Fair Use or Not Fair Use, That Is The Question
A Roundup of Recent Cases

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- 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—
  - the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  - the nature of the copyrighted work;
  - the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  - 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- The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.
Recent Case Studies

- Oracle America v. Google
- Fox News Network v. TVEyes
- Disney Enterprises v. VidAngel
- Cambridge University Press v. Becker
- James Castle Collection and Archive v. Scholastic
- Penguin Random House v. Colting
- Estate of Smith v. Cash Money Records
- Graham v. Prince
- Philpot v. Media Research Center
- TCA Television Corp. v. McCollum
Oracle America v. Google
Oracle America, Inc. v. Google LLC, No. 17-1118 (Fed. Cir. Mar. 27, 2018)

- Oracle sued Google in ND CA, alleging that Google’s unauthorized use of 37 packages of Oracle’s Java application programming interface (“API packages”) in its Android operating system infringed Oracle’s patents and copyrights.
  - A jury found Google infringed Oracle’s copyrights in the Java Standard Edition platform, but deadlocked as to whether Google’s copying was a fair use.
  - Following the trial, the district court found that the API packages were not copyrightable as a matter of law and entered judgment for Google.
Oracle appealed to the Federal Circuit, which reversed, finding that declaring code and the structure, sequence, and organization ("SSO") of the Java API packages were entitled to copyright protection. See Oracle Am., Inc. v. Google Inc., 750 F.3d 1339 (Fed. Cir. 2014).

The Federal Circuit remanded the case with instructions to reinstate the jury’s infringement verdict and for further proceedings on Google’s fair use defense and, if appropriate, on damages.

Google filed a petition for cert. as to the copyrightability determination, which was denied.

— The Solicitor General endorsed the Federal Circuit’s decision and recommended against review.
A second jury trial resulted in a verdict for Google based on its fair use defense.

Following the trial, the district court denied Oracle’s motion for judgment as a matter of law (“JMOL”) and entered final judgment in favor of Google.

Oracle’s renewed JMOL and motion for a new trial both were denied.

Oracle appealed the final judgment and the denials of its two JMOLs to the Federal Circuit.

Google cross-appealed from the final judgment to preserve its argument that the declarations/SSO were not copyrightable.

The Federal Circuit found that Google’s use of the Java API packages was not fair as a matter of law, reversed the district court’s decisions denying Oracle’s JMOL motions, and remanded for a trial on damages.

The Court also dismissed Google’s cross-appeal.
The Federal Circuit found that Google’s use was not a fair use as a matter of law.

- Google had the burden of establishing the affirmative defense of fair use.
- The Court applied a *de novo* standard of review.

**First Factor**: Weighed against fair use.

- Google’s use was commercial even though it offers Android free of charge.
- Google’s use of the API packages was not transformative as a matter of law because (1) it did not fit within any of the uses enumerated in Section 107; (2) its purpose was the same as that of Oracle; (3) Google did not change any of the expressive content or message of the copyrighted material; and (4) smartphones were not a new context.
- Even if the jury did not conclude that Google acted in bad faith, the “highly commercial and non-transformative nature of the use strongly support the conclusion that the first factor weighs against a finding of fair use.”
Second Factor: Weighed in favor of fair use.
  - Although no reasonable juror could disagree that the API packages involved some level of creativity, the jury could have concluded that functional considerations were substantial and important.
  - Nevertheless, the factor “has less significance to the overall analysis.”

Third Factor: At best neutral, and arguably weighed against fair use.
  - Although only 170 lines of code were necessary to write in Java, Google copied 11,500 lines of code, far more than necessary.
  - Although the 11,500 lines was a small part of the 2.86 million lines in the Java SE libraries, it also copied the SSO for the 37 API in its entirety.
  - The material copied was qualitatively significant.

Fourth Factor: Weighed heavily against fair use.
  - The evidence of actual and potential harm from Google’s copying was “overwhelming.”
  - Android competed directly with Java SE in the market for mobile devices.
  - Oracle intended to market Java SE for smartphones.
Fox News Network, LLC v. TVEyes, Inc.

