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# The impact of Cambridge and the determination of fair use in educational settings

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**The Fair Use exemption to copyright infringement is a difficult concept for those within the legal community because of its unique “case-by-case” application. Without any red line rules, providing guidance to typical users is even more challenging. This paper reviews several recent cases regarding the application of Fair Use and how the interpretation of Fair Use varies across the Federal Circuits. The most recent case of Cambridge v. Patton is discussed as well.**

**Key words:** Copyright infringement, fair use doctrine.

## INTRODUCTION

The ability of a person to control their creative and inventive works was of such consequence to the early leaders of the United States of America that the right was enshrined in Article I of the United States Constitution (U.S. Const. art. I, § 8, cl. 8). Over time, as the courts adjudicated copyright cases, the common law affirmative defense to copyright infringement of fair use developed from case law (H.R. Rep. No. 94-1476, 1976). Later, the United States Congress acted to codify the common-law doctrine of fair use through its insertion in the Copyright Act of 1976. The four factors in this Act include the purpose and character of the use, 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 (17 U.S.C. § 107). However, the language of the statute does not indicate how those who wish to make use of the provision of fair use are to apply the factors, just that the listed factors “shall be considered” for each “particular work.” Thus,

the statute gives no direction on how the four factors are to be weighted (17 U.S.C. § 107). Further, the list allows for the consideration of additional factors outside of the list. Even in cases where only the factors are applied, the language of the statute, as the common law doctrine before it, provides a degree of flexibility that virtually defies definition (Salinger v. Random House Inc., 1986). While the Supreme Court of the United States has ruled on three cases furthering and clarifying with each case the nuances of the application of fair use in the last 30 years, the various federal circuits have continued to show variations in the way the four factors, and the Supreme Court of the United States rulings, are applied and weighted in reviewing cases where fair use is used as an affirmative defense (Nimmer and Nimmer, 2013).

One of the primary purposes for the development of the doctrine of fair use is the use of copyrighted material for the purposes of education (17 U.S.C. § 107). The statute states, in part, that reproduction of copyrighted works “for purposes such as . . . teaching (including multiple copies

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for classroom use), scholarship, or research, is not an infringement of copyright” (17 U.S.C. § 107). However, without a clear definition from the neither the legislation nor the courts on the boundaries of fair use, educational institutions and education-related businesses have been the subject of continued litigation.

This article will review a sampling of cases from each of the Federal Circuits where cases involving fair use have been recently decided, the fair use factors discussed, and how the rationale and application of the factors may have varied.

## METHODS

### Fair use factors

The intent of Congress was not to create an expanded role of fair use or to redefine the elements or tests for the affirmative defense, but to implement what courts had already done through the common law (H.R. Rep. No. 94-1476, at 47, 1976). The fair use section of the Copyright Act details four factors that shall be used, non-exclusively, to determine if a reproductive action is infringement or would be considered fair use (17 U.S.C. § 107).

The first factor to consider when determining fair use is “the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes” (17 U.S.C. § 107). This raises the question if for-profit activities are not eligible for fair use and educational activities are. However, case summaries have shown that when courts found fair use was applicable based on factor one, fair use overall was supported over 90% of the time, and conversely, when factor one did not support fair use, often times fair use in general was not supported (Beebe, 2008).

The second factor to consider when determining fair use is “the nature of the copyrighted work” (17 U.S.C. § 107). The courts have applied this standard when reviewing where the work falls on the continuum from informational to highly creative. Courts have found that works such as catalogs, indexes, or other compilations of works are more open to fair use claims (New York Times Co. v. Roxbury Data Interface, Inc., 1997). In summaries of cases over a period of time, “Despite section 107’s command that ‘the factors to be considered shall include factor two,’ 17.7% of the 306 opinions failed to refer to factor two, while an additional 6.5% did so only to call it irrelevant” (Beebe, 2008). Nevertheless, there are specific aspects of the second factor that tend to be more significant in a court’s finding for or against fair use. In cases where the courts determined the copied work was highly creative, fair use was far less likely to be found (Beebe, 2008).

The third factor in determining whether fair use can be found in a defense against copyright infringement is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole” (17 U.S.C. § 107). This factor asks the court to evaluate both the quantitative and a qualitative scale of the plaintiffs work the defendant used. The guidelines purported to provide clarity for this factor; however, courts have often noted that the guidelines do not carry the weight of the law (Cambridge Univ. Press v. Patton, 2014). In effect, the question is deceptively simple: How much of a work can be copied without exceeding the boundaries of fair use, and relatedly, what is too much to be considered fair use? Courts have weighed more heavily towards qualitative measures than quantitative measures, finding that sometimes copying an entire work is fair use, but rarely allowing the copying of the essence of a work to be considered fair use (Beebe,

2008).

The fourth factor to be considered in determining if fair use applies is “the effect of the use upon the potential market for or value of the copyrighted work” (17 U.S.C. § 107). The purpose of copyright law, as noted in the United States Constitution, is to encourage the progress of science through the protection of an author’s or inventor’s work for a limited time (17 U.S.C. § 107). Due to this foundation, the fourth factor is seen as protecting the economic security of the copyright holder from another usurping their labor, and is often considered to carry the most weight of the four factors (Nimmer and Nimmer, 2013). While some commentators and courts may speak of the de-emphasis of factor four, findings continue to support the powerful influence and correlation between a courts finding on factor four and the court’s overall decision on the finding of fair use (Beebe, 2008).

In summary, the statutory language of the four factors does not create any definitive parameters that users, and courts for that matter, have been able to use to delineate what does or does not constitute fair use (Beebe, 2008). The factors must be evaluated individually, yet weighed as a whole. Additionally, the factors are not to be scored and tallied, with the highest score winning (Wright v. Warner Books, Inc., 1991). However, currently there is no statutory direction on how that is to be accomplished. This lack of direction has led to ambiguity for the general populous, thus, Congress, understanding the public’s need for clarity, included guidelines with the statute (17 U.S.C. § 107).

### The fair use guidelines

In an effort to articulate the meaning of and rationale for the legislation and how educational users would apply these factors, the committee report included guidelines for fair use (H.R. Rep. No. 94-1476, p. 68, 1976). In introducing the guidelines, the committee wrote “with respect to books and periodicals, the purpose of the following guidelines is to state the minimum standards of educational fair use . . . [and] that the conditions determining the extent of permissible copying for educational purposes may change in the future” (17 U.S.C. § 107). The guidelines are not part of the statute, but rather they are in the report, and therefore, do not carry the force of law (Cambridge Univ. Press v. Patton, 2014). Nonetheless, the guidelines have become a well-known benchmark for educators and others who make frequent use of copyright protected materials (Nimmer and Nimmer, 2013). The guidelines, as listed in the committee report, are broken into several parts. The first part addresses classroom copies in either a single copy, or classroom sets (H.R. Rep. No. 94-1476, p. 68, 1976).

#### I. Single Copying for Teachers.

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A. A chapter from a book;
- B. An article from a periodical or newspaper;
- C. A short story, short essay or short poem, whether or not from a collective work;
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper;

#### II. Multiple Copies for Classroom Use.

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; provided that:

- A. The copying meets the tests of brevity and spontaneity as defined below; and,  
 B. Meets the cumulative effect test as defined below; if and,  
 C. Each copy includes a notice of copyright (H.R. Rep. No. 94-1476, at 68, 1976).

The guidelines then address the brevity and spontaneity tests. The brevity limits as defined are very mechanical and this seems at odds with the two-part test of the third factor (17 U.S.C. § 107).

### **Brevity**

- (i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.  
 (ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words. [Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]  
 (iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.  
 (iv) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety.

Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

### **Spontaneity**

- (i) The copying is at the instance and inspiration of the individual teacher, and  
 (ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

### **Cumulative Effect**

- (i) The copying of the material is for only one course in the school in which the copies are made.  
 (ii) Not more than one short poem, article, story, essay or two excerpts may be copied from neither the same author, nor more than three from the same collective work or periodical volume during one class term.  
 (iii) There shall not be more than nine instances of such multiple copying for one course during one class term.  
 [The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]  
 III. Prohibitions as to I and II Above.

Notwithstanding any of the above, the following shall be prohibited:

- (A) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or

excerpts therefrom are accumulated or reproduced and used separately.

(B) There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

(C) Copying shall not:

- (a) substitute for the purchase of books, publishers' reprints or periodicals;  
 (b) be directed by higher authority;  
 (c) be repeated with respect to the same item by the same teacher from term to term.  
 (D) No charge shall be made to the student beyond the actual cost of the photocopying (H.R. Rep. No. 94-1476, p. 68, 1976).

The guidelines, taken as a whole, seem to provide a great deal of clarity for educational users looking to exercise fair use in the copying of copyrighted material; however, the courts have stipulated that the guidelines do not carry the force of law (H.R. Rep. No. 94-1476, at 68, 1976). One could argue that the market for commercially produced educational materials could be destroyed by the liberal application of fair use (Nimmer and Nimmer, 2013). While the guidelines note that expanding beyond the guidelines may not constitute fair use, courts have also found that copying within the noted guidelines can also be a violation of fair use (Nimmer and Nimmer, 2013). If strictly enforced, the prohibitions within the guidelines greatly restrict the extent of classroom copying (H.R. Rep. No. 94-1476, Par. III, 1976).

