



Exceptions to Enforcement of Copyright Law

Copyright protection in the U.S. has existed since the formation of the Constitution, and coverage has continually been expanded to keep pace with new technology and other developments, such as copyrights for sound recordings, computer programs, choreography, etc. Creators of original works that are permanently fixed in a tangible medium may obtain certain exclusive rights to exploit their works, including the right to:

- Reproduce (copy) the work.
- Create a "derivative work"- a new work based on the original.
- Publish or distribute the work.
- Publicly perform the work, such as performances of musical compositions.
- Publicly display the work, such as displays of artwork.

Copyright Infringement and Defenses

If someone other than the copyright holder engages in the acts mentioned above, they may be "infringing" on the copyright. The holder of the copyright, or someone to whom the copyright has been transferred, may bring an action in federal court for copyright infringement. If successful, the law may allow recovery of actual damages or the profits made by the infringer, an order to cease the infringement and/or destroy all copies, and an award of attorneys' fees.

In order to prevail, however, the holder of the copyright must show that the copying, or other infringement of the original work, actually took place and the infringing use is "substantially similar" to the original. This analysis depends on the facts of the case and the works in question.

Among defenses that an accused infringer may raise to an infringement claim are:

- That the infringement was "*de minimis*," or so slight and insubstantial that it may not warrant protection.
- The work should not have been copyrighted, such as because it is not original. Facts are not copyrightable and an exact copy of another work does not constitute an original work. Government works are generally not copyrightable.
- The use of the original work constitutes "fair use."

The Fair Use Doctrine

Originally created by the courts, the fair use doctrine has been incorporated into the federal Copyright Act. Under the fair use doctrine, copying the copyright owner's work may not be considered actionable infringement. Fair use limits the exclusive rights of the copyright owner by permitting, without a license, certain uses of a work under certain instances. For example:

- Criticism and comment: quotations or excerpts in a review of the original work.
- Parody and satire: a new work satirizing the old must, of necessity, contain at least enough to establish that the original work is being satirized or parodied.
- Scholarship and research: such as quotation of short passages of a work to illustrate or clarify the original author's observations.
- News reporting, including incidental reproduction (of artwork, etc.) in a newsreel or broadcast from the scene of an event.
- Teaching: using a small part of a work to illustrate or teach a lesson.

Factors Used to Determine Fair Use

The federal Copyright Act sets forth factors that a court should consider in determining whether the use in question is really "fair use:"

- Purpose and character of use, including whether it is of a commercial nature or for nonprofit educational purposes;
- Nature of the copyrighted work;
- Amount and substantiality of the portion used in relation to the work as a whole; and
- Effect of use on the potential market for or value of the copyrighted work, i.e., whether the use eliminates the need or desire to purchase the original.

The "Pretty Woman" Case

In 1989, the group "2 Live Crew" released a recording of the song "Pretty Woman." The group said the song was intended to satirize the 1964 Roy Orbison/William Dees song "Oh, Pretty Woman." Acuff-Rose Music, Inc. was the holder of the copyright for the song. 2 Live Crew asked permission to use it, and gave credit to Orbison and Dees on the album, but permission was denied. Acuff-Rose filed suit, alleging copyright infringement and seeking damages.

The federal district court judge agreed that the 2 Live Crew song was a fair use parody of the original. The court of appeals, however, applied the above four statutory factors

and, giving great weight to the commercial nature of the use (2 Live Crew profited from the new song), reversed the district court ruling. The U.S. Supreme Court, in a landmark 1994 decision, reversed the court of appeals. The Supreme Court pointed out that although 2 Live Crew copied key elements of the earlier song and profited from it, the very nature of parody requires copying of enough of the parodied work to "conjure up" the original in the mind of the listener.

The Supreme Court stated that the commercial use factor alone could not be determinative. Furthermore, whether the amount used was allowable for the parody or went beyond it by including too much has to be determined on a case-by-case basis considering all four factors. The Court stated that the 2 Live Crew parody might be fair use and remanded the case to the district court to make that evaluation and determination.

De Minimis Use

When an actual portion of a recording is lifted and used in a new work (called "sampling"), that use may be infringement of the recording copyright. In a 2004 decision, the 9th Federal Circuit Court of Appeals held that use by the Beastie Boys of a three-note "riff" from a work by jazz flutist James Newton was *de minimis*, and therefore did not violate the earlier work's music copyright; the Beastie Boys had obtained a license to use the sample from the sound recording.

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