3d 512 [7th Cir. 2002] (suggesting that necessarily all of a Beanie Baby must be used in a photo since “no one . . . wants a photograph of part of a Beanie Baby”), cert. denied, 537 U.S. 1110 [2003].


65.1. *Campbell*, 510 U.S. at 586–87; *see also Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 325–26 [S.D.N.Y. 2008] [denying preliminary
the amount taken “reasonable” or “justified” in relation to the purpose of the copying.\textsuperscript{65.2} Particularly where images are concerned, taking as “much as is necessary” may require copying the entire work.\textsuperscript{65.3} The Fourth Circuit has held that the uploading of substantially complete student papers to an online technology system designed to evaluate them for originality was appropriate, under the third fair use factor, for the limited purpose of detecting plagiarism.\textsuperscript{65.4}

Under the quantitative analysis of this factor, the relevant inquiry is the amount of the copyrighted work that has been borrowed relative to the overall size of that work, and not in comparison to other material in the allegedly infringing work. Thus, if the borrowed material makes up only a relatively small portion of the alleged infringer’s work, but constitutes a substantial percentage of the infringed work, this factor is more likely to cut against a finding of fair use.\textsuperscript{65.5}

\section*{\textsuperscript{§} 8:4.5 \textit{Factor Four: Impact on the Market for, or Value of, the Copyrighted Work}}

In \textit{Harper v. Row}, the U.S. Supreme Court indicated that the fourth fair use factor is “undoubtedly the single most important element of fair use,”\textsuperscript{66} although the Second Circuit has speculated that the Supreme

\textsuperscript{65.2} Blanch, 467 F.3d at 257 [examining whether copying was “excessive,” that is, beyond the user’s “justified” purpose].

\textsuperscript{65.3} \textit{See}, e.g., id. [use was “reasonable” to convey “fact” of the photograph; artist only copied the portion that was “necessary”]; Bill Graham Archives, 448 F.3d at 613 [reproduction of posters in their entirety, in minimal image size and quality, “necessary” for reader’s recognition]; Kelly v. Arriba Soft Corp., 336 F.3d 811, 820–21 [9th Cir. 2003] [for purposes of visual search, “necessary” to copy entire image; otherwise, image would be more difficult to identify, reducing search engine’s usefulness]; Nunez v. Caribbean Int’l News Corp., 235 F.3d 18, 24 [1st Cir. 2000] [use of entire photo necessary for television news story].

\textsuperscript{65.4} A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630, 642 [4th Cir. 2009].

\textsuperscript{65.5} \textit{See}, e.g., NXIVM Corp. v. Ross Inst., 364 F.3d 471, 480 [2d Cir. 2004] [fair use evaluation “plainly requires” analyzing portion in relation to the copyrighted work, not the infringing work]. It is the entirety of the copyrighted work that is to be considered in this analysis. Accordingly, courts are unlikely to credit arguments that individual chapters in a book constitute entire works for fair use purposes. \textit{See}, e.g., id. at 481 [rejecting argument that copying of individual “modules” from business-training-seminar manual constituted copying of entire works].

Court has abandoned this position.\textsuperscript{67} This factor requires determination of the potential effect of the unauthorized use on the market for the original work.\textsuperscript{67.1} Whether a challenged use is commercial in nature again assumes importance in this context. When a use is commercial, market harm is presumed and must be rebutted by the defendant.\textsuperscript{68} This presumption, however, applies only to instances of “mere duplication for commercial purposes.”\textsuperscript{69} A transformative use, even if commercial, does not warrant a presumption of market harm.\textsuperscript{70}

In cases where market harm cannot be presumed, “[t]he burden of proof as to market effect rests with the copyright holder.”\textsuperscript{71}

\begin{enumerate}
\item Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 926 [2d Cir. 1994], cert. dismissed, 516 U.S. 1005 [1995].
\item Where the “market” arguably harmed by use of advertising for comparative purposes is the market for the advertised product, not that of the copyrighted advertisement, this factor may weigh in defendant’s favor. See Sony Computer Entm’t Am., Inc. v. Bleem, 214 F.3d 1022, 1029 [9th Cir. 2000].
\item Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 [1994]; Mich. Document Servs., 99 F.3d at 1385–86. The defendant may be able to rebut the presumption by showing the alleged infringement did not deprive the plaintiff of any sales and, therefore, had no effect on the market. See, e.g., Compaq Computer Corp. v. Ergonome, Inc., 387 F.3d 403, 410–11 [5th Cir. 2004] (where evidence showed that market for product diminished before infringement began, jury reasonably could conclude that the infringement had no impact).
\item Campbell, 510 U.S. at 591. Market harm could be presumed, for example, where a defendant cellular phone company publicly performed musical compositions, without a transformative purpose and for commercial reasons, by streaming them on demand from its website as free previews of ringtones and ringback tones. United States v. ASCAP, 599 F. Supp. 2d 415, 431–32 [S.D.N.Y. 2009].
\item Campbell, 510 U.S. at 591; Perfect 10, 508 F.3d at 1168 [where use of search engine thumbnails is “highly transformative,” market harm cannot be presumed]; Kelly, 336 F.3d at 818–22 [concluding that defendant’s “smaller lower-resolution images” of plaintiff’s images served “an entirely different function” and did not harm the market for or value of the images]; Video-Cinema Films, Inc. v. CNN, Inc., 60 U.S.P.Q.2d [BNA] 1415, 1420 [S.D.N.Y. 2001]; see also Faulkner v. Nat’l Geographic Soc’y, 294 F. Supp. 2d 523, 546–47 [S.D.N.Y. 2003] [where defendant’s poster of past covers of National Geographic included plaintiff’s photos, court found fair use because the reproductions of the photos were “very small,” were included with “scores” of other photos, and the poster—though promotional—had no detrimental market effect on photos], aff’d sub nom. Faulkner v. Nat’l Geographic Enters., Inc., 409 F.3d 26 [2d Cir.], cert. denied, 546 U.S. 1076 [2005]. Where the use is “transformatively different” from the “original expressive purpose,” then the copyright owner may not be entitled to preempt others from entering the market. See Castle Rock Entm’t v. Carol Publ’g Group, 150 F.3d 132, 146 n.11 [2d Cir. 1998] (copyright owner cannot prevent others from “fair use markets,” such as parody, news reporting, educational, or other transformative uses).
\end{enumerate}
relevant inquiry, as set forth by the U.S. Supreme Court, is whether, if the challenged use “should become widespread, it would adversely affect the potential market for the copyrighted work.” A use that harms the market for the copyrighted work is one that might act as a substitute for the original. Possible adverse effects on potential markets for derivative works should be considered as well. The effect of the use on present and potential licensing markets also can be taken into account. Ordinarily, a loss of licensing revenues in markets that the copyright owner is reasonably able to develop or exploit, or license others to develop, will weigh against a finding of fair use. Conversely, potential losses in other markets—which the copyright owner may be attempting to protect by improperly leveraging its copyright rights—may not be considered in the fair use analysis.

