

## **FAIR USE OF COPYRIGHTED MATERIAL<sup>1</sup>**

A copyright holder has exclusive rights to reproduce, modify, distribute, publicly perform and publicly display a copyrighted work. However, if a “fair use” of such a work is made or intended to be made by a person other than the holder of such a copyright, the permission of the owner of the copyright is not required. Thus, “fair use” is an exception to the copyright owner’s exclusive rights.

The determination of fair or unfair use of a copyrighted work is made on a case by case analysis, and the following factors influence such a determination:

### **Purpose and character of use:**

The courts are most likely to find fair use when strictly non-commercial purposes are involved. They are least likely to find fair use when the use is commercial. In fact, the Supreme Court has stated that commercial use is summarily presumed not to constitute fair use. While it is possible to overcome the presumption that a commercial use is unfair, it can be difficult.

### **Nature of the copyrighted work:**

The courts are most likely to decide that a use is fair when the copied work is either a factual work or one that has already been distributed. The courts are far less likely to find fair use when the copied work is creative or fictitious or when the work has never before been published.

### **Amount and substantiality of the work used:**

The courts are most likely to find fair use when what is used is a very small amount of the protected work. When much of the protected work is used, however, the chances of a fair use ruling become slimmer. If what is used is small in amount but substantial in terms of importance—the heart of the copied work—then a finding of fair use is unlikely.

### **Effect on the potential market for or value of the protected work:**

The courts are most likely to find fair use when the new work is not intended to serve as a substitute for the copyrighted work. The courts are least likely to decide that a use is fair when the new work is a complete substitute for the copyrighted work.

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<sup>1</sup> Diane Brinson, “Multimedia and Fair Use of Copyrighted Material,” *Desktop Publishers Journal* 7.12 (December 1995): 24.