## **RESULTS**

### **Summary of selected recent case law applying the fair use factors**

The variety of rationales, weights, and methodology of the application of the four factors varies across the courts (Beebe, 2008). This section highlights cases and the deciding courts treatment of the four factors.

#### **Supreme Court of the United States**

##### **Campbell v. Acuff-Rose Music Inc.**

In 1989, a rap music group, 2 Live Crew, produced a rap parody of the Roy Orbison song "Oh, Pretty Woman" (Campbell v. Acuff-Rose Music Inc., 1994). The group sought to license the song from the copyright holder, Acuff-Rose, but after providing the lyrics and a sample of the recording, Acuff-Rose denied permission. The group 2 Live Crew decided to release the parody without the permission of the copyright holder and the song was included on an album titled "As Clean as They Wanna Be" (Campbell v. Acuff-Rose Music Inc., 1994).

After commercial success of the album, having sold over 250,000 copies, Acuff-Rose sued the group and the record company for copyright infringement (Campbell v. Acuff-Rose Music Inc., 1994). The district court granted

summary judgment. In reviewing the four factors, the district court found that the commercial nature of the use was not a bar for factor one and factor four was not violated because a rap parody would have no impact on the commercial market for the original recording (*Campbell v. Acuff-Rose Music Inc.*, 1994).

The Court of Appeals for the 6th Circuit reversed and remanded noting the district court had put too little value on the commercial nature of the copy and that the first factor tipped towards the plaintiff because a commercial activity should always presume to favor the plaintiff (*Campbell v. Acuff-Rose Music Inc.*, 1994). The court also addressed the third factor and noted that the copying of the hook of the original song had violated the qualitative standard found in the third factor of fair use. Finally, the court disagreed that the parody did not harm the commercial market for the original song; therefore, failing the fourth and, in the court's view, the most important element of fair use (*Campbell v. Acuff-Rose Music Inc.*, 1994).

The case was appealed to the Supreme Court of the United States (*Campbell v. Acuff-Rose Music Inc.*, 1994). The first point of contention was the role of parody. The Court notes that without an application of fair use, the work of 2 Live Crew would most certainly be a copyright violation (*Campbell v. Acuff-Rose Music Inc.*, 1994). Parody is a comment on the original, in either a funny or a critical manner, and therefore a parody must evoke enough of the original in the mind of the audience for the comment to be meaningful (*Campbell v. Acuff-Rose Music Inc.*, 1994).

In looking at the first factor, the Court stated the commercial nature of the copy should not have any presumptive value against fair use, nor would non-commercial use have a presumption of fair use. The appellate court's application of such a presumption was not consistent with prior case law or legislative intent (*Campbell v. Acuff-Rose Music Inc.*, 1994).

The second factor, the nature of the copyrighted work, addressed the continuum of factual compilations to highly creative works (*Campbell v. Acuff-Rose Music Inc.*, 1994). No significant determinative value came from this factor at any level of the case, as the work copied was a creative song; therefore, indicative of the very crux of copyright protection.

The third factor looked to whether the quantity and quality of the copied work was "reasonable in relation to the purpose of the copying" (*Campbell v. Acuff-Rose Music Inc.*, 1994). The lower courts differed on the quantitative value of the work copied, with the district court finding the copying within the scope of fair use and the appellate court finding the copying to be substantial. The challenge facing the courts in this case was the role of parody. A parody must make reference to the original in order to bridge the gap for the audience between the original work and the new work often by using the

original's "most distinctive or memorable" parts (*Campbell v. Acuff-Rose Music Inc.*, 1994). The test then becomes is the amount copied reasonable enough to assure identification of the original, yet not infringe or overuse the creative work of another. The Supreme Court stated that no more than necessary was taken to accomplish the purpose and therefore the third factor did not fall in favor of the plaintiff (*Campbell v. Acuff-Rose Music Inc.*, 1994).

The fourth factor, the effect of the copy on the market of the original, is often considered the most important factor especially when paired with factor one, and one of the most challenging to determine (*Campbell v. Acuff-Rose Music Inc.*, 1994). The appellate court placed the presumption of harm because of the commercial nature of the copy, as they had done in the first factor (*Campbell v. Acuff-Rose Music Inc.*, 1994). The group 2 Live Crew had argued that their rap parody of the Orbison song would have no impact on the market for the original song—meaning there would be no substitutions of people buying the rap version rather than the original version. However, not all market harm is actionable under copyright (*Campbell v. Acuff-Rose Music Inc.*, 1994). A critical review, or in this case a biting parody, may reduce the demand for the original but that is not the market substitution issue that the law aims to protect. However, the law protects the ability of the copyright holder to create a derivative rap version of the original, thus, one may argue that the 2 Live Crew version harmed that market, so that should be evaluated by the court.

In reading the final paragraph of the Court's decision, there is a sense of a rather mechanical approach to the factors and it is worth noting the Court did not address any factors outside of the four listed within the statute (*Campbell v. Acuff-Rose Music Inc.*, 1994). The opinion marched through each of the four factors, scoring either for or against the fair use claim, but never addressed the weight of each of the factors. The Court found the first, third, and fourth factors tilted in favor of fair use and the second factor was of no concern (*Campbell v. Acuff-Rose Music Inc.*, 1994).

## **United States Court of Appeals for the 1st Circuit**

### **Nunez v. International News Corp., 2000**

A professional photographer took several pictures, including nude and semi-nude, for use in a model's professional modeling portfolio (*Nunez v. International News Corp.*, 2000). The model was Miss Puerto Rico Universe 1997, and after the distribution of the photographs as part of normal practice in the modeling community, controversy arose as to the appropriateness of the photographs for someone who was representing the Commonwealth of Puerto Rico in the Miss Universe pageant. The local news media began reporting on the

story and the photographs were displayed on television as part of the coverage of the story. The model was interviewed by two television stations as well. Subsequently, a local newspaper acquired the photographs and published several news articles about the controversy and three of the photographs accompanied the stories. The plaintiff's photographer then sued the newspaper for copyright infringement and the paper argued the affirmative defense of fair use (Nunez v. International News Corp., 2000).

The preamble of the Fair Use section includes "news reporting" as an intended use of fair use (17 U.S.C. § 107). The district court dismissed the complaint because of the newsworthy nature of the photographs, the difficulty in reporting on the story without displaying a sample of the photographs, and the minimal economic impact on the photographer (Nunez v. International News Corp., 2000). The district court addressed factor one in noting the newsworthiness of the photographs, tilting in favor of the defendant. The court also addressed the third factor by determining the amount of copying was limited to what was needed to support the newspaper article. Finally, the court addressed the fourth factor by determining the economic impact was insignificant to the photographer's market for other images. It is worth noting, as has been highlighted earlier, when the court determines in either support, or non-support, for factors one and four, the direction of the overall finding goes the same direction over 90% of the time (Nunez v. International News Corp., 2000).

The appellate court then took a review of the case and in turn reviewed each of the four factors (Nunez v. International News Corp., 2000). Even though the court noted that the factors are not exclusive, based on the statute, and that the factors are to be weighed together, the court, did not review any additional factors outside of the four.

In reviewing the first factor, the court looked to determine the nature and use of the copy in relation to the original (Nunez v. International News Corp., 2000). In this case, the court debated whether the use of the photographs of a semi-nude beauty queen was used to simply increase newspaper sales or if they were part of a larger work that was newsworthy. The district and appellate court both agreed that the pictures were the story and a newspaper article about the controversy without the accompanying photographs would be difficult to understand (Nunez v. International News Corp., 2000). It is interesting to note the language the court used in saying facts supporting or opposing fair use for factor one "count" for or against a party, thereby noting a mechanical approach (Nunez v. International News Corp., 2000).

In discussing the second factor, the nature of the copyrighted work, one important aspect is the creative nature of the work. In this case, the work of a photo-

grapher would generally be considered more creative than factual, even though the court did mention that the modeling photographs were not ones of creativity, but rather more of a marketing piece for the model (Nunez v. International News Corp., 2000). Nonetheless, the court found that the intent of the photographs was to be distributed to others and that the publication of the photographs in the newspaper did no harm this intended use. In summary, the appellate court found the second factor to be neutral to the issue of fair use (Nunez v. International News Corp., 2000).

The third factor addressed the amount of the material that was copied in either the qualitative or the quantitative sense (Nunez v. International News Corp., 2000). In this case, the court noted that to copy any less than the entire photograph would have "made the picture useless to the story" (Nunez v. International News Corp., 2000). Even though the defendant copied the entirety of the copyrighted work, the court counted this factor as having "little consequence" in their analysis.

In evaluating the fourth factor, the effect on the market, the court had to determine what market was potentially impacted. As seen in the Campbell case, the court often has to make a determination as to which of several potential markets is the one most closely associated with the copied material. Here, the court had to decide between the market for the actual pictures and the market for the services of the photographer in the profession. The lower court considered the market of the professional photographer, while the appellate court determined the proper market was that of the actual photographs (Nunez v. International News Corp., 2000). The court hearing the appeal determined the market for professional modeling photographs was for dissemination at no cost for the purposes of publicity for the model and that the reproduction of these photographs in a newspaper did not hurt that market, but perhaps even enhanced the market because of the widespread coverage of the story (Nunez v. International News Corp., 2000).