73. Campbell, 510 U.S. at 591; see also Kelly, 336 F.3d at 821 (“thumbnails” not a substitute for full-sized images; fair use found); Ty, Inc. v. Publ’ns Int’l Ltd., 292 F.3d 517, 518 [7th Cir. 2002] (distinguishing between complementary and substitutive copying), cert. denied, 537 U.S. 1110 (2003).
74. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 568 (1985); Campbell, 510 U.S. at 591–93. For example, the Federal Circuit held that the unauthorized issuance of a U.S. postage stamp depicting a copyrighted Korean War memorial sculpture did not threaten market harm, because someone seeking to photograph the sculpture or otherwise create a derivative work “would not find the stamp to be a suitable substitute.” Gaylord v. United States, 595 F.3d 1364, 1375 [Fed. Cir. 2010] [nevertheless rejecting fair use defense].
74.1. See Am. Geophysical Union, 60 F.3d at 929 (“impact on potential licensing revenues” is “proper subject” in assessing fourth factor).
74.2. See Campbell, 510 U.S. at 592 [market includes those that creators would develop or license others to develop]; Am. Geophysical Union, 60 F.3d at 930 [market includes “traditional, reasonable, or likely to be developed markets”]. See, e.g., Video-Cinema Films, 78 U.S.P.Q.2d [BNA] at 1546 (use of one-minute performance clip erodes market for licensed performance excerpts, which is “precisely the type of harm that the fourth fair use factor aims to prevent”). One court has emphasized that even if the copyright holder had not yet entered the new market, it still retained the right to “curb the development” of that market “by refusing to license a copyrighted work or by doing so only on terms the copyright owner finds acceptable.” UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 353 [S.D.N.Y. 2000].
74.3. See, e.g., Gulfstream Aerospace Corp. v. Camp Sys. Int’l, Inc., 428 F. Supp. 2d 1369, 1380 [S.D. Ga. 2006] [in infringement action arising out of defendant maintenance tracking company’s use of plaintiff’s maintenance manuals, where plaintiff sought to use copyright “to gain a judicially-enforced monopoly in maintenance-tracking services” for plaintiff’s aircraft, market harm factor weighed heavily in defendant’s favor]. Similar issues are raised by the defense of copyright misuse. For a discussion of that defense, see section 11:7.5[D].
Market harm may also occur in markets that the plaintiff has not yet entered or fully exploited.\(^{74.4}\) In the *Napster* case, for example, the Ninth Circuit upheld the lower court’s finding of two distinct types of market harm to the plaintiff record companies: (1) reduced CD sales among college students and (2) “barriers to plaintiffs’ entry into the market for the digital downloading of music.”\(^{75}\) Where a work has no independent economic value, the fourth fair use factor will tend to cut in defendant’s favor.\(^{75.1}\)

Finally, it is well accepted that if the work does not act as a substitute for, but instead effectively criticizes, the original, that use will not be considered as inflicting “market harm” for purposes of fair use. Even though, in practical terms, the critique may have devastating effects on a work’s marketability, that is a consequence of robust First Amendment debate, and is not the type of harm cognizable under copyright, to be taken into account in weighing the fourth fair use factor.\(^{75.2}\)

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\(^{74.4}\) See Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int’l, 533 F.3d 1287, 1317–18 [11th Cir. 2008] (defendants not entitled to summary judgment; market harm existed despite plaintiff’s concession that it had failed to develop profitable market for copyrighted work or potential derivative works, because defendants’ use could potentially usurp market).

\(^{75}\) A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1016 [9th Cir. 2001].

