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### What is the purpose of Fair Use?

The United States Constitution authorized Congress to, *"promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."*<sup>1</sup> Although copyright law provides such exclusive rights to the benefit of creators, such rights are undercut by the fair use doctrine, codified in s.107 of the United States Copyright Act of 1976. Fair use is a limitation on the copyright owner's exclusive rights and is asserted as an affirmative defense to copyright infringement claims. Its purpose is rooted in public policy, in particular to balance First Amendment rights to freedom of speech against the copyrights of creators. However, since fair use is flexible, fact-based, and determined by the balancing of various factors, the outcome is unpredictable, and the defense is prone to misuse.

### What is Fair Use?

The preamble of the fair use provision states that, *"the 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."*<sup>2</sup> Fair use determinations are guided by the purposes stated above.

Courts are required to consider and balance the following factors:

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
- the nature of the copyrighted work
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole
- the effect of the use upon the potential market for or value of the copyrighted work

### How are the Fair Use Factors Implemented?

Courts are required to weigh the fair use factors as applied to the facts of a copyright infringement case to determine the outcome.

The first factor is complex. There is a stronger likelihood that a commercial use will be found infringing. See, *Warner Bros. Entertainment Inc. v. RDR Books* (Southern District of New York, 2008)<sup>3</sup>. However, this is not a certainty and will depend on the nature of the use

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<sup>1</sup> United States Constitution Article 1 Section 8 Clause 8

<sup>2</sup> Copyright Act of 1976 Title 17 of the United States Code s. 107

<sup>3</sup> Citation: 575 F. Supp. 2d 513, para 545

(e.g., a use may be considered a transformative use worthy of fair use). Likewise, a use by a non-profit entity will not be considered a fair use by virtue of the entity's tax status. For example, if a non-profit entity uses works of art for marketing purposes, a copyright license is required.

The second fair use factor routinely tips in favor of creators of visual art. Courts have recognized that some works, including works of art, are inherently creative in nature and are considered to be at the core of copyright protection. See e.g., *Stewart v. Abend* (1990)<sup>4</sup>; *Campbell v. Acuff-Rose Music, Inc.* (1994)<sup>5</sup>.

Regarding the third fair use factor, works of art are typically reproduced in their entirety, rather than quoted like a literary work. It is unusual to find an unrecognizable fragment of a work of art portrayed in a film project, for example. It would seem that this factor should always favor the visual artist. However, courts may weigh the substantiality of the portion used, particularly when considering uses made for commentaries or parodies of the original work. See, *Blanch v. Koons*, (2<sup>nd</sup> Circuit, 2006)<sup>6</sup>.

Concerning the fourth factor, whether and to what extent the market or value of the work of art is undercut when a work is not licensed may be difficult to determine conclusively. See e.g., *Ringgold v. Black Entertainment TV, Inc.*, (2<sup>nd</sup> Circuit, 1997)<sup>7</sup>. It is clear that the market for a license suffers when works of art are exploited without permission, particularly in the online environment where users are often misled into believing that all content is free and may be shared at will.

### **Why is Fair Use Important to Visual Artists and Creative Professionals?**

Artists should be aware that fair use exists. Artists need to be vigilant in safeguarding their exclusive rights under the copyright law. Fair use cases are uncertain. Since the facts of every case vary, artists should seek the guidance of ARS, DACS and/or an attorney when their works of art are being exploited without permission, and in particular, when the user asserts fair use as a defense. It is advisable for artists to consider seeking permission when appropriating elements of another creator's work to avoid a possible dispute. Likewise, creative professionals (e.g., advertisers, filmmakers, website developers) and publishers should seek permission from the copyright owner of a work of art before reproducing, displaying or distributing copies of the work. Taking such steps to secure the artist's copyright permission is the prudent way to avoid a copyright infringement matter.

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<sup>4</sup> Citation: 495 U.S. 207, para 237

<sup>5</sup> Citation: 510 U.S. 569, para 586

<sup>6</sup> Citation: 467 F.3d 244, para 257

<sup>7</sup> Citation: 126 F.3d 70, para 81