

Entertainment, Arts and Sports Law Journal



A publication of the Entertainment, Arts and Sports Law Section
of the New York State Bar Association



Inside

- Fair Use in Appropriation Art
- Proper Use of Unpaid Interns
- League Ownership of Teams
- What to Consider When Counseling Bands
- The NHL and Player Safety
- Copyright Law and Innovation
- *American Broadcasting Companies v. Aereo*
- Changing the Classification of Child Models
- An Analysis of DMCA § 4001
- Digital Music Thrift Stores
- Redefining "Control" Within the Copyright Act
- Nazi-Era Looted Art Disputes



Fairly Fair Use

By Nima Daivari

Many attorneys fear making a fair use argument. The notion of admittedly and willfully infringing on a copyrighted work is more risk than many attorneys would like to take. That said, as advocates of the law, it is not only our job to take on the responsibilities of the law, but we and our clients and companies should be able to gain from the protections the law affords us as well.

Copyright law exists to protect content creators. The purpose of copyright, which is set forth in the U.S. Constitution, is to provide an incentive to creators by codifying law that helps "...promote the Progress of Science and useful Arts..."¹

In order to promote the progress of the arts, copyright law grants incentive to art creators by granting the creators certain protections for their ideas that are in fixed, tangible form. Such rights include the exclusive right to the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or another transfer of ownership...;
- (4) ...to perform the copyrighted work publicly;
- (5) ...to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

At first blush these exclusive rights make complete sense. If the promotion of art is the purpose of copyright law, then certainly by granting creators certain exclusive rights, the law is encouraging them to continue to create with the knowledge that their creative endeavors are protected and have value.

Yet further analysis begs the question: if the purpose of copyright law is to promote the creation of more art, then does not granting a monopoly over the created art in many ways hinder the development of further art?

The answer is yes, copyright law can actually hinder further art creation. That is why the courts have found² fair use to be a defense to copyright infringement.

17 USC 107 states that..."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.

There are many prominent fair use cases, including: *Harper & Row v. Nation Enterprises*,³ *Campbell v. Acuff-Rose Music*,⁴ *Dr. Seuss Enterprises v. Penguin Books*,⁵ *Suntrust v. Houghton Mifflin Co.*,⁶ *Kelly v. Arriba Soft Corporation*,⁷ *Blanch v. Koons*,⁸ and most recently the ongoing *Patrick Cariou v. Richard Prince*.⁹

The *Cariou* decision is an interesting read. As the case demonstrates, a fair use argument is incredibly fact sensitive, and thus a ruling can be very hard to anticipate. That said, as attorneys one of our many duties is to make difficult calls. We have to make a thoughtful analysis and then back up our analysis by pointing to legislation and case law. As attorneys, we have to be comfortable making these types of analyses instead of repeatedly seeking licenses for uses that do not require licensing.

In order to walk through some fair use analyses, below are a few recurring types of issues that arise in television production.

Criticism

This is one of easier analyses to make, because it falls under one of the clearest and most protected fair uses—criticism. For example, imagine a program entitled *Discussions with Daivari*. This exercise will review the four factors and come to a decision.

Purpose and Character of Use

Discussions with Daivari is a television program that reviews upcoming feature films. The purpose of using the copyrighted work (say, clips from the feature film being discussed) is to critique the film. Criticism of works is rooted in the First Amendment right to free speech and thus highly protectable. The intent behind the series is to generate revenue for its producers and exhibitors. It is a for-profit television series that airs on a for-profit network. While a non-profit use tends to be more defensible, a for-profit use is not dispositive of a fair use. As such, we should feel comfortable that this use passes the first factor.¹⁰

Nature of Copyrighted Work

The nature of the copyrighted work is a fictional, for-profit feature film. It is highly creative and neither contains factual information nor is there a need for the public to be informed about the contents of the film, as opposed to a situation like the one in *Time Inc. v. Bernard Geiss Associates*,¹¹ where the court found that the public interest in a video recording of the assassination of President John F. Kennedy outweighed Time Inc.'s copyright interest in the acquired footage. However, a strong copyright interest does not exempt the copyrighted work from a fair use argument.¹²

Amount and Substantiality

The last two factors, amount and substantiality and effect on the market place are the trickier two factors in this instance. The first, amount and substantiality, is the part where the largest margin of error can exist. If we look to *Harper* we can see that the substantiality of the material used matters just as much as the amount. In *Harper* fewer than 300 words were taken out of 500 pages. However, the words taken were of key interest. If *Discussions with Daivari* airs the twist ending for a film like *The Sixth Sense* or *Psycho*, it does not matter that only one minute out of 120 minutes (less than 1%) of the original copyrighted work was used, because it went to the "heart" of the work, and thusly affected the marketplace (discussed more in next step). It is the attorney's job to review the amount and substantiality of the source material used to ascertain if too much was used. When in doubt, err on the side of caution. One of the best ways to do this is to advise the production to revolve the discussion around material that is displayed in the feature film's trailer. If the studio released those story points or clips, it is safe to say that those clips do not get to the heart and soul of the work, lest the studio undercut the value of its own film.