\(^{75.1}\) See, e.g., Blanch, 467 F.3d at 258 (defendant’s use plainly had “no deleterious effect” on market for work where copyright owner acknowledged that she had not published or licensed work after its initial appearance and that defendant’s use neither harmed her career or plans for work nor decreased work’s value); see also A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630, 644 [4th Cir. 2009] (where uploading of student papers to online technology system was for purpose of detecting plagiarism, most plausible theory of market harm was impairment of students’ potential market for selling papers to other students to submit as their own for academic credit; plaintiffs testified that no such market for “cheating” was envisioned); But see Batesville Servs. v. Funeral Depot, Inc., No. 1:02-cv-01011-DFH-TAB, 2004 U.S. Dist. LEXIS 24336, at *25 [S.D. Ind. Nov. 10, 2004] (marketing photographs were distributed by plaintiff at no charge; fair use defense nevertheless rejected).

\(^{75.2}\) See Campbell, 510 U.S. at 591–92 (“when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act”); NXIVM Corp. v. Ross Inst., 364 F.3d 471, 482 [2d Cir. 2004] (“If criticisms . . . kill the demand for plaintiffs’ service, that is the price that, under the First Amendment, must be paid in the open marketplace for ideas.”); New Era Publ’ns Int’l v. Carol Pub. Group, 904 F.2d 152, 160 [2d Cir. 1990] (harm caused by a “devastating critique” that “diminished sales by convincing the public that the original work was of poor quality” is not “within the scope of copyright protection,” quoting Consumers Union of United States, Inc. v. Gen. Signal Corp., 724 F.2d 1044, 1051 [2d Cir. 1983]).
§ 8:5 How Have Specific Instances of the Fair Use Defense Been Resolved?

§ 8:5.1 Off-Air Taping

[A] Home Taping for Private Use

In Sony Corporation of America v. Universal City Studios, Inc., the U.S. Supreme Court held that the videotaping of television broadcasts for private home use is a permissible fair use. The Court relied on the district court’s factual findings indicating that “the average member of the public uses a VTR principally to record a program he cannot view as it is being televised and then to watch it once at a later time[,] a practice known as ‘time-shifting.’” After quickly running through the first three fair use factors, the Court focused on the fourth. It emphasized that “a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author’s incentive to create.”

Because the use at issue was noncommercial, the Court held, the burden was on plaintiffs to establish “either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.” Relying on the district court’s findings that plaintiffs had failed to establish past harm from time-shifting and that future harms claimed by plaintiffs were only “speculative,” the Court concluded that this burden had not been satisfied.

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76. Sony, 464 U.S. at 421; see also id. at 423 [surveys conducted by both parties indicate that primary use of machines was for time-shifting].

77. The Court first noted that “time-shifting for private home use must be characterized as a noncommercial, nonprofit activity.” Id. at 449. With respect to the second and third factors, the Court held that “when one considers the nature of a televised copyrighted audiovisual work, and that time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use.” Id. at 449–50 (citation and footnote omitted).

78. Id. at 450.

79. Id. at 451.

80. Id. at 454.

81. Sony did not address the question of home audio recording for private use. The reasoning underlying the majority opinion, however, readily applies to such recording done for time-shifting purposes. Moreover, legislative history accompanying enactment in 1971 of the provision extending copyright protection to sound recordings includes statements indicating that home audio recording was thought at that time to constitute fair use, see H.R. REP. NO. 47, 92d Cong., 1st Sess. 7 (1971); 117 CONG. REC. H34, 748–49 [daily ed. Oct. 4, 1971], although the reports accompanying the
The next generation of video recording devices—personal video recorders—were the subject of a suit by the television and motion pictures industries. The suit challenged the devices’ ability to reproduce and distribute, without express authorization from the copyright owners, digital copies of television programming in ways that allowed viewers to:

(i) skip over or delete commercials;

(ii) sort or organize the recordings of programs that they had made; and

(iii) distribute digital copies of the programming via the Internet to others owning same-format devices.

The plaintiffs alleged that these features, and the defendants’ post-sale relationship with the consumer, distinguish the devices from the “much simpler technology” used to copy broadcast television programming in the Supreme Court’s Sony decision. The suit was dismissed after the defendant-manufacturer filed for bankruptcy and its successor removed some of the disputed features from new models of the recorder.

[B] Taping for Public Use

Although the U.S. Supreme Court has endorsed private home taping of audiovisual works, it has not addressed taping of such works for public use. In Encyclopædia Britannica Educational Corp. v. Crooks, however, a district court held that large-scale off-air copying of audiovisual works by a nonprofit corporation did not constitute fair use, even though the copies were used for educational purposes. The defendants, a cooperative created to provide educational services to a number of school districts and over 100 affiliated schools, videotaped plaintiffs’ copyrighted audiovisual works shown on a local public television station. Defendants maintained a library of these videotapes and provided copies on request to teachers, who used them in the classroom. Focusing on the possibility of market harm, the court held that defendants’ videotape practices interfered with the marketability of

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of plaintiffs’ works in videotape format.\textsuperscript{83} Were the large-scale copying undertaken by defendants permitted, the court found, the incentive for educational institutions to license plaintiffs’ works or to pay for videotape copies of those works would be virtually eliminated.\textsuperscript{84}

Although the \textit{Encyclopædia Britannica} decision was rendered before that of the Supreme Court in \textit{Sony}, the two are not inconsistent. Unlike in \textit{Sony}, the potential for market harm was clear in \textit{Encyclopædia Britannica}, even though the defendants assertedly had copied plaintiffs’ works only for time-shifting purposes.