- TVEyes is a for-profit, commercial, subscription-based online media clipping service.
  - It copies content from more than 1,400 channels, including entertainment, sports, and local programming, 24 hours a day, seven days a week, 365 days a year (including Fox News’ content).
  - Users can view, search, download, share, archive, and email high-definition video clips of third-party content.
  - The content is made available as 10-minute, high-definition video clips, viewable consecutively via streaming or download to paying customers.
TVEyes actively advertises that its users can:

- “watch live TV, 24/7”
- “download unlimited clips’ of television programming in high definition”
- “play unlimited clips from television broadcasts”
- “email unlimited clips to unlimited recipients”
- “post an unlimited number of clips” to social media
- “enjoy ‘unlimited storage [of clips] on TVEyes servers’”
- “download edited clips to their hard drive or to a compact disc”
The parties cross-moved for summary judgment in two rounds of briefing.

- The district court’s first decision held that two aspects of TVEyes’ service constituted fair use: “indexing and providing clips and snippets of transcripts to subscribers.”
- The district court’s second decision held that:
  - it was not fair use for TVEyes to copy Fox News content and distribute it as video clips that could be downloaded or watched by date and time on TVEyes,
  - TVEyes’ existing e-mailing system was not fair use, and
  - allowing video clips to be archived on TVEyes’ servers was fair use.
- The district court then issued a permanent injunction.
Fox News, LLC v. TVEyes, Inc., No. 15-3885 (2d Cir. 2018)

- TVEyes appealed to the Second Circuit; Fox News cross-appealed.
- Both sides received extensive amici support.

TV Eyes amici:
- Google Inc. and Microsoft Corp.
- Electronic Frontier Foundation & Public Knowledge
- Professors of Intellectual Property Law
- Computer & Communications Industry Association
- Media Critics

Fox News amici:
- Cable News Network, Inc., Gray Television Group, Inc., Hearst Television, Inc., and ITV America
- The Copyright Alliance
- National Cable and Telecommunications Association
- National Association of Broadcasters
- IP Scholars
- American Society of Journalists and Authors (+ Journalism Professors)
- Digital Media Licensing Association (+ Photographers Associations)
The Second Circuit (Judges Newman, Jacobs, and Kaplan) reversed the district court’s decision, finding that:

- “TVEyes’s re-distribution of Fox’s audiovisual content serves a transformative purpose in that it enables TVEyes’s clients to isolate from the vast corpus of Fox’s content the material that is responsive to their interests, and to access that material in a convenient manner. But because that re-distribution makes available to TVEyes’s clients virtually all of Fox’s copyrighted content that the clients wish to see and hear, and because it deprives Fox of revenue that properly belongs to the copyright holder, TVEyes has failed to show that the product it offers to its clients can be justified as a fair use.”
**First Factor:** Weighed in favor of fair use, “albeit slightly.”
- TVEyes’s copying was transformation because it allowed users to isolate responsive material and “access that material with targeted precision.”
- TVEyes’s copying was “technology that achieves the transformative purpose of enhancing efficiency” by allowing a viewer to watch the programming at a time and place that is convenient to them.
- The “commercial nature” of TVEyes’s copying weighed against a finding of fair use, but not enough to overcome the transformativeness.

**Second Factor:** Plays no significant role.
- The court rejected TVEyes’s argument that the factual content of Fox’s news favored fair use.

**Third Factor:** Weighed against fair use.
- TVEyes made available “virtually the entirety of the Fox programming” that users requested.

**Fourth Factor:** Weighed against fair use.
- There is a “plausibly exploitable market” for this access.
- TVEyes deprived Fox of revenues to which it is entitled as the copyright holder.
Disney Enterprises v. VidAngel
Disney Enterprises v. VidAngel, No. 16-56843 (9th Cir. 2017)

- VidAngel operated an online streaming service that removed objectionable content from movies and TV shows by purchasing physical discs containing the media, decrypting the discs to “rip” a digital copy, and then streaming a filtered version to its viewers.
- Disney and other studios brought suit alleging copyright infringement and circumvention of technological measures in violation of the DMCA.
- The district court granted plaintiffs’ motion for a preliminary injunction, rejecting defendant’s fair use argument, and finding that the first and fourth factors weighed against fair use.
The Ninth Circuit affirmed the preliminary injunction, finding that Disney was likely to succeed on the merits of its copyright infringement claim.