The court in summary found, in a checklist fashion and without applying any weight to any of the factors, that the "first, second, and fourth factors" favor fair use, while the third is not relevant in the case and therefore found in favor of fair use. The court did not evaluate any factors outside of the four established by the statute (Nunez v. International News Corp., 2000).

## **United States Court of Appeals for the 2d Circuit**

### ***Authors Guild Inc. v. Hathitrust***

A group of thirteen universities founded an organization to set up and operate a digital library (Authors Guild Inc. v. Hathitrust, 2014). The digital library contained over ten

million works and allowed members to access these works for three purposes. Firstly, the texts are accessible for keyword searches that do not display the actual text of the work, but rather reports the number of times a word appears in the work and the page number. Secondly, if a user has a disability that prevents the use of a standard printed book, the user can access a digital copy for use in accessible forms such as a text reader or a magnifier. The last permitted use of the digital copies was to create a reproduction of the original should it be lost. An association representing authors of some of the digitized works sued for copyright infringement (Authors Guild Inc. v. Hathitrust, 2014). In the district court, summary judgement was granted in part because the court saw no dispute that the transformative nature of the work would be considered fair use (Authors Guild Inc. v. Hathitrust, 2014).

At the appellate court, the fair use factors were reviewed within the lens of each of the three uses of the digital library. The issue of preservation was not discussed in terms of fair use because no copies had been made at the time of the suit (Authors Guild Inc. v. Hathitrust, 2014).

### **Full-text search**

In looking at the first factor, the conversion of a text to a full-text searchable database is a completely transformative use (Authors Guild Inc. v. Hathitrust, 2014). By the conversion, the library adds to the original to create something with a different purpose and character from the original. The second factor had limited value to the court's review because of the transformative nature of the copy. Factor three looks to determine if the amount of the work that is copied is more than necessary to achieve the purpose. In this case, the entire work was copied, but to copy any less than the whole work would be meaningless. The fourth factor of economic harm looked at the possibility of the digital copy acting as a substitute, and therefore, damaging the market for the original, copyrighted work (Authors Guild Inc. v. Hathitrust, 2014). In the review of the record, the court found that a searchable database would not act as a substitute for the text (Authors Guild Inc. v. Hathitrust, 2014). The court did not consider any other factors for this use and after all four factors were considered the "balance" favored fair use (Authors Guild Inc. v. Hathitrust, 2014).

### **Access to the print-disabled**

The court then reviewed whether access to the print-disabled component would be considered fair use (Authors Guild Inc. v. Hathitrust, 2014). Upon receiving

documentation of need, patrons who were classified as having a disability that prohibits the use of printed materials, the patron would be given access to digital copies for use with a text reader or other types of enabling devices. The district court considered this a transformative use, but the appellate court disagreed, because converting printed materials to a digital format did not add anything new to the original. However, while the conversion may fail the transformation test, it does not automatically fail factor one (Authors Guild Inc. v. Hathitrust, 2014). Conversion of material for use by the blind is one of the explicit examples listed in the committee report. Nevertheless, given the breadth of materials in the library, beyond what may be needed for an accommodation, the court determined the second factor weighed against fair use (Authors Guild Inc. v. Hathitrust, 2014). The third and fourth factors also weighed towards fair use because of the accommodations for the blind and otherwise disabled. The court, in weighing all of the factors together concluded that providing digital copies to print-disabled patrons was within the bounds of fair use (Authors Guild Inc. v. Hathitrust, 2014).

### **United States Court of Appeals for the 3d Circuit**

#### ***Video Pipeline v. Buena Vista Home Entertainment***

A company licensed and compiled movie clips, similar to movie trailers, for use in video rental stores and then decided to use the licensed movie clips on various websites, a use not authorized by the licensing agreement (Video Pipeline v. Buena Vista Home Entertainment, 2003). After the movie company revoked the license, the company took small clips from the movies to create their own movie clips for use on their websites. The district court issued the movie companies an injunction barring the clips as copyright infringement (Video Pipeline v. Buena Vista Home Entertainment, 2003).

In reviewing the affirmative defense of fair use, the appellate court first reviewed the first factor of character and purpose of use (Video Pipeline v. Buena Vista Home Entertainment, 2003). Both courts found that the movie clips were not transformative in use, nor did they add new elements to the original copyrighted works. There was, for example, no review of the movie that the clip supported. Coupled with the strong commercial nature of the clips, the evaluation of the first factor weighed strongly against fair use (Video Pipeline v. Buena Vista Home Entertainment, 2003).

The second factor looked at the nature of the copyrighted material. In this case, the material was creative in nature and would be more closely protected than other copyrighted materials that are more

informational in nature. Both courts found this factor also weighed strongly against fair use (Video Pipeline v. Buena Vista Home Entertainment, 2003).

The third factor weighed the amount and substantiality of the work copied (Video Pipeline v. Buena Vista Home Entertainment, 2003). This factor looks to balance both the quantity copied (in this case approximately two minutes out of a movie that is approximately ninety minutes long) and the quality of what is copied (i.e. the essence of the product). The lower court found that the clips, even though they were short, share the essence of the movie, and therefore, weighed against fair use (Video Pipeline v. Buena Vista Home Entertainment, 2003). However, the appellate court found the clips were all from the first part of the movies, did not reveal any surprises or plot twists, and provided enough information for someone to understand the concept of the movie, thus, the third factor leaned towards fair use (Video Pipeline v. Buena Vista Home Entertainment, 2003).

The fourth factor of economic impact looked at the effect of the copied material on the potential market for the original (Video Pipeline v. Buena Vista Home Entertainment, 2003). The lower court found that the effect on the commercial movie market was ambiguous, and therefore, found the fourth factor neither supported nor weighed against fair use. The appellate court took a different view, looking not at the commercial movie market, but at the derivative market for authentic movie trailers. The appellate court noted there was a market for trailers and listed several examples of commerce linked to trailers. Therefore, contrary to the lower court, the appellate court found the copied materials did harm the potential market for the copyrighted material and this factor therefore weighed strongly against fair use (Video Pipeline v. Buena Vista Home Entertainment, 2003).

In its conclusion, the appellate court reviewed no additional factors outside of the four, even though the court did note the list of statutory factors was non-exclusive. Further, the court noted that "three of the four" factors weighed against fair use, without a discussion of the impact of each factor, even though it was acknowledged that the factors are not a scorecard (Video Pipeline v. Buena Vista Home Entertainment, 2003).

## **United States Court of Appeals for the 4th Circuit**

### ***A.v. Ex Rel. Vanderhye and Iparadigms, Llc***

Defendant iParadigms, LLC, offered subscriptions to a system called "Turnitin Plagiarism Detection Service" (Turnitin) that enabled schools to monitor for plagiarism by digitally comparing student work. When a school subscribes to Turnitin, it requires students to submit their assignments through a web-based system available at [www.turnitin.com](http://www.turnitin.com) or via an integration between Turnitin

and a school's course management system. The system gives participating schools the option of "archiving" the student works. When the option is selected, Turnitin digitally stores the written works so that the work becomes part of the database used by Turnitin to evaluate the originality of other student's works in the future.

The plaintiffs, high school students, claimed that archiving their schoolwork without their permission infringed their copyrights in those works. The District Court decided for iParadigms on two points. First, the students and iParadigms entered into binding agreements when the students clicked on "I agree" (A.V. Ex Rel. Vanderhye v. iParadigms, LLC, 2009). This agreement effectively shielded iParadigms from liability arising out of plaintiff's use of the website. Second, iParadigms' use qualified as "fair use" (A.V. Ex Rel. Vanderhye v. iParadigms, LLC, 2009).

The appellate court upheld the district court that archiving student work for the purpose of detecting plagiarism constituted fair use. It deemed it was transformative because it was unrelated to the work's expressive content and was instead aimed at detecting and discouraging plagiarism. The court explained that ownership rights created by the Copyright Act are not absolute. These rights are, as stated by *Bond v. Blum* (2003), "limited in that a copyright does not secure an exclusive right to the use of facts, or other knowledge," but rather, copyright protection extends only to the author's manner of expression. Moreover, the copyright owner's rights are subject to several exceptions enumerated by the Copyright Act. One of these exceptions codifies the common-law "fair use" doctrine, which "allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances" (*Eldred v. Ashcroft*, 2003, as quoted in *A.V. Ex Rel. Vanderhye and iParadigms, LLC*, 2009). This is codified at 17 U.S.C. § 107:

[T]he fair use of a copyrighted work, including such use by reproduction in copies . . . , for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

### **First factor**

In the first factor, the court examined the purpose and character of the use whether such use is of commercial nature or is for nonprofit educational purposes. In this analysis, it "is not 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" (*A.V. Ex Rel. Vanderhye v. iParadigms, LLC*, 2009). To determine the character of the use, the

court needs to determine whether the use at issue merely supersedes the objects of the original creation, or whether it adds something new, with a further purpose or different character. In other words, courts must examine whether and to what extent the new work is transformative. In the case of iParadigms' use of the student works, the district court concluded that the first factor weighed in favor of a finding of fair use because the latter's use was "highly transformative," and "provides a substantial public benefit through the network of educational institutions using Turnitin" (A.V. Ex Rel. Vanderhye and iParadigms, LLC, 2009).