Effect on Potential Market for Copyrighted Work

This factor looks to substitution in the marketplace, and not the effect of criticism. One would be hard-pressed to argue that a television show that airs one to two, non-key minutes of a feature film that is intended for exhibi-

tion in a movie theater displaces the market for the feature film.

We should be comfortable with this being a fair use.

News Reporting

The next style of show to look at is a fictitious entertainment news series, *Nima Nightly*.

Purpose and Character of Use

Nima Nightly features sit-down interviews with celebrities, follows them around as they go about their days, and discusses current events in Hollywood. The purpose of using the copyrighted work (say, trailers for upcoming television series, movie posters, and concert footage) is to break news and disseminate it to *Nima Nightly*'s viewers. Again, the purpose of the series is to generate revenue for its producers and exhibitors. It is a for-profit television series that airs on a for-profit network.

Nature of Copyrighted Work

The nature of the copyrighted work in this example can vary. It could be a book cover, a movie poster, audio-visual clips from a television series or film, or a litany of other copyrighted material. Nonetheless, even protected works are subject to fair use, lest we forget *Campbell*.

Amount and Substantiality

This factor can cause some issue with respect to static images like a book cover or film poster. By its nature, depicting a static image requires showing the image in its entirety unless it is cropped, covered, blurred, or in some other way manipulated. However, by not depicting the image that is being discussed one runs the risk of not making clear the subject matter at hand. Luckily, the freedom of the press is steeped in our First Amendment rights, and news reporting is generally considered a fair use. Again, it is the attorney's job to advise his or her client to balance the amount of copyrighted material shown with the amount necessary to depict what is being discussed.

Effect on Potential Market for Copyrighted Work

The same points that were established in the previous example can be made here. The likelihood that a news program would displace the marketplace for a book or a concert is slim.

Thus, when reporting on a newsworthy matter, we can feel comfortable that it is a fair use.

Teaching/Educational Use

The last example is a fictional educational video for non-profit use.

Nima's Neighbors is a not-for-profit television series that educates young children.

Purpose and Character of Use

Nima's Neighbors is a television program that attempts to teach young children basic life and education skills. The purpose of using the copyrighted work (say, the song *Happy Birthday*) is to teach young children early language and music skills. Nonprofit use and educational use are both strongly favored by the courts and public policy, which leads us to believe this factor has been met.

Nature of Copyrighted Work

Putting aside the dubious legal status of the song *Happy Birthday* and assuming that it is indeed a copyrighted work that is not yet in the public domain, the nature of the copyrighted work is a song. Music and lyrics are considered to be two separate copyrightable ideas. A song is protectable, which makes this factor less likely to be fulfilled.

Amount and Substantiality

The song consists of a mere four lines and is one of the first songs many children learn. Using anything less than the song in its entirety would defeat the purpose of teaching the child viewer the lyrics and tempo of the song. This factor might weigh the heaviest against a fair use, in that the entire copyrighted work is being exploited. However, looking to *Arriba*, one can see that the use can take the original work in its entirety but still be found to be fair.

Effect on Potential Market for Copyrighted Work

There is no risk in displacing the marketplace for the song *Happy Birthday* when depicting it in a television series. Certainly no one would believe that having heard the song once on *Nima's Neighbors* would stop others from seeking out the song. However, an argument could be made that a fair use finding displaces the marketplace for the revenue generated from license fees. If every use of *Happy Birthday* was found to be a fair use, then the rights holder to the song would not be able to generate revenue from the copyrighted work. Nonetheless, in this particu-

lar instance the totality of the circumstances (i.e., nonprofit use, educational use, minimal market displacement) leads to the conclusion that it is likely to be a fair use.

It is important to remember that the fair use factors are just that—factors. As is evidenced by the above and the cases listed, a fair use argument is highly fact sensitive and a thorough analysis must be made in each instance.

It is also important to remember that fair use is a *defense* to a copyright infringement claim. As stated at the beginning of the column, the use is indeed a willful infringement and fair use is merely a shield if a claim is filed. A good attorney will balance the necessity of making a fair use argument against the necessity of using the copyrighted material. Would blurring be appropriate? How about cropping the shot? Does the song really need to be played or will a sound-alike suffice? How litigious are the rights holders for the material one is looking to use? These are just some of the many questions to ask when making the analysis.

Endnotes

1. U.S. CONST. art. I, §8, Cl. 8.
2. *Gyles v. Wilcox*, 26 E.R. 489, 490 (1740).
3. 471 U.S. 539 (1985).
4. 510 U.S. 569 (1994).
5. 109 F.3d 1394 (1997).
6. 252 F.3d 1165 (11th Cir. 2001).
7. 280 F.3d 934 (9th Cir. 2002).
8. 467 F.3d 244 (2d Cir. 2006).
9. 2013 WL 1760521 (2d Cir. 2013). See pp. 17-20 of this issue for an analysis of the recent decision.
10. See *supra* notes 4, 6 and 7.
11. 293 F. Supp. 130 (S.D.N.Y. 1968).
12. See *supra* notes 4 and 7.

Nima Daivari is Counsel, Business and Legal Affairs for ITV Studios. He received his B.A. in Film from USC, his J.D. from New York Law School and is licensed to practice in both New York and California.

**Get CLE Credit:
Write for the *EASL Journal*!**

Next *EASL Journal* Submission Deadline: Friday, August 30, 2013