The court first rejected VidAngel’s reliance on the Family Movie Act, which “was designed to allow consumers to skip objectionable audio and video content in motion pictures without committing copyright infringement,” ruling that the text of the Act did not support application to VidAngel’s activities.

The court affirmed the district court’s application of the four fair use factors in finding that VidAngel’s use was not fair use.
First Factor: Weighed against fair use.
- Removing objectionable content does not transform a work.
- “Star Wars is still Star Wars, even without Princess Leia’s bikini scene.”

Second Factor: Weighed against fair use.
- VidAngel conceded this factor.

Third Factor: Weighed against fair use.
- VidAngel conceded this factor.

Fourth Factor: Weighed against fair use.
- The district court found that “VidAngel’s service [is] an effective substitute for Plaintiff’s unfiltered works,” because surveys suggested that almost half of its customers would watch the movies without VidAngel’s filters.
Cambridge University Press v. Becker
In April 2008, three academic publishers sued officers of Georgia State University for infringing their copyrights in academic texts by allowing unlicensed portions of the books to be posted and made available electronically to students in course packs.

Following a bench trial, the district court held that fair use applied to a given use if at least three of the four factors favored defendants.
The district court found five infringements using the following formula:

- **Factor 1**: Favoring defendants in all instances given the nonprofit educational nature of the use.
- **Factor 2**: Favoring defendants in all instances because the texts were factual in nature.
- **Factor 3**: Favoring defendants if excerpt constituted no more than 10% or one chapter of book.
- **Factor 4**: Favoring defendants if there was no evidence that digital permissions were available.
Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11th Cir. 2014)

- The Eleventh Circuit reversed and remanded for further proceedings on the issue of fair use, finding that:
  - “[T]he District Court erred in giving each of the four factors equal weight, and in treating the four factors as a simple mathematical formula. As we will explain, because of the circumstances of this case, some of the factors weigh more heavily on the fair use determination than others.”

- **Factor 1**: The district court correctly found that it favored a finding of fair use.
- **Factor 2**: The district court erred because this factor did not support a finding of fair use in instances where the works contained evaluative and descriptive material that surpasses the bare facts, or material that derives from the authors’ experiences and opinions.
Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11th Cir. 2014)

- **Factor 3**: The district court erred in applying a fixed standard.
  - “The District Court’s blanket 10 percent-or-one-chapter benchmark was improper. The fair use analysis must be performed on a case-by-case/work-by-work basis.”
  - “Defendants argue that the District Court’s 10 percent-or-one-chapter baseline served as a starting point only. However, this ‘starting point’ in fact served as a substantive safe harbor in the third factor analysis, an approach which is incompatible with the prescribed work-by-work basis.”

- **Factor 4**: The district court properly applied the fourth factor, **but** because defendants’ copying was non-transformative and the threat of market substitution was therefore serious, the court erred by not affording this factor additional weight in its overall analysis.
The district court also erred in considering two additional, purportedly non-statutory factors, which should have been part of the four-factor analysis:

- That “limited unpaid copying of excerpts will not deter academic authors from creating new academic works,” and
- “[T]he slight limitation of permissions income caused by the fair use authorized by this Order will not appreciably diminish Plaintiffs’ ability to publish scholarly works and will promote the spread of knowledge.”
On remand, the district court revisited the fair use analysis as to 48 infringement claims and found four cases of infringement, again designating the defendants as the prevailing party.

Plaintiffs appealed the remand decision.

On July 27, 2017, the 11th Circuit heard oral argument.

During argument, the panel questioned how it was that the district court initially found that the fourth factor weighed against fair use as to many of the works, which conclusion was affirmed on appeal, but then on remand found that many of the same uses were in fact fair use.
James Castle Collection and Archive v. Scholastic
Plaintiff Castle Collection, the exclusive owner of the copyrights of the artist James Castle, moved to enjoin the publication of a book about Castle titled “Silent Days, Silent Dreams,” one day before its release.