In this case, the district court acknowledged that iParadigm's use of the plaintiffs' works occurred in the commercial context, that is, iParadigms makes a profit in providing this service to educational institutions. The appeals court agreed with the district court stating that commercial use of copyrighted material is not determinative, and that if "commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, which are generally conducted for profit in this country" (internal quotes omitted) (Sony Corp. v. Universal City Studios, Inc, 1984, as quoted in A.V. Ex Rel. Vanderhye and iParadigms, LLC, 2009). While a commercial use finding general weighs against a finding of fair use, the appeals court noted that it must be "weighed along with [the] other factors in fair use decisions" (Sony Corp. v. Universal City Studios, Inc, 1984, as quoted in A.V. Ex Rel. Vanderhye and iParadigms, LLC, 2009).

The plaintiffs argued that the archiving process is not transformative because it adds nothing to the work because it merely stores the work unaltered; even if iParadigm's use has a transformative purpose, the use itself is not transformative if it fails to effect such purpose, because the Turnitin system is not fool-proof, the archiving of plaintiffs' works to compare and detect plagiarism cannot be transformative.

The appeals court countered the first proposition and held that use of a copyrighted "work need not alter or augment the work to be transformative in nature" (A.V. Ex Rel. Vanderhye and iParadigms, LLC, 2009), the second assertion was rejected holding that "[t]he question of whether a use is transformative does not rise or fall on whether the use perfectly achieves its intended purpose . . . Whether a better plagiarism detection system could be designed is not important to our analysis of whether the disputed use serves a different purpose or function" (A.V. Ex Rel. Vanderhye and iParadigms, LLC, 2009).

### **Second factor**

The appeal court explained that a work is entitled to greater protection if it is a product of creative expression,

but if the disputed use is not related to its mode of expression, but rather to its historical facts, then the creative nature of the work is mitigated (Bond v. Blum, 2003, as quoted in A.V. Ex Rel. Vanderhye and iParadigms, LLC, 2009). As found by the district court, the appeals court noted that iParadigms' use of the plaintiffs' works related solely to the comparative value of the works and did not diminish the incentive for creativity on the part of the students.

In this case, the plaintiffs contended, first, that their works were unpublished and that the fair use of an unpublished work is narrower in scope because the right to control the first public appearance of the author's expression weighs against such use of the work before its release. To this assertion, the appeal court held that unpublished work "shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors" (A.V. Ex Rel. Vanderhye and iParadigms, LLC, 2009). Moreover, the appeal court explained that the Turnitin did not have the intended purpose or incidental effect of supplanting plaintiffs' rights to first publication. In fact, no third party, other than the respective instructor to whom plaintiffs submitted their papers, can view their respective works. Neither did iParadigms publicly disseminate or display their works. Moreover, the appeals court noted that the archiving process does not involve any review of the submitted works, even by those at iParadigms. "This is significant in that the primary basis for the close scrutiny courts give the use of an unpublished work is, as previously noted, an author's right to control the first public appearance of his expression" (internal quotation marks and citations omitted) (A.V. Ex Rel. Vanderhye and iParadigms, LLC, 2009).

Second, the plaintiffs contend that the district court ignored that the works in question were works which are categorized as "highly creative" in nature and deserving of the strongest protection. The appeal court held that iParadigms' use of the works was not related to the creative core of the works. In this case, the use of the works is for the purpose of comparing the similarity of type written characters used in other student works, as this is unrelated to any creative component (A.V. Ex Rel. Vanderhye and iParadigms, LLC, 2009).

### **Third factor**

The appeal court explained that this statutory factor requires courts to consider the amount and substantiality of the portion used in relation to copyrighted work as a whole. Moreover, it requires courts to consider the quality and importance of the copyrighted materials used (Campbell v. Acuff-Rose Music Inc., 1994, as quoted in A.V. Ex Rel. Vanderhye and iParadigms, LLC, 2009), whether the portion of the copyrighted material was "the

heart of the copyrighted work" (internal citation removed) (A.V. Ex Rel. Vanderhye and iParadigms, LLC, 2009).

The appeal court discussed, that while iParadigms uses substantially the whole of plaintiffs' works, its use was limited in purpose and scope as a digitized record for electronic comparison purposes only. Moreover, "[h]aving already concluded that such use of plaintiffs' works was transformative, the district court concluded that iParadigms' use of the entirety of plaintiffs' works did not preclude a finding of fair use" (A.V. Ex Rel. Vanderhye and iParadigms, LLC, 2009).

#### **Fourth factor**

Courts must examine the market of the copyrighted work to determine "the effect of the use upon the potential market for or value of the copyrighted work" (17 U.S.C. § 107(4)). This has been described as the "single most important element of fair use" (Harper Row Publishers, Inc. v. Nation Enterprises, 1985, as quoted in A.V. Ex Rel. Vanderhye and iParadigms, LLC, 2009). It was recognized that the primary goal of copyright is to ensure that authors have the opportunity to profit (i.e. the author's incentive to create); by contrast, 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 (Sony Corp. v. Universal City Studios, Inc, 1984, as quoted in A.V. Ex Rel. Vanderhye and iParadigms, LLC, 2009). Thus, the ultimate question to be resolved is whether the defendant's use of plaintiffs' works would materially impair the marketability of the work[s] and whether it would act as a market substitute for them.

The appeal court noted that the fourth factor overlaps to some extent with the question of whether the use was transformative. A transformative work is less likely to cause a substantially adverse impact on the potential market of the original (On Davis v. The Gap, Inc, 2001, as quoted in A.V. Ex Rel. Vanderhye and iParadigms, LLC, 2009)

#### **Bouchat v. Baltimore Ravens Ltd.**

An artist filed a series of lawsuits against the Baltimore Ravens football team for copyright infringement and related damages from their use of a team logo the artist had designed (Bouchat v. Baltimore Ravens Ltd., 2013). Earlier cases had been resolved with the team having been found to have infringed on the Bouchat logo and Bouchat being awarded zero dollars by a jury. The final lawsuit in the series focused on the use of the logo in question in historical displays and videos that include clips of prior games where the logo in question was on the player's uniforms. The lower court found that the

limited and incidental use of the former logo was fair use and found for summary judgment. Additionally, the lower court found the first factor to favor fair use because the use by the team was transformative. The second and third factors were neutral. The fourth factor favored fair use because the incidental use was minimally commercial and there would be no impact on the market for the logo (Bouchat and Baltimore Ravens Ltd., 2013).

The review by the appellate court started with the first factor and asked a two-part question, "Was the use transformative and to what extent does the use serve a commercial purpose?" (Bouchat v. Baltimore Ravens Ltd., 2013). The court stated that the original use of the logo was for promotional purposes but the use in the videos in question was for historical purposes, and thus a transformative use. Likewise, the logo in the historical documentary videos had little or noncommercial value. The court spent little time discussing the second factor, finding that the work was creative, and therefore, subject to the protection from fair use, but that the transformative way the logo was used within a historical context minimized the weight of the second factor (Bouchat v. Baltimore Ravens Ltd., 2013).

The third factor addressed the amount of the copyrighted material copied, which in this case was the entire logo. However, as was seen in other cases, such as Nunez, copying an entire work does not immediately weigh against fair use (17 U.S.C. § 107). The appearance of the entire logo in a historical documentary about the football team does not exceed a reasonable amount of copying to be considered fair use, so the court found this factor to be neutral or in favor of fair use (Bouchat v. Baltimore Ravens Ltd., 2013)

The fourth factor looked at the impact of the use of the logo within the films on the potential value or market for the original work. The court found the fleeting display of the logo within a historical documentary film would have no impact on the potential market for the original logo (Bouchat v. Baltimore Ravens Ltd., 2013).

The court did not review any factors outside of the four statutory factors. In summary, the court decided the first factor strongly supported fair use and the remaining three factors were of little impact either way. While the court did not explicitly weight the factors, it did note that "in the aggregate" the factors favored fair use (Bouchat v. Baltimore Ravens Ltd., 2013)

#### **United States Court of Appeals for the 5th Circuit**

##### ***Ergonome Inc. v. Compaq Computer Corp***

A company that produced a book, The Hand Book, about proper hand positioning and tips to avoid repetitive stress injuries sued Compaq for copyright infringement after learning that portions of The Hand Book materials were

included in Compaq computer manuals and packaged with every computer sold (*Ergonome Inc. v. Compaq Computer Corp.*, 2004). The lower court had ruled the use was covered by the affirmative defense of fair use because of the limited amount of similar material (*Ergonome Inc. v. Compaq Computer Corp.*, 2004).

The appellate court began its review with the first factor and noted that while the Compaq manuals were not sold individually, they were included as part of a commercial transaction. This weighed this factor potentially against fair use but the court did not address whether the use of the material was transformative, meaning a new or novel use for the copyrighted material. The second factor weighed the nature of the protected work and the court reasoned that the material was more factual than creative, and therefore, more subject to claims of fair use when compared to highly creative works (*Ergonome Inc. v. Compaq Computer Corp.*, 2004).

The third factor evaluated the quantity and quality of the material copied. The court focused solely on the quantity copied. The court stated that is was a reasonable conclusion of the lower court that the amount copied was insubstantial in relation to the entire work. The court did not address the second aspect of the third factor, the qualitative amount of the work copied, specifically, "Did Compaq copy the essence of the book" (*Ergonome Inc. v. Compaq Computer Corp.*, 2004)?