\section*{§ 8:5.2 Fair Use of Digital Audio Files}

Digital music compression algorithms, such as MP3, allow digital music files to be downloaded and stored on a computer user’s hard drive with relative speed and ease.\textsuperscript{85} This has resulted in an increasing number of websites that provide computer users with the ability to access, listen to and copy those files.

Inasmuch as MP3 files \{1\} may be copied serially without a marked decrease in audio quality and \{2\} do not contain any code to prevent such serial copying, \textit{“[b]y most accounts, the predominant use of MP3 is the trafficking in illicit audio recordings.”}\textsuperscript{86} A number of lawsuits have been filed against these sites, claiming that the websites’ role in facilitating the copying of MP3 files is actionable under the Copyright Act.

In \textit{MPL Communications, Inc. v. MP3.com, Inc.} and \textit{UMG Recordings, Inc. v. MP3.com, Inc.}, music publishers and the recording industry, respectively, sued MP3.com, Inc. for direct copyright infringement.\textsuperscript{87} MP3.com admitted to making copies of audio CDs in MP3 format \{a process called “ripping”\} and storing them on a central server. End-users then could access these centrally stored files by logging on to the MP3.com website and placing an audio CD into their computer’s CD-ROM drive. If the CD was one of the 80,000 or so that MP3.com

\begin{itemize}
\item \textsuperscript{83} Id. at 1169.
\item \textsuperscript{84} Id. at 1169–70.
\item \textsuperscript{85} See Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1073–74 (9th Cir. 1999) (“[V]arious compression algorithms (which make an audio file ‘smaller’ by limiting the audio bandwidth) now allow digital audio files to be transferred more quickly and stored more efficiently.”).
\item \textsuperscript{86} Id. at 1074.
\end{itemize}
had “ripped” onto its servers, the end-user could store the files in his or her own “locker” and listen to them from any computer terminal with Internet access. The court granted summary judgment to the recording industry plaintiffs. The court dismissed MP3.com’s argument that its service was “the functional equivalent” of storing its subscribers’ CDs, a service the opinion tacitly assumed would be fair use if performed by the end-user.\(^8\) The court then went on to analyze whether MP3.com’s unauthorized copying would be excused under the fair use doctrine. The MP3.com court found that the use was commercial,\(^9\) nontransformative,\(^10\) and made use of the entirety of the works, that the works were artistic, and that the use, on its face, “invade[d] plaintiffs’ statutory right to license their copyrighted sound recordings to others for reproduction.”\(^11\)

Several lawsuits also were filed by music interests against another digital music website located at www.napster.com. These suits alleged that the Napster website, which permitted individual users to locate and swap MP3 audio files by scanning the hard drives of other users who were logged onto the website at any moment, contributed to the illegal copying of copyrighted musical works and was therefore indirectly liable for infringement.\(^2\)

The Ninth Circuit in Napster categorically rejected the defenses offered by the defendant online service. To Napster’s assertion that its service provided a means of “sampling,” whereby individual users could download music prior to making purchase decisions, the court replied that this use was commercial because the plaintiff record companies charge a royalty fee for use of samples on legitimate retail

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88. UMG Recordings, 92 F. Supp. 2d at 350.
89. Id. at 351 (“[W]ile subscribers to My.MP3.com are not currently charged a fee, defendant seeks to attract a sufficiently large subscription base to draw advertising and otherwise make a profit.”).
90. Id. (“[A]lthough defendant recites that My.MP3.com provides a transformative ‘space shift’ by which subscribers can enjoy the sound recordings contained on their CDs without lugging around the physical discs themselves, this is simply another way of saying that the unauthorized copies are being retransmitted in another medium—an insufficient basis for any legitimate claim of transformation.”).
91. Id. at 352.
92. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1012-13 (9th Cir. 2001); Metallica v. Napster, Inc., No. C 00-4068 MHP, 2001 WL 777005 [N.D. Cal. Mar. 5, 2001]. The Metallica lawsuit also named several prominent universities, including Yale, for “encourag[ing] its students to pirate” musical works via university-controlled computer systems. Yale and the other universities were dropped from the suit after either blocking Napster from being accessed by students or restricting access.
Internet sites and tightly regulate the length and number of plays for
song samples. To Napster’s argument that it offered a means of
“space-shifting” by which users could download music they already
owned, the court responded that, unlike the “time-shifting” approved
in Sony or the “space-shifting” condoned in dictum in RIAA v.
Diamond Multimedia Systems, Inc., Napster users engaged in
unauthorized distributions of plaintiffs’ works to the general public.
Finally, to Napster’s allegation that its service resulted in increased
CD sales to the plaintiffs, the court retorted that “[i]ncreased sales of
copyrighted material attributable to unauthorized use should not
deprove the copyright holder of the right to license the material. Nor
does [the alleged] positive impact in one market, here the audio CD
market, deprive the copyright holder of the right to develop identified
alternative markets, here the digital download market.”

