

Fair Use: AIM Center Policy Brief

By Joanne Karger, J.D., Ed.D.

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Fair Use: AIM Center Policy Brief

This brief provides an overview of the “fair use” doctrine under copyright law. To date, there have been very few court cases in either the K–12 or higher education context that address the applicability of this doctrine to the conversion of print instructional materials into accessible formats. Because determinations of fair use are highly case-specific, educators who are interested in learning more about this topic should consult with the general counsel’s office for their institution or district. For more information about the relationship between copyright law (including the Chafee Amendment) and accessible instructional materials, visit the National AIM Center web site: aim.cast.org/learn/policy/federal.

Introduction

U.S. copyright law grants copyright owners an exclusive right to reproduce their “original works of authorship.”¹ This right is subject to certain limitations, including the “fair use” doctrine.² Fair use allows other individuals to reproduce a previously copyrighted work for such purposes as “teaching (including multiple copies for classroom use), scholarship, or research.”³ In order to raise a successful fair use defense in response to an allegation of copyright infringement, individuals must argue that their actions constituted a fair use based on four factors specified in the U.S. copyright law.⁴ To analyze fair use claims, courts engage in a balancing of these four factors, which are “explored and weighed together, in light of the purposes of copyright.”⁵

¹ 17 U.S.C. § 102(a).

² *Id.* at § 107.

³ *Id.*

⁴ *Id.*

⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

Part I: Four Fair Use Factors

The four factors that are considered in fair use cases are as follows:

- (1) Purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,
- (2) Nature of the copyrighted work,
- (3) Amount and substantiality of the portion used in relation to the copyrighted work as a whole, and
- (4) Effect of the use upon the potential market for or value of the copyrighted work.⁶

Factor 1: Purpose and Character of Use

The first factor pertains to the purpose and character of the use. Key considerations include whether the use was for profit and whether it was “transformative.” The more transformative a work is, the more likely it will contribute to a finding of fair use and the less significant the other factors will be.⁷ A transformative use is one that “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁸ A transformative use is distinguishable from a “straight reproduction” of the work.⁹

Factor 2: Nature of the Copyrighted Work

The second factor addresses the nature of the work being copied or reproduced. Works that are factual are more likely to contribute to a finding of fair use than works that are

⁶ 17 U.S.C. § 107.

⁷ *Campbell*, 510 U.S. at 579.

⁸ *Id.*

⁹ *Id.* at 579 & n. 11.

fictional or creative in nature.¹⁰ Courts have also found, however, that the second factor may be less important when the purpose of the work is transformative.¹¹

Factor 3: Amount of the Work Copied

The third factor concerns the amount of work being used in relation to the work as a whole. The amount that is allowed varies depending on the purpose and character of the use.¹² Consideration of the amount of work copied involves investigation of both quantitative and qualitative aspects.¹³

Factor 4: Impact on the Market for or Value of the Works

The fourth factor examines the impact of the use on the market for the original work. This factor involves consideration of the effect not only on the current market but also on the potential market for the original work as well as any derivative works.¹⁴ While actual harm need not be shown, there must be “some meaningful likelihood [that] future harm exists.”¹⁵

Part II: Discussion of Authors Guild, Inc. v. HathiTrust

¹⁰ Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985).

¹¹ Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2nd Cir. 2006).

¹² Campbell, 510 U.S. at 586-87.

¹³ Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1178-79 (9th Cir. 2012).

¹⁴ Harper & Row, Publishers, Inc. v. National Enterprises, 471 U.S. 539, 567 (1985).

¹⁵ Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 451 (1984).

A recent federal court case involving fair use has potential implications for the provision of AIM. In this case, the Authors Guild alleged copyright infringement by HathiTrust, a partnership of several research institutions and libraries that had developed a shared digital library containing millions of volumes. In October, 2012, the district court judge in this case ruled in favor of HathiTrust on a motion for summary judgment based on a balancing of the four fair use factors.¹⁶

On June 10, 2014, the U.S. Court of Appeals for the Second Circuit affirmed the judgment of the district court with respect to the doctrine of fair use.¹⁷ The Second Circuit conducted its own analysis of the four fair use factors in relation to the purposes of: (1) enabling a full-text search of works in the database; and (2) providing access to works for individuals with print disabilities.¹⁸

Factor 1

In analyzing the first factor, the Second Circuit concluded that **enabling a full-text search of works** constituted “a quintessentially transformative use.”¹⁹ The court noted that rather than merely repackaging or republishing an original work, the HathiTrust Digital Library (HDL) added something new with a different purpose and character.²⁰ The court further concluded that with respect to **providing access to works for individuals with print disabilities**, although the use was not transformative because the underlying purpose was the same, the purpose could still be considered valid.²¹ The court pointed out that the Supreme Court had already identified the act of making copies of copyrighted works for individuals with print disabilities as an example of fair use.²²

¹⁶ *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 464, 466 (S.D.N.Y. 2012).