Finally, the fourth factor looked at the economic impact on the market for the original copyrighted material. The court found that the inclusion of the copyrighted material had no impact on the market for the original (*Ergonome Inc. v. Compaq Computer Corp.*, 2004). The copyright holders had reported they were no longer actively marketing the printed materials and instead focused on software because the sharing of the techniques through normal managerial trainings was diminishing the market. The court did not look at any extra factors. Additionally, the court did not address the qualitative aspect of factor three, instead only focusing on the total sum of the copying in comparison to the original (*Ergonome Inc. v. Compaq Computer Corp.*, 2004).

### **United States Court of Appeals for the 6th Circuit**

#### ***Princeton University. Press v. Michigan Document Services***

Michigan Document Services (MDS) was a commercial printer in the business of producing course packs (*Princeton Univer. Press v. Michigan Document Servs.*, 1996). Course packs are faculty-selected segments of copyrighted materials, copied, and then bound for use in classes often times in lieu of textbooks. The lower court found the copying to be a violation and did not accept the defendant's claim of fair use (*Princeton Univer. Press v. Michigan Document Servs.*, 1996).

The appellate court challenged, in detail, the notion that the fair use statute's mention of "multiple classroom copies" means that the copy center's facilitation of that copying is subject to fair use (*Princeton Univer. Press v. Michigan Document Servs.*, 1996). The court focused firstly on the fourth factor, the impact on the market for the original copyrighted work. The court noted that other copy centers were paying royalties in excess of \$500,000 per year, while MDS chose to pay none. The court determined this market would certainly be harmed by the widespread adoption of the behavior of MDS. The court reviewed the fourth factor first because it deemed this factor as carrying the most weight in this case (*Princeton Univer. Press v. Michigan Document Servs.*, 1996).

The first factor can be considered from two perspectives: the transformative nature of the copy in comparison to the original and the commercial nature of the reproduction. While the student's use of the materials was non-commercial, the company's production and sale of the packs most certainly was. Furthermore, simply copying large chunks of copyrighted materials, even if it is bound with other materials, is "hardly transformative" (*Princeton Univer. Press v. Michigan Document Servs.*, 1996).

The court noted that the second factor was not in dispute as MDS acknowledged the copying of the copyrighted creative materials (*Princeton Univer. Press v. Michigan Document Servs.*, 1996). Therefore, there was no dispute as to the nature of the copyrighted work. The third factor looked at the amount of copied materials and the quality of the copied excerpts as part of the whole. The amount of copying was immense, printing as much as 30% of one work and no less than 8,000 words from most works.

In summary, the court did not look at any factors outside of the statutory four (*Princeton Univer. Press v. Michigan Document Servs.*, 1996). The court did weigh the fourth factor the most heavily in finding against fair use and further found the other factors to be against a finding of fair use as well. The court further discussed the classroom copying guidelines, which are not part of the statute, but are part of the committee report and legislative history. The court noted that while the guidelines "do not have the force of law, they do provide general guidance" and the copying in this case was far outside the guidelines; therefore, it weighed against fair use (*Princeton Univer. Press v. Michigan Document Servs.*, 1996).

### **United States Court of Appeals for the 7th Circuit**

#### ***Kienitz v. Scornie Nation LLC***

An organization that hosts an annual block party made t-shirts poking fun at the mayor of the town who had wanted to shut down the annual event. The artistic image

on the t-shirts was based on a photograph of the mayor downloaded from the town's website. The professional photographer who took the original image sued for copyright infringement (*Kienitz v. Sconnie Nation LLC*, 2013).

The court, in reviewing the four factors, stated the most important factor was the fourth, the economic impact of the copying on the value of the original (*Kienitz v. Sconnie Nation LLC*, 2013). For the fourth factor, the court found that the usage on the shirts had no impact on the potential market for the original photograph because the shirts bore little similarity to the original after the artistic rendition was created. Additionally, the court determined the copied work was transformative, thus, weighing the first factor towards fair use. Finally, the court determined that the second and third factor had little relevance to the issue (*Kienitz v. Sconnie Nation LLC*, 2013).

## United States Court of Appeals for the 8th Circuit

### Mulcahy v. Cheetah Learning LLC

Rita Mulcahy filed a lawsuit, claiming copyright infringement and unfair competition by Cheetah Learning LLC and by Jeff Schurrer, an instructor who allegedly distributed infringing materials to Cheetah students. Mulcahy wrote and copyrighted PMP Exam Prep., which was heavily based on the Guide to the Project Management Body of Knowledge (PMBOK) created and copyrighted by PMI. PMI established a permission fee system for future derivatives of its work. Mulcahy's book begins with materials focused on passing the PMP exam that have no counterparts in the PMBOK. However, the subsequent sections take up 150 of the work's 165 pages; therefore, reproducing the majority of the PMBOK in a condensed form. Cheetah was notified that its material, called Candidate Notetaker had significant similarities with Mulcahy's PMP Exam Prep. Cheetah informed Mulcahy that it removed what it believed to be the infringing content. Mulcahy was unsatisfied, hence the lawsuit.

The district court ruled in favor of Mulcahy concluding that "(i) Mulcahy's copyright is valid because PMP Exam Prep does not infringe PMI's copyright in the PMBOK, (ii) alternatively, PMP Exam Prep is a fair use of the PMBOK, and (iii) Cheetah's course materials are substantially similar to PMP Exam Prep, and therefore, infringe upon Mulcahy's copyright as a matter of law" (*Mulcahy v. Cheetah Learning LLC*, 2004).

However, the appeal court held that the district court erred in ruling that PMP Exam Prep is not an unauthorized derivative of the PMBOK and that any copying of the PMBOK in PMP Exam Prep was a fair use (*Mulcahy and Cheetah Learning LLC*, 2004). The appeal

court, quoting 17 U.S.C 106(2), stated that a derivative is:

A work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted (emphasis supplied).

Since the owner of the original copyright has the exclusive right to prepare derivative works, the creator of a derivative is only entitled to a copyright if permission was granted to use the underlying copyright work (17 U.S.C. 103(a)). Therefore, if the PMP Exam Prep is an unauthorized derivative work of the PMBOK, Mulcahy's copyrights are invalid.

In this analysis, while it was not explicitly stated, a distinction was made between a derivative work and transformative use. An important distinction is that a derivative creator must first seek the permission from the original creator before the former can have a valid copyright claim; whereas, in transformative use, prior permission is not required for a valid copyright.

Therefore, the court must determine whether Mulcahy's book is a derivative work. In doing so, it applied the substantial similarity test. Under this test, if the later work does not contain sufficient material from the pre-existing work, the former is not a derivative work; "a work is not derivative unless it has been substantially copied from the prior work" (*Mulcahy v. Cheetah Learning LLC*, 2004). Moreover, "a determination of what is sufficient must take into account the nature of the derivative work inquiry" (*Mulcahy v. Cheetah Learning LLC*, 2004).

In this case, large portion of Mulcahy's book copy, condense, and adapt portions of the PMBOK that are relevant to passing the exam. Whether this copying is infringing, the issue cannot be answered by looking at the percentage of the PMBOK that has been condensed or copied. Rather, the court must examine if the putative infringing work copied or condensed the "qualitative core" of one marketable portion of the PMBOK (*Mulcahy v. Cheetah Learning LLC*, 2004). "Thus, a work may be found to be derivative even if it has a different total concept and feel from the original work" (*Mulcahy v. Cheetah Learning LLC*, 2004).

Mulcahy argued that PMP Exam Prep is a fair use of the PMBOK. The court only considered the fourth factor in this case, that is, the effect of the use upon the potential market for or value of the copyrighted work. The district court concluded that it constituted fair use because Mulcahy's book told students "You need both the PMBOK and this book to prepare for the exam," and thus the effect of Mulcahy's work would likely improve the potential market for PMBOK (*Mulcahy v. Cheetah Learning LLC*, 2004). In the appeal court's view, its use is not so clear explaining that students may find that PMP

Exam Prep is sufficient that they need not obtain and study the PMBOK. The appeal court considered the following facts important in this analysis: 1) that PMI has created a for-profit education market by offering a valued certification exam; 2) PMI offers courses on passing its exam, demonstrating an intent to exploit that market; 3) its exam is based on the PMBOK, creating a market for selling or licensing this work to educators and students, and 4) PMI established a permission fee system for derivative works. The appeal court considered the potential for destruction of this market by widespread circumvention of PMI's permission fee system enough to negate fair use (*Mulcahy v. Cheetah Learning LLC*, 2004).

### **United States Court of Appeals for the 9th Circuit**

#### ***Seltzer v. Green Day Inc.***

An artist and illustrator created a work entitled "Scream Icon", which was printed on posters with adhesive backs and posted on walls around Los Angeles (*Seltzer v. Green Day Inc.*, 2013). The defendant Straub, a professional photographer, photographed a brick wall that was covered in graffiti, and other art, including a "weathered and torn" copy of the copyrighted work "Scream Icon" (*Seltzer v. Green Day Inc.*, 2013). Later the defendant was hired to produce video backdrops for the concerts of the musical group Green Day (also a defendant). As part of the video backdrop for one song, the image of "Scream Icon" from the previously taken picture was used. The lower court granted summary judgment for the defendant citing fair use as the defense (*Seltzer v. Green Day Inc.*, 2013).