§ 8:5.3 Reverse Engineering
The rise of the computer software industry has raised questions
concerning the application of the fair use doctrine to reverse engineering. Also known as disassembly or decompilation, reverse engineering
assumes importance in the computer software context because of the
otherwise inscrutable nature of computer programs. Computer programs are distributed to the public in the form of “object code,” a series
of ones and zeros that are virtually unreadable by humans. Because
most humans cannot read this object code, they “often cannot gain
access to the unprotected ideas and functional concepts contained in
object code without disassembling that code—that is, making copies.”
In order to “reverse engineer” a computer program, a programmer,
through disassembly or decompilation of the object code, produces the
program’s “source code”—the program’s road map, which is readable by
humans. In this respect, computer programs are wholly unlike most
other literary works whose underlying unprotectible ideas and processes

prohibiting digital sound sampling absent a license; fair use defense not expressly raised or considered].
94. RIAA v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir.
1999). See also In re Aimster Copyright Litig., 334 F.3d 643, 652–53 (7th Cir.
2003) [citing Diamond Multimedia in support of suggestion that
space-shifting of music already owned by the user might be fair use because
it is analogous to the time-shifting held fair in the Supreme Court’s Sony
decision], cert. denied, 540 U.S. 1107 (2004).
95. Napster, Inc., 239 F.3d at 1019.
96. Id. at 1018.
97. Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1525 (9th Cir. 1992)
[citation omitted].
may be uncovered by casually examining the works’ manifest expression. This special feature of computer programs has been the key to fair use litigation concerning reverse engineering. The leading decisions in this area are Atari Games Corp. v. Nintendo of America, Inc.,98 Sega Enterprises Ltd. v. Accolade, Inc.,99 and Sony Computer Entm’t, Inc. v. Connectix Corp.,100 all of which held that reverse engineering is a fair use when undertaken to discover the program’s underlying ideas.

Atari, the earliest-decided case, required the Federal Circuit to determine whether defendant Nintendo’s reverse engineering of an Atari program was a fair use. Although the court ultimately held that it was not, that holding rested on the court’s finding that Nintendo had violated Copyright Office regulations in securing a copy of the Atari source code. The court was clear, however, that the “reverse engineering’ process, to the extent untainted by the . . . copy purloined from the Copyright Office, qualified as a fair use.”101 Relying on the examples set forth in the preamble to section 107, the court noted that activities undertaken to “permit public understanding and dissemination of the ideas, processes, and methods of operation in a work” generally are fair uses.102 Similarly, turning to the second fair use factor, the court held that “[w]hen the nature of a work requires intermediate copying to understand the ideas and processes in a copyrighted work, that nature supports a fair use for intermediate copying. Thus, reverse engineering object code to discern the unprotectible ideas in a computer program is a fair use.”103

The Ninth Circuit employed similar reasoning in finding the reverse engineering at issue in Sega Enterprises to be a fair use of the copyrighted program. Analyzing the four fair use factors, the court focused on the second, noting its importance to the inquiry in the reverse engineering context.104 The court emphasized that the defendant would not be able to understand the functional requirements for compatibility with plaintiff Sega’s video game console, or to produce its own video game cartridges for use with that console, without disassembling the object code of the plaintiff’s video game cartridges. Moreover, “[i]f disassembly of copyrighted object code is per se an unfair use, the owner of the copyright gains a de facto monopoly over

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100. Sony Computer Entm’t, Inc. v. Connectix Corp., 203 F.3d 596 [9th Cir.] [intermediate copying of computer code in connection with development of a video game system that emulated plaintiff’s system to allow play on a regular computer was a fair use], cert. denied, 531 U.S. 871 (2000).
101. Atari, 975 F.2d at 844.
102. Id. at 843.
103. Id.
104. Sega, 977 F.2d at 1522.
the functional aspects of his work—aspects that were expressly denied copyright protection by Congress.” Accordingly, the court held, “where disassembly is the only way to gain access to the ideas and functional elements embodied in a copyrighted computer program and where there is a legitimate reason for seeking such access, disassembly is a fair use of the copyrighted work, as a matter of law.”

In *Sony Computer Entertainment, Inc. v. Connectix Corp.*, the Ninth Circuit extended the Sega holding to other forms of reverse engineering that require intermediate copying. In *Connectix Corp.*, the defendant had made a copy of the Basic Input/Output System (BIOS) contained on a chip within the Sony PlayStation, placed the copied BIOS onto the RAM memory of the defendant’s computers, and observed the operation of the program through the use of hardware that simulated the functioning of the PlayStation. The court declined to draw a distinction between these types of “observational” reverse engineering techniques and the “disassembly” techniques it had sanctioned in *Sega*. In either case, the court concluded, the intermediate copying was “necessary to gain access to the unprotected functional elements within the program” and therefore protected by fair use, particularly where, as here, the resulting computer program was “modestly transformative” and, because it emulated the functions of a Sony PlayStation console on an ordinary personal computer, served as a “legitimate competitor” of the Sony product.

Concerned with the judicial trend that reverse engineering of computer programs may qualify as fair use, software developers and sellers increasingly are inclined to use “shrink-wrap” licenses with provisions that prohibit all reverse engineering activities. These provisions raise the question of whether such contractual clauses are enforceable, or whether they are preempted under section 301 of the Act because they arguably collide with statutorily permitted fair uses. In *Bowers v. Baystate Technologies, Inc.*, the Federal Circuit relied on *ProCD, Inc. v. Zeidenberg* to hold that shrink-wrap license

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105. *Id.* at 1526.
106. *Id.* at 1527–28.
108. *Id.* at 603–04.
109. *Id.* at 603, 607–08.
109.1. *See* section 11:3.3 [discussing federal law preemption of state-law claims].
109.2. *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1324 [Fed. Cir.], *cert. denied*, 539 U.S. 928 [2003]. *See also* Davidson & Assocs., Inc. v. Internet Gateway, 334 F. Supp. 2d 1164, 1181 [E.D. Mo. 2004] [relying on *Bowers* in holding that end users who agreed to “click-thru” license and terms of use waived their fair-use defense to reverse-engineer video game software], *aff’d sub nom.* Davidson & Assocs. v. Jung, 422 F.3d 630 [8th Cir. 2005].
agreements that prohibit reverse engineering of software products are valid and not preempted by the Copyright Act.

