

Fair Use

- Defense?
 - If infringe, you can avoid remedies
- Rationale
 - Equity
 - Utilitarian
 - public benefit of infringement > impairment to the incentive to create/distribute
 - “reasonable consent”

Fair Use

“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. . . . The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” 17 U.S.C. § 107

Fair Use

“... In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- (4) the effect of the use upon the potential market for or value of the copyrighted work.” § 107

Campbell v. Acuff-Rose Music



Campbell v. Acuff-Rose Music

1. Purpose and Character of Use

- parody +
- satire?
- commercial –

2. Nature of Copyrighted Work

- more expressive -

Campbell v. Acuff-Rose Music

3. Amount/Substantiality of Portion Used
 - in relation to copyright work
 - quantity -
 - quality -
 - higher % of infringing work –

4. Effect of Use on Potential Market for and Value of Copyrighted Work
 - harms from criticism
 - harms derivative market -

Fair Use

4. Effect of Use on Potential Market for and Value of Copyrighted Work
 - presumption of harm if commercial infringement
 - if non-transformative copy
 - how determine potential market?
 - does it need to be a significant impact?
 - circularity concern

Fair Use

- In the end you balance
- The balance is commonly between factors 1 and 4.
 - #1 is focused on public benefit
 - #4 is focused on harm to incentives