The appellate court started its review of the fair use defense with a determination of the transformative nature of the copy in comparison with the original. The court found that not only was the actual image altered through color, distortion and other marks, but the meaning of the work was changed through the addition of religious symbols and correlation with the lyrics. As for the second prong of the first factor, the work was part of a commercial endeavor (a music concert), but only incidentally (*Seltzer v. Green Day Inc.*, 2013).

The second factor addressed the stronger protection of creative works compared to informational works (*Seltzer v. Green Day Inc.*, 2013). This factor would weigh against fair use. Nevertheless, the fact that the image was widely distributed as street art by the copyright holder was a mitigating factor in the court's discussion of the second factor (*Seltzer v. Green Day Inc.*, 2013). The third factor addressed the amount copied, which in this case was the complete image. In this case, even though the complete image was copied, it was used in a transformative way, so the amount copied was not

excessive for its purpose (*Seltzer v. Green Day Inc.*, 2013).

The final fourth factor looked at the copying of the original work and the effect on the market for the original image (*Seltzer v. Green Day Inc.*, 2013). The artist testified that the value of his work was unchanged, thereby negating the fourth factor. His use of the work as street art was in no way diminished by the display of his art as part of a video board. In summary, the court did not look outside the four statutory factors to evaluate the claim of fair use. The court found all factors favored fair use, but noted that factor one and factor four "are generally viewed as the most important factors (*Seltzer v. Green Day Inc.*, 2013).

### **United States Court of Appeals for the 10th Circuit**

#### ***Diversey v. Schmidly, No. 13-2058***

Plaintiff-Appellant Andrew Diversey used several administrators and members of the Board of Regents of the University of New Mexico (UNM) for infringing his copyright to an unpublished dissertation (*Diversey v. Schmidly*, 2013). The district court dismissed his complaint as untimely. The district court also rejected Diversey's argument that UNM's ongoing distribution of his work in its libraries was a continuing infringement or which the cause of action did not accrue until the infringement ceased (*Diversey v. Schmidly*, 2013).

On appeal, Diversey argued that the district court erred because there were several distinct copyright infringements giving rise to several independent claims for relief and that each of which has its own corresponding accrual date (*Diversey v. Schmidly*, 2013). The appeal court held that Diversey's claim of infringement on his exclusive right to make copies was untimely filed. On the other hand, the appeal court upheld his second claim, infringement of his exclusive right to distribute his work, and held that the second, third, and fourth factors under "fair use" weighed in his favor.

#### **Law relating to the limitation period**

The appeal court discussed when a claim for copyright infringement accrues (*Diversey v. Schmidly*, 2013). The latter is necessary to determine whether a claim was timely filed; also a copyright infringement claim must be brought within three years after the claim accrued (*Diversey v. Schmidly*, 2013).

The appeal court noted that the majority view holds that a claim "for copyright infringement accrues when one has knowledge of a violation or is chargeable with such knowledge" (*Roley and New World Pictures, Ltd.*, p. 481, 1994; *Hotaling v. Church of Jesus Christ of Latter Day*

Saints, p.202 1997, as quoted in *Diversey v. Schmidly*, 2013). Moreover, the court rejected the notion that a plaintiff “can recover for acts of infringement occurring more than three years before the filing of a complaint merely because some related act of infringement occurs within the limitation period” (*Diversey v. Schmidly*, 2013). Stated differently, an infringement committed within the limitation period is a distinct violation and has a separate accrual date.

Diversey asserted two distinct infringements. First, his exclusive right to make copies was infringed when the draft dissertation was reproduced for deposit in UNM's Zimmerman Library and its Center for Southwest Research (*Diversey v. Schmidly*, 2013). Second, his exclusive right to distribute his work was infringed when the University listed his work in its library catalog for public lending (*Diversey v. Schmidly*, 2013).

The appeal court agreed that the district court failed to recognize separate accrual dates for each distinct infringement (*Diversey v. Schmidly*, 2013). However, the appeals court held that Diversey's first claim was untimely (*Diversey v. Schmidly*, 2013). For purposes of this paper, it is not necessary to discuss why the first claim was untimely.

The appeal court held that Diversey's second claim of unauthorized distribution by the library was timely filed (*Diversey v. Schmidly*, 2013). In this discussion, the appeal court distinguished between the act of depositing the work in the library and the library's subsequent distribution of the work (*Diversey v. Schmidly*, 2013). As to when a work is published in a library, the court quoted *Hotaling v. Church of Jesus Christ of Latter Day Saints* (1997):

When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public.

According to Diversey, he diligently checked the UNM libraries' catalog information system. As his prior searches failed to discover any reference to his dissertation, he confirmed the work was not “distributed,” until he discovered his work in June 16, 2009 (*Diversey v. Schmidly*, 2013). Thus, his claim of infringement of his right to distribution accrued on June 16, 2009, and his June 15, 2012, complaint was timely as to this claim.

### **Fair use**

The Copyright Act of 1976 establishes the four primary (but non-exclusive) factors to determine whether a particular use is fair:

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. (17 U.S.C. § 107)

### **First factor**

The appellees contend their use was permissible under the statutory provisions for fair use. In this discussion, the appeal court determined that it is only the first factor, the purpose and character of use that weighs for the appellees. The appeal court stated that the character of UNM's use is non-commercial, and its purpose is educational (*Diversey v. Schmidly*, 2013); this comes within the coverage of fair use. “The libraries themselves, while they serve the public, are academic libraries existing primarily for scholarly and research purposes” (*Diversey v. Schmidly*, 2013).

### **Second factor**

The nature of the copyrighted work weighs strongly in Diversey's favor. The court held that “the defense of fair use could never be applied to alleged infringements of unpublished works. . . the unpublished nature of Diversey's dissertation weighs heavily against the appellees under the second fair-use factor” (*Diversey v. Schmidly*, 2013).

### **Third factor**

“The third factor, the amount and substantiality of the portion used in relation to the whole, also weighs strongly in Diversey's favor because the UNM libraries are distributing the entire dissertation” (*Diversey v. Schmidly*, 2013)

### **Fourth factor**

The court acknowledged that it was hard to assess the effect of the use upon the potential market for or value of the copyrighted work. It noted that Diversey did not allege his work was intended for the commercial market, rather, “the value of his work is in the opportunities it affords him to complete his doctoral program, compete for academic jobs, and advance the scholarship in his discipline” (*Diversey v. Schmidly*, 2013). The appeal court noted that Diversey cannot complete the dissertation review and defense process at another institution while UNM still

lists his work in its libraries' catalog: "this has completely deprived him the value of the dissertation" (Diversey v. Schmidly, 2013).

## United States Court of Appeals for the 11th Circuit

### *Suntrust Bank v. Houghton Mifflin Co.*

Alice Randall authored *The Wind Done Gone* ("TWDG"), a fictional work based on Margaret Mitchell's *Gone with the Wind* ("GWTW"). The main issue to be determined in this case is whether the publication of TWDG should be enjoined based on alleged copyright violations.

Randall claims that her novel is a critique of GWTW's depiction of slavery and the Civil-War era in the American South. For this purpose, she appropriated a majority of the characters, plot and scenes from GWTW into the first half of TWDG. In fact, TWDG explicitly referred to GWTW in its foreword, copied core characters, character traits and relationships from GWTW. Additionally, TWDG copies verbatim dialogues and descriptions from GWTW (Suntrust Bank and Houghton Mifflin Co., 2001).

Houghton Mifflin, publisher of TWDG, argued its case on two prongs: first, the substantial similarity between the two works and second, the doctrine of fair use protects TWDG because it is primarily a parody of GWTW (Suntrust Bank and Houghton Mifflin Co., 2001).

The appeal court evaluated Suntrust's copyright infringement claim in light of the history of the Constitution's Copyright Clause and its relationship to the First Amendment. The appeals court then proceeded to assess Suntrust's claims in relation to the doctrine of fair use.

The appeal court started its analysis with a brief history of the Copyright Clause. It took note that it was intended "to be the engine of free expression" (Harper Row Publishers, Inc. v. Nation Enters, 1985, as quoted in Suntrust Bank and Houghton Mifflin Co., p. 1261, 2001). It has three main goals: the promotion of learning, the protection of the public domain, and the granting of an exclusive right to the author (Suntrust Bank and Houghton Mifflin Co., 2001). Further, the appeal court recognized conflicting interests between the Copyright Clause and the First Amendment – the free flow of ideas in a democratic dialogue against exclusive rights of the author. Nonetheless, a balance between the two may be preserved by the "idea/expression dichotomy" and the doctrine of fair use (Suntrust Bank and Houghton Mifflin Co., 2001).

### Idea/Expression Dichotomy

This concept is codified in the Copyright Act, 1976, § 102(b):

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

In other words, "[c]opyright cannot protect an idea, only the expression of that idea" (Baker v. Selden, 1879, Bell South Advertising. Publishing'g Corp. and Donnelly Information. Publishing'g Inc., 1993, as cited in Suntrust Bank and Houghton Mifflin Co., 2001). This dichotomy embedded in the statute preserves the balance in that it assures the free flow of information by a refusal to recognize a valid copyright in ideas, facts, etc.

### Fair use

The doctrine of fair use was developed to preserve the constitutionality of copyright laws by protecting the First Amendment values (Suntrust Bank and Houghton Mifflin Co., 2001). Included in its definition are purposes such as criticism, comment, news reporting, teaching, scholarship or research. The appeal court explained that the exceptions made for these purposes allow later authors to use a previous author's copyright to introduce new ideas (Suntrust Bank and Houghton Mifflin Co., p. 1265, 2001).