§ 8:5.4 Search Engines

In order to assist users in locating information on the Internet, the operators of “search engines” may make copies of certain content of the websites it indexes. In Ticketmaster Corp. v. Tickets.com, Inc., defendant operated an online service that allowed users to search for and purchase tickets to a variety of events. Defendant’s automated “robots” crawled Ticketmaster’s website, made temporary copies of Ticketmaster web pages, extracted factual information about events from the pages, and then discarded the remaining information. The factual information extracted from the pages was then formatted according to Tickets.com’s specifications and displayed on its website. The court found the situation analogous to the reverse-engineering of software, and held that temporarily copying a web page in order to extract uncopyrightable facts is a fair use. Applying the four fair-use factors, the court found that Tickets.com’s commercial use of the pages weighed against a finding of fair use. However, weighed in favor of fair use.

In Kelly v. Arriba Soft Corp., the defendant operated a visual search engine. It retrieved photographic images from websites and created an index of “thumbnail” versions of the images, and their URL addresses, in response to end users’ search requests. Clicking on the links provided by the search engine brought users to the image on the indexed site. In a decision with significant implications for the evolution of websites, the Ninth Circuit, on rehearing, concluded that the reproduction and display, in thumbnail size, of the plaintiffs’ images was a fair use. The court found that the use of thumbnails was transformative because the thumbnail images are used as a tool for cataloguing the Internet. Thumbnails “would not be a substitute

109.5. Id. at *16–*19.
111. Kelly 336 F.3d at 818–22.
112. Id. at 819 (“Arriba’s use of the images serves a different function than Kelly’s use—improving access to information on the internet versus artistic expression.”).
for the full-sized images because the thumbnails lose their clarity when enlarged.\footnote{113} In its prior opinion, which was withdrawn, the Ninth Circuit held that the display of full-sized versions of the images was not fair use,\footnote{114} but the decision on rehearing reversed the district court’s grant of summary judgment on that issue and remanded it, because the district court had erred in ruling on the issue when it had not been raised by the plaintiff.\footnote{114.1}

Subsequent to \textit{Kelly}, the Ninth Circuit held in \textit{Perfect 10, Inc. v. Amazon.com, Inc.} that Google’s creation and display of thumbnails was “highly transformative” and, therefore, a fair use.\footnote{114.2} The court rested its holding principally on its finding that Google’s Image Search provided a “great value to the public.”\footnote{114.3} The district court, distinguishing \textit{Kelly}, had held that Google’s use was not fair on two grounds. First, Google derived revenue through its advertising program whenever Image Search was used. Second, Perfect 10 would be able to demonstrate a likelihood of market harm insofar as it had a separate market in licensing its images in a reduced-size format for downloading to cell phones. The court of appeals, however, disagreed: (1) the district court had not determined that the commercial element added by the advertising program was at all significant and (2) the potential harm to Perfect 10’s licensing market was “hypothetical,” because the district court had not made any finding that any Google users actually had downloaded thumbnail images for cell phone use.\footnote{114.4}

Search engines typically cache websites to facilitate searching, to enable retrieval when the original pages are inaccessible, and to allow users to compare changes to web pages over time. One court, in \textit{Field v. Google}, concluded that Google’s practice of caching websites was a fair use because the plaintiff had freely made his content available without charge, there was no evidence of any effect on plaintiff’s direct or licensing market for the works, and Google’s caching was undertaken in good faith.\footnote{114.5} It also concluded that Google’s presentation of cached links was transformative because, inter alia, as opposed to the entertainment function offered by the plaintiff’s website, caching made sites available when the original was inaccessible and provided

\begin{footnotesize}
\begin{itemize}
  \item[113.] \textit{Id.} at 821.
  \item[114.] \textit{Kelly v. Arriba Soft Corp.}, 280 F.3d 934, 947–48 [9th Cir. 2002].
  \item[114.2.] \textit{Perfect 10, Inc. v. Amazon.com, Inc.}, 508 F.3d 1146, 1165 [9th Cir. 2007].
  \item[114.3.] \textit{Id.} at 1166.
  \item[114.4.] \textit{Id.} at 1166, 1168.
  \item[114.5.] \textit{Field v. Google}, 412 F. Supp. 2d 1106, 1117–23 [D. Nev. 2006].
\end{itemize}
\end{footnotesize}
information about changes to the website over time. Unlike in *Kelly*, however, which involved the reduction of photographic content to thumbnail size, there does not appear to be any evidence in the record in *Field* that the plaintiff’s site itself was either transformed or made inaccessible or that it changed over time.

§ 8:5.5 Parodies

Although parody is not one of the examples of typical fair uses listed in the preamble to section 107, the U.S. Supreme Court confirmed in *Campbell v. Acuff-Rose Music, Inc.* that parody nonetheless may constitute a fair use. The standard four-factor analysis applies to parodies just as to any other potentially fair uses, and there can be no presumption that parodies generally are or are not fair. The special nature of parodies, however, may in some cases make a finding of fair use more likely.