The book, written for children, included illustrations that combined artwork original to the author and artwork that copied Castle’s art.

Defendants argued that the book was protected by fair use, and the district court agreed.

- **First Factor**: Weighed in favor of fair use.
  - Analogizing to Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609 (2d Cir. 2006) and SOFA Entm’t Inc. v. Dodger Productions Inc., 709 F.3d 1273, 1277 (9th Cir. 2013), the court found that the author’s “illustrations combine with the text to create [his] version of Castle,” which was transformative.
  - The illustrations “transform[ed] Castle’s art into a version of Castle’s life story.”

- **Second Factor**: Weighed against fair use.
  - Art works were original, but because the use was transformative, this factor carried less weight.

- **Third Factor**: Weighed in favor of fair use.
  - The copying was necessary to “enhance the biographical narrative.”

- **Fourth Factor**: Weighed in favor of fair use.
  - Likely favors fair use as “the Castle Collection dislikes the way Castle is portrayed in the Book and would not have licensed his art for that use.”
Penguin Random House v. Colting

- Plaintiffs are the owners and exclusive licensees of copyrights in four famous novels: *Breakfast at Tiffany’s*, *The Old Man and the Sea*, *On the Road*, and *2001: A Space Odyssey*.
- Defendants published a series of illustrated children’s books “based on” these novels.
- The district court found that these children’s books were not protected by fair use as a matter of law.

- **First Factor**: Weighed against fair use.
  - The court found that shortening plaintiffs’ novels and removing adult themes was not transformative, and adding a few pages of analysis, quiz questions, and background information was done only to manufacture a fair use defense.
  - “Fair use . . . is not a jacket to be worn over an otherwise infringing outfit.”

- **Second Factor**: Weighed against fair use.
  - Plaintiffs’ novels are creative works that receive “special solicitude.”

- **Third Factor**: Weighed against fair use.
  - Nearly all of defendants’ books retold plaintiffs’ novels, with few pages of analysis.

- **Fourth Factor**: Weighed against fair use.
  - Both parties agreed there was an established market for children’s versions of adult novels, and publishers license their novels for this purpose.
  - Although plaintiffs hadn’t yet entered market, they might.
Estate of Smith v. Cash Money Records
1. Purpose and Character of the Use

2. Nature of the Work

3. Amount and Substantiality of the Portion Used

4. Effect on the Market for or Value of the Work
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Defendants released an album by Drake called *Nothing Was the Same*, which included the song “Pound Cake/Paris Morton Music 2.”

The song sampled 35 seconds from plaintiff’s 1982 spoken-word track, “Jimmy Smith Rap.”

Defendants rearranged and deleted some of the words, but did not add any words.

Defendants obtained a license for the recording, but not for the underlying composition.

The court granted summary judgment to defendants, finding fair use.
First Factor: Weighed in favor of fair use.
   - Defendants’ use of the plaintiff’s work “transforms Jimmy Smith’s brazen dismissal of all non-jazz music into a statement that ‘real music,’ with no qualifiers, is ‘the only thing that’s gonna last.’”

Second Factor: Weighed against fair use.
   - Plaintiff’s work is a creative expression.

Third Factor: Weighed in favor of fair use.
   - The amount taken was reasonable in proportion of the needs of the intended transformative use.

Fourth Factor: Weighed against fair use.
   - Plaintiff’s work “targets a sharply different primary market than Pound Cake, a hip-hop track.”
   - Plaintiff never attempted to establish a market for licensed derivative works of the composition copyright.
Graham v. Prince

- Donald Graham sued Richard Prince, the well-known appropriation artist, and the Gagosian Gallery and its owner for copyright infringement based on the use of Graham’s photograph in Prince’s New Portraits exhibition.
- Prince commented on an Instagram post of Graham’s artwork and then printed a screenshot of the post.
- Defendants moved to dismiss based on their affirmative defense of fair use, but the court denied the motion.
First Factor: Weighed against fair use.
- Prince’s work was not “so aesthetically different from the originals that they can pass the Second Circuit’s ‘reasonable viewer’ test as a matter of law.”
- Prince “simply reproduce[d] the entirety of Graham’s photograph – with some *de minimis* cropping – in the frame of an Instagram post, along with a cryptic comment written by Prince.”
- Commercial purpose was impossible to assess as transformativeness could not be determined, which could discount commercial purpose.