### The Court's appreciation of fair use factors

The appeal court found a substantial similarity between TWDG and GWTW: character, settings, and plot twists from GWTW. The court also noted that TWDG copied, in wholesale fashion, the descriptions and histories of the fictional characters and places from GWTW, as well as their relationships and interactions with one another (Suntrust Bank and Houghton Mifflin Co., 2001, p. 1267). Houghton Mifflin contended that although the characters, settings, and plot were copied from GWTW, they were vested with new significance when viewed through TWDG main character, Cynara. However, the appeals court dismissed the argument stating that "it does not change the fact that they are the very same copyrighted characters, settings, and plot" (Suntrust Bank and Houghton Mifflin Co., 2001, p. 1267).

Randall's appropriation of the elements of GWTW did not automatically amount to an infringement since Randall's appropriation may be protected as "fair use." Houghton Mifflin argued that TWDG is entitled to fair-use protection as a parody of GWTW. The appeal court cited Campbell where the Supreme Court held that parody, while it is not listed in § 107, is a form of comment and criticism that may constitute a fair use of the copyrighted work being parodied (Campbell and Acuff-Rose Music Inc., 1994, as cited in Suntrust Bank and Houghton Mifflin Co., p. 1268, 2001). The appeal court resolved that

TWDG is a commentary of GWTW, and that a “parody needs to mimic an original to make its point . . . but this does not mean that every parody is shielded from a claim of copyright infringement as a fair use” (Suntrust Bank and Houghton Mifflin Co., 2001, p. 1268). Here, the appeals court adopted Campbell's expanded definition of a parody – that a work is a parody if it is a commentary of the original, even if it is not comical.

### First factor

In its discussion of the first factor, the appeals court adhered to the rule established in *Harper Row Publishers, Inc. v. Nation Enters*, [t]he crux of the profit/nonprofit distinction is not 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 (*Harper Row Publishers, Inc. v. Nation Enters*, 1985, as quoted in *Suntrust Bank and Houghton Mifflin Co.*, 2001).

Thus, even if TWDG served a nonprofit educational purpose, it is undeniably a commercial product; thus, this weighs against a finding of fair use. However, its commerciality is outweighed in view of its highly transformative use of GWTW's copyrighted elements, having established that TWDG is a parody. As Campbell has held, “the more transformative the new work, the less will be the significance of other factors, like commercialism. . . .” (*Campbell and Acuff-Rose Music Inc.*, 1994, as quoted in *Suntrust Bank and Houghton Mifflin Co.*, 2001).

To what extent TWDG's use of copyrighted elements can be said to be transformative?

“The inquiry is whether the new work merely supersedes the objects of the original creation, or instead adds something new . . . altering the first with new expression, meaning, or message” (citations and internal quotation marks omitted) (*Suntrust Bank and Houghton Mifflin Co.*, 2001, p. 1269).

The appeal court determined that TWDG is a criticism that seeks to rebut the “perspective, judgments, and mythology of GWTW” (*Suntrust Bank and Houghton Mifflin Co.*, 2001, p. 1271). The appeal court discussed in length the differences between TWDG and GWTW. One notable difference between the two works is that the earlier is a third-person epic; whereas, the new work is told in the first-person of the life of Cynara. Another is Cynara's language which departed from Mitchell's original prose. As the appeals court puts it, “Cynara acts as the voice of Randall's inversion of GWTW. She is the vehicle of parody; she is its means – not its end” (*Suntrust Bank and Houghton Mifflin Co.*, p. 1270, 2001). The appeal court concluded that TWDG, “reflects transformative value because it can provide social benefit, by shedding

light on an earlier work, and, in the process, creating a new one” (*Suntrust Bank and Houghton Mifflin Co.*, p. 1270, 2001).

### Second factor

Creative works are afforded greater protection than derivative works. However, “this factor is given little weight in parody cases since parodies almost invariably copy publicly known, expressive works” (*Suntrust Bank and Houghton Mifflin Co.*, p. 1271, 2001).

### Third factor

The appeal court noted that parody presents difficult problems in the fair-use context because parody's humor, or its comment, necessarily springs from recognizable allusion through imitation. Campbell recognized that, as the appeals court noted, a parody must be able to “conjure up at least enough of that original to make the object of its critical wit recognizable” (internal quotation marks omitted) (*Suntrust Bank and Houghton Mifflin Co.*, 2001). Thus, the question to resolve is “how much is enough?”

The appeal court extracted concepts from *Campbell and Elsmere Music* to answer the question above. First, a parody needs to appropriate elements of a prior work at least enough as necessary to a) serve its parodic function, and b) make the object of its criticism recognizable (*Campbell v. Acuff-Rose Music Inc.*, 1994 as cited in *Suntrust Bank and Houghton Mifflin Co.*, 2001). For purposes of this discussion, point (b) may be termed as “identification function.” Second, more extensive use can be allowed provided the parody “builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary” (*Elsmere Music, Inc. and National Broadcasting'g Co.*, 1980, as quoted in *Suntrust Bank and Houghton Mifflin Co.*, 2001). Third, once the parody has appropriated enough to make its object recognizable, “how much more is reasonable will depend on 1) the extent to which the [work's] overriding purpose and character is to parody the original or, in contrast, 2) the likelihood that the parody may serve as a market substitute for the original” (*Campbell and Acuff-Rose Music Inc.*, 1994, as quoted in *Suntrust Bank and Houghton Mifflin Co.*, 2001).

The second point in the third concept means that any material in the parody more than that necessary to serve its parodic function or “identification function” is unlawful, only if it negatively affects the potential market for or value of the original copyright. The appeal court could not determine conclusively whether the quantity and value of the materials used are reasonable in relation to the

purpose of the copying.

#### Fourth factor

The effect that the publication of TWDG will have on the market for or value of Suntrust's copyright in GWTW must be examined. In the analysis of this factor, the appeals court considered it necessary to determine the following: 1) the extent of market harm, 2) whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market, and 3) potential harm of market substitution in relation to derivative works (Suntrust Bank and Houghton Mifflin Co., p.1274, 2001).

However, in this case, Suntrust failed to demonstrate that TWDG would supplant demand for Suntrust's licensed derivatives. In cases of parody in relation to a determination against, the following are crucial: 1) evidence of harm to the potential market for or value of the original copyright, 2) evidence about relevant markets, (Campbell v. Acuff-Rose Music Inc., p. 590, 1994, as cited in Suntrust Bank v. Houghton Mifflin Co., 2001) and 3) evidence of substantial harm to a derivative market (Campbell and Acuff-Rose Music Inc., p. 593, 1994, as cited in Suntrust Bank and Houghton Mifflin Co., 2001). Moreover, the complainant must show a "preponderance of the evidence that some meaningful likelihood of future harm exists" (Campbell v. Acuff-Rose Music Inc., p. 590, 1994, as cited in Suntrust Bank and Houghton Mifflin Co., 2001). The defendant, in contrast, succeeded to offer evidence in support of its fair use defense which correctly focused on market substitution and demonstrates why Randall's book is unlikely to displace sales of GWTW.

The appeal court concluded that Suntrust is not entitled to injunctive relief because it failed to establish its likelihood of success of the merits; therefore, the factors of fair use, taken together, weighed in favor of TWDG. However, Suntrust was able to establish the extent it suffered injury from TWDG's putative infringement of its copyright in GWTW which can be remedied through an award of monetary damages. The appeal court held that a viable fair use defense is available. Therefore, it ruled that the district court erred when it issued an injunction being contrary to the principles of the First Amendment and the copyright law, "acting as a prior restraint on speech because the public had not had access to Randall's ideas . . ." (Suntrust Bank and Houghton Mifflin Co., p. 1277, 2001).

#### Cambridge Univ. Press v. Patton

In a later case that is reminiscent of Princeton University Press and Michigan Document Services (1996), where a copy company was making course

packets for use in college courses, Cambridge University Press v. Patton (2014) once again pits academic publishers with those who wish to copy and distribute excerpts from copyrighted works without compensating the copyright holders. In this case, instead of an outside company making the course packs, the Georgia university system itself was aiding faculty in the production and electronic distribution of copyrighted excerpts, without paying licensing fees (Cambridge Univ. Press v. Patton, 2014). When the campus was producing paper course packs, licensing fees were being paid to the copyright holders. As the university's ability to distribute electronic copies rapidly expanded, the use of paper course packs dwindled and electronic distribution exploded. The faculty was able to have copyrighted materials scanned and loaded into their courses, or in a later system, they were able to upload the copyrighted materials directly, without librarian assistance.

After the plaintiffs filed suit, the university system developed and distributed new fair use guidelines that included a checklist for faculty to use to determine if fair use was being violated (Cambridge Univ. Press v. Patton, 2014). The faculty was directed to add up the checks and if more favored fair use, than not, then fair use was justified. The plaintiffs claimed that the new policy did little to curb copyright infringement. Ultimately, the plaintiffs produced a list of 126 cases of claimed infringements (Cambridge Univ. Press v. Patton, 2014). After a bench trial, the plaintiffs were successful on only five of the claims of infringement. The trial court reviewed each of the four factors. For the first factor of character of use, it is found that as a non-profit educational institution, the copying was done for the purposes of instruction, thus it weighed heavily towards fair use. The trial court found that the second factor, the nature of the material, to be generally informational in nature, and therefore, more subject to fair use (Cambridge Univ. Press v. Patton, 2014).