An important threshold question in cases where a defense of fair use by parody is asserted is whether the work is in fact a parody. In *Campbell*, the Supreme Court defined parody as a humorous form of comment or criticism. The essential quality of a parody is that it “comment[s] on the original or criticiz[es] it, to some degree.”

For the purposes of copyright law, the nub of the definitions, and the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.

The Court distinguished between parody, which takes aim at the copyrighted work, and satire, which borrows from the copyrighted work but aims at some other target. Notwithstanding *Campbell’s* effort to distinguish between parody and satire, the reasoning of the

114.6. *Id.* at 1118–19.
115. *But see* House Report at 65 [noting that the Register of Copyright’s 1961 Report gave as an example of fair use “use in a parody of some of the content of the work parodied”].
117. *Id.* at 581.
118. *Id.* at 582 (“The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived.”) [footnote omitted].
119. *Id.* at 583.
120. *Id.* at 580.
121. “Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification.
Court may well apply where a work is used principally for satiric purposes.\textsuperscript{121.1}

If a parodic purpose or content is not reasonably perceivable, however, the fair use defense likely will fail. In an action brought by the reclusive writer J.D. Salinger against an unauthorized novel based on his famous narrative of teenage alienation, *The Catcher in the Rye*, the district court concluded that “the alleged parodic content [of the alleged sequel] is not reasonably perceivable, and that the limited non-parodic transformative content is unlikely to overcome the obvious commercial nature of the work . . . .”\textsuperscript{121.2} The defendant’s novel, *60 Years Later: Coming Through the Rye*, portrayed an elderly Holden Caulfield, struggling with physical and mental deterioration, still obsessed with the preoccupations of his youth and increasingly aware that he is the product of the imagination of J.D. Salinger. The court granted a preliminary injunction, concluding that the defendant had “simply rehash[ed] one of the critical themes of *Catcher*,” and had taken “more than what is necessary from Salinger’s own copyrighted work in order to evoke effectively Salinger as an object of criticism or ridicule.”\textsuperscript{121.3}

That a work is indeed a parody—a humorous criticism of or comment on the copyrighted work\textsuperscript{122}—can have significant implications for analysis of the four section 107 factors, and in particular the first, “the purpose and character of the use.” As the Court emphasized

\textsuperscript{121.1} Compare Blanch v. Koons, 467 F.3d 244, 255 [2d Cir. 2006] (“We have applied *Campbell* in too many non-parody cases to require citation for the proposition that the broad principles of *Campbell* are not limited to cases involving parody.”), with Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400-01 [9th Cir.] [holding that a work that broadly mimicked Dr. Seuss’s *The Cat in the Hat* was not a parody of that work, but instead a satire of the O.J. Simpson murder trial and related events], cert. dismissed, 521 U.S. 1146 [1997]; Rogers v. Koons, 960 F.2d 301, 310 [2d Cir.] (“the copied work must be, at least in part, an object of the parody”), cert. denied, 506 U.S. 934 [1992].

\textsuperscript{121.2} Salinger v. Colting, 09 Civ. 5095, 2009 U.S. Dist. LEXIS 56012, at *45--*46 [S.D.N.Y. July 1, 2009]. On appeal, the Second Circuit vacated and remanded for a full consideration of irreparable harm in light of eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388 [2006], but agreed with the district court that the defendant was not likely to establish fair use. Salinger v. Colting, 607 F.3d 68, 83 [2010]. Robert Spoo served as an expert witness for the defense in this case.

\textsuperscript{121.3} *Id.* at *19, *41.

\textsuperscript{122} Although humor is the sword of the parodist, that a parody’s attempts at humor may fail, or offend standards of good taste, does not alter the parodic character of the work. *Campbell*, 510 U.S. at 582–83; see also
in *Campbell*, “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.”

Accordingly, a parody’s potential to “provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one,” may outweigh the fact that the parody is commercial in nature. In *Campbell*, for example, the Court rejected the proposition that the parody—a rap version of the popular Roy Orbison rendition of “Oh, Pretty Woman”—was presumptively unfair because of its commercial nature. Rather, the Court emphasized, the significance of a commercial use will vary depending on the context and likely will be minimal in the case of a transformative parody.

As for the second fair use factor, the Court emphasized in *Campbell* that the distinction between factual and creative works is not “ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.” Thus, the Court in *Campbell* virtually ignored the fact that the copyrighted work targeted by the parody was creative and expressive.

As to the third factor—“the amount and substantiality used in relation to the copyrighted work as a whole”—the parodic nature of a use is significant because “the extent of permissible copying varies with the purpose and character of the use.” Although typically the use of the “heart” of a work would preclude a finding of fair use, this is not necessarily so in the parody context. In order for a parody to

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Burnett v. Twentieth Century Fox Film Corp., 491 F. Supp. 2d 962, 968–69 (C.D. Cal. 2007) (dismissing copyright claim where cartoon show’s “crude” and “absurd” depiction of Carol Burnett as a charwoman in a porn shop was clearly fair-use parody).

123. *Campbell*, 510 U.S. at 579; Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 806 [9th Cir. 2003] [defendant’s series of “Food Chain Barbie” photographs juxtaposing nude Barbie dolls with vintage kitchen appliances was highly transformative parody protected by fair use]; Mattel, Inc. v. Pitt, 229 F. Supp. 2d 315 [S.D.N.Y. 2002] [defendant’s “Dungeon Dolls,” physically altered and recostumed Barbie dolls in S&M bondage gear displayed on a website as the protagonist in a tale of sexual slavery, was highly transformative and constituted parody].