¹⁷ *Authors Guild, Inc. v. HathiTrust*, 2014 U.S. App. LEXIS 10803, *45 (2nd Cir. 2014).

¹⁸ *Id.* at *14-*40.

¹⁹ *Id.* at *22.

²⁰ *Id.* at *23.

²¹ *Id.* at *36.

²² *Authors Guild, Inc.*, 2014 U.S. App. LEXIS 10803, at *36.

Similarly, the legislative history (House Committee Report) accompanying the codification of the fair use doctrine in the Copyright Act of 1976 stated that “the making of a single copy or phonorecord by an individual as a free service for a blind persons [sic] would properly be considered a fair use...”²³ Moreover, Congress had reaffirmed its commitment to improve hardships experienced by individuals with print disabilities through the passage of the Americans with Disabilities Act and the Chafee Amendment.²⁴

Factor 2

In analyzing the second factor, the court determined that, with respect to both **facilitating full-text searches** and **providing access to individuals with print disabilities**, because the database included all types of works, there was no question that the collection would include those that are creative in nature and “are of the type that the copyright laws value and seek to protect.”²⁵ The court pointed out, however, that the second factor is rarely found to be determinative.²⁶

Factor 3

Turning to the third factor, the court concluded that although the HDL had made use of entire works in order to facilitate **full-text searches**, these copies were reasonably necessary and not excessive.²⁷ The court also found that maintaining two libraries with identical servers was reasonably necessary to protect against the risk of disaster or data loss.²⁸ With respect to **providing access for individuals with print disabilities**, the court rejected the argument made by the Authors Guild that the copying was

²³ *Id.* at *36-*37.

²⁴ *Id.* at *37-*38.

²⁵ *Id.* at *24; *see also id.* at *38.

²⁶ *Authors Guild, Inc.*, 2014 U.S. App. LEXIS 10803, at *38; *see also id.* at *25.

²⁷ *Authors Guild, Inc.*, 2014 U.S. App. LEXIS 10803, at *26.

²⁸ *Id.* at *27-*28.

excessive because the HDL retained not only digital text files but digital image files as well.²⁹ The court noted that many users who are legally blind would be able to view the images with sufficient magnification or color contrasts.³⁰ Similarly, individuals with physical limitations that prevent them from holding a book or turning its pages would be able to view the images with the help of assistive devices.³¹

Factor 4

Finally, the court concluded that the fourth factor favored a finding of fair use because **full-text search** functionality was a transformative use that would not result in a “market substitution” that is necessary for economic harm under fourth factor analysis.³² The court similarly rejected the two arguments made by the Authors Guild that each copy represented a lost sale because users were able to obtain the copy without a license and that the HDL created the risk of a security breach stemming from the fact that hackers would be able to obtain unauthorized access.³³ With respect to **providing access to individuals with print disabilities**, the court found that the market for accessible books for this population was “insignificant.”³⁴

Court’s Conclusion

Based on a balancing of these four factors, the court concluded that the doctrine of fair use allows HDL: “to digitize copyrighted works for the purpose of permitting full-text

²⁹ *Id.* at *38-*39.

³⁰ *Id.* at *39.

³¹ *Id.*

³² *Authors Guild, Inc.*, 2014 U.S. App. LEXIS 10803, at *28-*29.

³³ *Id.* at *31-*32.

³⁴ *Id.* at *40.

searches”³⁵ and “to provide full digital access to copyrighted works to their print-disabled patrons.”³⁶

Part III: Additional Resources on Fair Use

- [University of Minnesota Explanation of Fair Use](#)
- [University of Minnesota Fair Use Interactive Tool](#)
- [Stanford University Libraries Explanation of Fair Use](#)
- [Educational Fair Use Guidelines from U.S. Copyright Office: Reproduction of Copyrighted Works by Educators and Librarians \(1995\)](#)
- [Proposed Fair Use Guidelines, Final Report to the Commissioner from the U.S. Patent and Trademark Office Conference on Fair Use \(1998\)](#)
- [Association of Research Libraries Code of Best Practices in Fair Use for Academic and Research Libraries \(2012\)](#)
- [Infographic about Fair Use and the Code of Best Practices \(2013\)](#)

³⁵ *Id.* at *33-*34.

³⁶ *Id.* at *40.