The third factor, the amount of work copied was determined on a case-by-case basis depending on how much was copied from each work. The court stated:

[w]here a book is not divided into chapters or contains fewer than ten chapters, unpaid copying of no more than 10 percent of the pages in the book is permissible under factor three. . . . Where a book contains ten or more chapters, the unpaid copying of up to but no more than one chapter (or its equivalent) will be permissible under fair use factor three. . . . The chapter or other excerpt must fill a demonstrated, legitimate purpose in the course curriculum and must be narrowly tailored to accomplish that purpose. Where the foregoing limitations are met factor three will favor fair use, i.e., will favor Defendants. Otherwise factor three will favor Plaintiffs (Cambridge Univ. Press v. Patton, 2014).

The formulation above, drafted by the court is different

from the classroom guidelines produced by Congress (H.R. Rep. No. 94-1476, p. 68, 1976). The court also included front matter and non-text material within the page counts, including such items as the table of contents in determining the total amount of copyrighted material reproduced (Cambridge Univ. Press v. Patton, 2014).

The fourth factor was found by the trial court to weigh towards fair use because the excerpts would not harm the market for scholarly works because the excerpts would not substitute for books, but that it might harm the licensing market for the authors if such a market exists for the work in question. The appellate court undertook a significant review of the case, writing a 48 page opinion (Cambridge Univ. Press v. Patton, 2014). The court first questioned the part of the overarching methodology the court used in evaluating the fair use factors. The court wrote that the district court erred in using an arithmetic approach to the four factors, but rather the statute calls for a weighting of the factors.

The appellate court started its review of the first factor and noted that the non-profit status of the organization does not "insulate" it from claims of copyright infringement any more than a for-profit organization is presumed to have violated copyright (Cambridge Univ. Press v. Patton, 2014). The court reasoned that the copying was made for economic gain (or to prevent an economic loss by paying licensing fees), and therefore, could be outside of the scope of non-profit use. Regarding the second prong of the first factor, the court determined that simply copying the materials for digital distribution while not using the materials for a new or novel purpose deemed the use as not transformative. Overall, the court decided the nature of the work of the university was enough to overcome the other concerns and tilted the first factor in favor of fair use (Cambridge Univ. Press v. Patton, 2014).

The second factor examined the nature of the copyrighted work and the extent of the creativity of the work. Basically, the more creative the work, the less a fair use argument can be made. The trial court determined the copyrighted works were informational, factual in nature, and therefore, more available to fair use claims (Cambridge Univ. Press v. Patton, 2014). The appellate court found this approach to be flawed and that many of the works in question contained analysis, evaluations, and other subjective materials that are closer to the core of copyright protection.

The appellate court took great exception to the methodology employed by the trial court to determine if the quality and quantity of the copied material was fair use. The district court erred in looking solely at the number of pages copied and neglected if the copy took the essence of the work, and therefore, was not fair use (Cambridge Univ. Press and Patton, 2014).

The final factor for the appellate court to determine was

factor four, the effect of the copy on the market for the original copyrighted work. The appellate court agreed with the lower court that the excerpt would not act as a market substitution for books. However, a derivative does exist for the licensing of excerpts and the widespread adoption of the defendant's behavior would disrupt and diminish that market. While the court did agree with the lower court's analysis of factor four, it disagreed with the weight it applied to the factor indicating the factor should have been more heavily weighted (Cambridge Univ. Press v. Patton, 2014).

In sum, the lower court did identify two additional factors outside of the statutory four, but the appellate court disagreed that the two were actually unique and subsumed them under the four factors. The appellate court, while acknowledging the evaluation done by the lower court, determined that a holistic approach needed to be taken, rather than a checklist approach, by evaluating the nature of each copyrighted work and the copied material (Cambridge Univ. Press v. Patton, 2014).

## **United States Court of Appeals, Federal Circuit**

### **Gaylord v. United States**

While this case did not discuss the doctrine of fair use and its factors, it explained how just compensation should be determined in cases where the government commits copyright infringement. Gaylord, creator of "The Column," sued the United States Postal Service for infringement because the latter issued a stamp featuring a photograph of "The Column" without seeking Gaylord's permission. Gaylord claims a 10% royalty; however, the Court of Federal Claims rejected it. Instead, the latter concluded that the proper measure of damages is to employ a "zone of reasonableness" to determine the copyright owner's actual damages" (Gaylord v. United States, 2012, as cited in Steve Altman Photography v. United States, 1989) Hence, the Court of Federal Claims determined the license value between \$1,500 and \$5,000. The lower range was based on the Postal Service's past payment to John Alli for the photo he took of "The Column." The maximum was based on the Postal Service's policy which disallowed payment of more than \$5,000 to license an existing image for use on a stamp. Based on the above, the Court of Federal Claims awarded Gaylord a one-time royalty of \$5,000, awarding the highest amount within the "zone of reasonableness" because he was deprived of the opportunity to negotiate.

"Reasonable and entire compensation" under 28 U.S.C § 1498(b) entitles copyright owners to compensatory damages, including the minimum statutory damages, but not to non-compensatory damages. The lower court capped the "reasonable and entire compensation as damages for infringement" based only on the Postal

Service's policy without taking into account what Gaylord might have considered as reasonable. The Court held that such this analysis is incorrect.

Section 1498(b), which waives the United States' sovereign immunity for copyright infringement, states:

whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States ... the exclusive action which may be brought for such infringement shall be an action by the copyright owner against the United States in the Court of Federal Claims for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in [17 U.S.C. § 504(c)] . . . (28 U.S.C. § 1498(b).

The Federal Circuit applied the ruling in *Leesona Corp. v. United States* (1979) which limited "reasonable and entire compensation" under §1498(a) to a reasonable royalty for "a compulsory compensable license in the patent" or, when that "cannot be ascertained, another method of estimating the value of the lost patent" (*Gaylord v. United States*, 2012, as cited in *Leesona Corp. v. United States*, 1979). The cCourt reasoned that the same principle is applicable in §1498(b) where courts must determine just compensation for the plaintiff's loss when the government takes what is essentially a compulsory, non-exclusive license on the plaintiff's copyright.

In this case, the cCourt deemed appropriate to determine "actual damages" under the copyright damages statute, 17 U.S.C. § 504,

When, as in this case, the plaintiff cannot show "lost sales, lost opportunities to license, or diminution in the value of the copyright," many circuits award actual damages based on "the fair market value of a license covering the defendant's use." The value of this license should be calculated based on a hypothetical, arms-length negotiation between the parties. ("[I]n situations where the infringer could have bargained with the copyright owner to purchase the right to use the work, actual damages are what a willing buyer would have been reasonably required to pay to a willing seller for plaintiffs' work") (citations omitted) (*Gaylord v. United States*, 2012).

The Court remanded the case back to the trial court and ordered it to consider all evidence relevant to a hypothetical negotiation rather than limiting its analysis to the Postal Service's past licenses for different works or the latter's internal policies.

## DISCUSSION

The roadmap for the application of fair use policies is more difficult to navigate after Cambridge University

*Press v. Patton* (2014). The question presented was: "Is a university faculty person to undertake an individual 'holistic' approach to the four factors to determine if the material to be copied captures the 'essence' of the piece or damages the market for the original?" (Nimmer and Nimmer, 2013). Further, the Cambridge court stressed that the Classroom Guidelines do not carry the force of law (*Cambridge Univ. Press v. Patton*, 2014). One could copy less and violate copyright or copy more than the guidelines and be within fair use. Further, Cambridge strongly rebuked the checklist approach to fair use review, instead stressing the importance of holistically reviewing and weighting the factors based on a case-by-case evaluation (*Cambridge Univ. Press v. Patton*, 2014).

While the four factors are not technically an exclusive list, the courts have not articulated any other factors. More importantly, not all of the four factors are created equal. The first factor is to consider when determining fair use is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes" (17 U.S.C. § 107). Case summaries have shown that when courts found fair use was applicable based on factor one, fair use overall was supported over 90% of the time, and conversely, when factor one did not support fair use, often times fair use in general was not supported (Beebe, 2008).

Moving forward, institutions of higher education should avoid systemic copying and distribution of copyrighted material without seeking licensing for the excerpts and should expand the offering of their library digital subscriptions to allow students to access the copyrighted materials directly from the source through the university's subscription. As with the course pack cases in the early 1990s, academic publishers can be expected to vigorously defend their copyrights. Faculty and others in the education realm should be exposed to training on copyright and fair use including the factors and the common prongs in each, understanding that no bright lines exist and that each work must be considered individually (Nimmer and Nimmer, 2013).

While the use by higher education institutions was wrapped in the cloth of non-profit educational use, the court saw the economic impact of the school's actions as commercial. Other non-profit organizations must be careful to avoid violating the law thinking their tax-status in some way insulates them from the enforcement of copyright laws.

All organizations, higher education, public schools, and non-profits are best served by licensing works from the publishers rather than crating copying and distribution schemes. Had the court ruled otherwise, why would any author produce works for use in education? One copy would serve the whole community. Copyright laws and their enforcement enrich the learning community by encouraging more works to be created and reward authors for their labor. Licensing is a simple remedy to

stay within the guidelines of the law.

### Conflict of interest

The authors have not declared any conflict of interest.

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