Second Factor: Weighed against fair use.
- Defendants did not dispute Graham’s photo was creative and published.

Third Factor: Weighed against fair use.
- “[O]nly a determination that Prince’s use of the photograph was transformative could enable this factor to weigh in [Defendants’] favor.”

Fourth Factor: Weighed against fair use.
- Insufficient record as to whether Defendants usurped the market, but Graham’s allegation that target audiences were the same was sufficient.
Philpot v. Media Research Center
Kenny Chesney

From Wikipedia, the free encyclopedia

Kenneth Arnold Chesney (born March 26, 1968) is an American country music singer, songwriter and record producer. He has recorded 20 albums, 14 of which have been certified Gold or higher by the RIAA. He has also produced more than 40 top 10 singles on the U.S. Billboard Hot Country Songs and Country Airplay charts, 29 of which have reached number one on the charts. Most of these have also charted high within the top 40 of the US Billboard Hot 100, making him one of the few successful crossover country artists. He has sold over 30 million albums worldwide.\[1\]

Chesney co-directed and produced a film for ESPN entitled The Boys of Fall. He has received six Academy of Country Music awards (including four consecutive Entertainer of the Year awards from 2005 to 2008),\[2\] as well as six awards from the Country Music Association. He is one of the most popular touring acts in country music, regularly selling out the venues in which he performs.\[3][4\] His 2007 Flip-Flop Summer Tour was the highest-grossing country road trip of the year.\[5\]

The Country Music Association honored Chesney with the
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4. Effect on the Market for or Value of the Work

- Plaintiff took photographs of Kenny Chesney and Kid Rock, both of which Defendant used in connection with articles regarding those musicians’ political opinions.
- The court found that the use of those photographs was fair use, and granted summary judgment for Defendant.

- **First Factor**: Weighed in favor of fair use.
  - Defendant’s use was transformative as its purpose—to comment on celebrities’ political opinions—was different from plaintiff’s purpose, to show the artists in concert.
  - Defendant’s use was “more incidental and less exploitative” than commercial use usually seen.

- **Second Factor**: Neutral.
  - Photographs were factual, depicting celebrities in concert, but creative, because photographer made judgments about photographic choices.

- **Third Factor**: Weighed against fair use.
  - Defendant used all or almost all of both photos.

- **Fourth Factor**: Weighed in favor of fair use.
  - No showing of impact on any economic market—plaintiff admitted he received no remuneration for use of the photographs.
  - Lack of attribution is generally not cognizable under the Copyright Act.
TCA Television Corp. v. McCollum
Plaintiffs, successors-in-interest to the estates of Abbott and Costello, appealed from the district court’s dismissal of their claim against the producers of the play *Hand to God*.

Defendants claimed the use of part of the iconic *Who’s On First?* routine in the play was a fair use.

Though the Second Circuit disagreed with the district court that the use was fair use, the dismissal was affirmed because Plaintiffs failed to allege a valid copyright interest.
First Factor: Weighed against fair use.
- Even if the play critiqued social norms of a small town, it did not transform the Abbott and Costello Routine, but rather had the characters perform it so that it was recognizable, with the main character lying about creating it and then being called a liar by his puppet.
- The was “identically comedic” in the play.
- Because the use was not transformative, the district court should not have discounted the commercial nature of the use.

Second Factor: Weighed strongly against fair use.
- The routine was creative, and Defendants’ use was not justified.

Third Factor: Weighed against fair use.
- Defendants used the portion of the routine that “reveals the singular joke underlying the entire routine.”

Fourth Factor: Weighed against fair use.
- Even if Defendants’ use could not “usurp” the routine, the district court erred in disregarding the possibility of harm to the licensing market.
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