124. *Campbell*, 510 U.S. at 579. See also Abilene Music, Inc. v. Sony Music Entm’t, Inc., 67 U.S.P.Q.2d [BNA] 1356, 1359–63 [S.D.N.Y. 2003] [although commercial, hip-hop song that included an altered rendition of three lines from the Louis Armstrong rendition of “What a Wonderful World” was highly transformative parody because it “criticiz[ed] and ridicul[ed] the cheerful perspective” of the original song, commenting on “lost innocence” and “the naivete of mainstream culture”].

125. *Campbell*, 510 U.S. at 585.

126. Id. at 586.

127. Id.

128. Id. at 586–87.
succeed in criticizing its target, it necessarily must take the work's essential elements. As the Court explained:

Parody’s humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, that parody must be able to “conjure up” at least enough of that original to make the object of its critical wit recognizable. What makes for this recognition is quotation of the original’s most distinctive or memorable features, which the parodist can be sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the [parody’s] overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original.129

Accordingly, the fair use analysis must determine “what else the parodist did besides go to the heart of the original.”130 To the extent that the parodist, while availing himself of the original’s “heart” in order to “conjure up” the original, goes beyond that copying to transform the original, a finding of fair use becomes more likely. Conversely, if “a substantial portion’ of the parody itself is composed of a ‘verbatim’ copying of the original,” a finding of fair use is less likely.131

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129. Id. at 588; see also Burnett v. Twentieth Century Fox Film Corp., 491 F. Supp. 2d 962, 970–71 [C.D. Cal. 2007] [crude eighteen-second animated cartoon depiction of Carol Burnett took just enough of imagery and theme music to make her charwoman character recognizable to viewers].
130. Campbell, 510 U.S. at 589.
131. Id. In Suntrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357 [N.D. Ga. 2001], the district court found that the defendant’s novel, though in part a transformative parody of Gone With The Wind, did not constitute a fair use of the latter work, because it copied from it too extensively—qualitatively and quantitatively—and threatened economic harm to the plaintiff through “market substitution” as an unauthorized sequel. Id. at 1369, 1384. The Eleventh Circuit reversed, however, holding that the preliminary injunction issued by the district court was “an abuse of discretion in that it represents an unlawful prior restraint in violation of the First Amendment.” Suntrust Bank v. Houghton Mifflin Co., 252 F.3d 1165, 1166 [11th Cir. 2001] [per curiam]. The court’s full opinion, which vacated its initial ruling, reaffirmed that “the issuance of the injunction was at odds with the shared principles of the First Amendment and the copyright law, acting as a prior restraint on speech because the public had not had access to [the defendant’s] ideas or viewpoint in the form of expression that she chose.” 252 F.3d 1165, 1177 [11th Cir. 2001].

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Market harm, the fourth fair use factor, again raises interesting issues in the parody context. A true parody constitutes a transformative use, and accordingly, the **Sony** presumption of market harm that applies to mere duplication for commercial purposes is inapplicable.\(^{132}\) Indeed, the Court recognized in *Campbell* that “as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it.”\(^{133}\) Although a parody’s mockery of the original may “kill[] demand” for the original, that sort of harm is a result of criticism, not of commercial competition, and does not constitute “market harm” for purposes of fair use analysis.\(^{134}\)

It is clear, then, that a true, transformative parody is likely to be deemed a fair use under section 107. The Court in *Campbell* was careful to emphasize, however, that parodies are entitled to no presumption of fairness, and that each of the fair use factors must be considered in the particular context of each case. Nevertheless, one copyrighted work, Mattel’s Barbie doll, apparently has reached such iconic status that courts repeatedly have found fair use when it is parodied.\(^{135}\)

\[\text{\underline{132. } Campbell, 510 U.S. at 591.}\]

\[\text{\underline{133. } Id.; Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 805 [9th Cir. 2003] (defendant’s series of “Food Chain Barbie” photographs, juxtaposing nude Barbie dolls with vintage kitchen appliances, was a parody and court felt it was “safe to assume” that Mattel would not enter the market for “adult-oriented artistic photographs of Barbie”); Mattel, Inc. v. Pitt, 229 F. Supp. 2d 315 [S.D.N.Y. 2002] (defendant’s ‘Dungeon Dolls,’ repainted and recostumed Barbie dolls in S&M gear, were a parody and did not act as a market substitute; “[t]o the Court’s knowledge, there is no Mattel line of ‘S&M’ Barbie”).}\]

\[\text{\underline{134. } Campbell, 510 at 591-92.}\]

\[\text{\underline{135. } See, e.g., Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 802 [9th Cir. 2003] (Barbie has come to symbolize “the ideal American woman” and “American girlhood”; its influence on the position of women in society subjects it to comments on society, gender roles and sexuality); Mattel, Inc. v. Pitt, 229 F. Supp. 2d 315, 322 [S.D.N.Y. 2002] (defendant attempting to comment on the sexual nature of Barbie); see also Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 898-99 [9th Cir. 2002], cert. denied, 537 U.S. 1171 [2003] (Barbie is a “cultural icon”; defendant’s pop song “Barbie Girl” poking fun at Barbie’s values of “life in plastic,” undressing and “partying” was parody and did not infringe or dilute plaintiff’s trademark).}\]

(Keller/Cunard, Rel. #11, 11/10) 8–37