

# Table of Contents

## PART I. OVERVIEW

### CHAPTER 1. OVERVIEW OF FAIR USE

#### I. GENERALLY

- § 1:1 Statutory provision
- § 1:2 The purpose and role of fair use
- § 1:2.50 No separate First Amendment defense

#### II. ORIGINS AND PURPOSE OF FAIR USE

- § 1:3 Generally
- § 1:4 Law vs. equity: right to jury trial
- § 1:5 The early English cases
- § 1:6 —*Burnet v. Chetwood*
- § 1:7 —*Lord Hardwicke*
- § 1:8 —*Tonson v. Walker*
- § 1:9 —*Dodsley v. Kinnersley*
- § 1:10 —*Macklin v. Richardson*
- § 1:11 —*Cary v. Kearsley*
- § 1:12 —*Roworth v. Wilkes*
- § 1:13 —*Wilkins v. Aikin*
- § 1:14 —*Whittingham v. Wooler*
- § 1:15 —*Mawman v. Tegg*
- § 1:16 —*Bramwell v. Halcomb*
- § 1:17 —*Bell v. Whitehead*
- § 1:18 —*Lewis v. Fullarton*
- § 1:19 Fair abridgment, fair use, and the 1911 UK Act
- § 1:20 *Folsom v. Marsh*
- § 1:21 Factors 1 and 2: “nature and object of the selections made”
- § 1:22 *Folsom v. Marsh*—Factor 2: “quantity and value of the materials used”
- § 1:23 —Factor 3: “degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work”

## CHAPTER 2. STATUTORY PROVISION

### I. STATUTORY RECOGNITION OF FAIR USE

- § 2:1 “Codification” versus “statutory recognition”: why the distinction is important
- § 2:2 Fair use as a common-law analysis
- § 2:3 Common law copyright infringement actions
- § 2:4 Fair use is not an affirmative right
- § 2:5 Fair use as affirmative defense
- § 2:6 Fair use isn’t a checklist of equally weighted factors
- § 2:7 Preliminary injunctions and fair use as an affirmative defense
- § 2:8 De minimis uses

### II. PREAMBLE TO SECTION 107

- § 2:9 Generally
- § 2:10 Preamble lists only illustrative uses

## PART II. FAIR USE FACTORS

### CHAPTER 3. PURPOSE AND CHARACTER OF THE USE

#### I. GENERALLY

- § 3:1 Justification for the use
- § 3:2 Commercial uses
- § 3:3 —Legislative history of section 107(1)
- § 3:4 —Commerciality not absolute principle
- § 3:4.50 Commercial and non-commercial mixed-character uses
- § 3:5 Noncommercial uses
- § 3:6 —Legislative history of nonprofit educational purposes
- § 3:7 —*Campbell’s* treatment of noncommercial uses
- § 3:8 Entertainment uses
- § 3:9 Transformative use: Time to drop the label?
- § 3:9.50 No need for a transformative use and no need to change the original when the use is transformative

## TABLE OF CONTENTS

- § 3:10 Parodies are themselves subject to protection
- § 3:11 First factor and law and economics

## II. SPECIFIC TYPES OF USES

- § 3:12 Generally
- § 3:13 Abstracting and indexing
- § 3:14 —*Wainwright Securities v. Wall Street Transcript Corp.*
- § 3:15 —*New York Times v. Roxbury Data Interface*
- § 3:16 —*Nihon Keizai Shimbun v. Comline Business Data*
- § 3:17 Indexing by Internet search engines
- § 3:18 Advertisements
- § 3:19 —Advertisements that sell products
- § 3:20 —Online sales
- § 3:21 —Comparative advertising
- § 3:22 —Advertising parodies
- § 3:23 — —*Tin Pan Apple v. Miller Brewing and Eveready Battery v. Adolph Coors*
- § 3:24 — —*Leibovitz v. Paramount Pictures*
- § 3:25 — —*MGM v. American Honda Motor*
- § 3:26 — —*MasterCard International v. Nader 2000 Primary Committee*
- § 3:27 Appropriation art
- § 3:27.10 *The Andy Warhol Foundation v. Goldsmith*—  
Meaning of meaning
- § 3:27.20 —Proceedings before the district court
- § 3:27.30 —Proceedings before the court of appeals
- § 3:27.40 —The Supreme Court decision
- § 3:27.50 —Amicus briefs
- § 3:27.60 Caselaw after *The Warhol Foundation*
- § 3:28 Architectural plans: completing the structure
- § 3:29 Biographies
- § 3:30 —*Toksvig v. Bruce Publishing*
- § 3:31 —*Eisenschiml v. Fawcett Publications*
- § 3:32 —*Greenbie v. Noble*
- § 3:33 —*Holdredge v. Knight Publishing*
- § 3:34 —*Rosemont Enterprises v. Random House*
- § 3:35 —*Estate of Hemingway v. Random House, Inc.*
- § 3:36 —*Meeropol v. Nizer*
- § 3:37 —*Rokeach v. Avco Embassy Pictures*

- § 3:38 —*Iowa State University Research Foundation v. American Broadcasting Cos.*
- § 3:39 —*Salinger v. Random House, Inc.*
- § 3:40 —*New Era Publications International ApS v. Henry Holt & Co.*
- § 3:41 —*Wright v. Warner Books*
- § 3:42 —*Norse v. Henry Holt & Co.*
- § 3:43 —*Nash v. CBS*
- § 3:44 —*Elvis Presley Enterprises v. Passport Video*
- § 3:45 —*Warren Publishing Co. v. Spurlack*
- § 3:45.50 *Red Label Music Publishing, Inc. v. Chila Productions*
- § 3:46 Blind persons
- § 3:47 Broadcasting and other forms of exhibition
- § 3:48 —Commercial broadcasts
- § 3:49 —Noncommercial broadcasts
- § 3:50 Calligraphers
- § 3:50.50 *Catalogue raisonné*
- § 3:51 Computers
- § 3:52 —Reverse engineering
- § 3:53 —Copying to extract data, including text & data mining
- § 3:54 —Internet uses
- § 3:55 Criticism and comment
- § 3:56 —*Maxtone-Graham v. Burtchaell*
- § 3:57 —*Baraban v. Time Warner*
- § 3:58 —*Arica Institute v. Palmer*
- § 3:59 —*Twin Peaks Productions v. Publications International*
- § 3:60 —*Castle Rock Entertainment v. Carol Publishing Group*
- § 3:60.50 Class actions
- § 3:61 Criticism and comment—*Ty, Inc. v. Publications International*
- § 3:62 —*Chicago Board of Education v. Substance, Inc.*
- § 3:62.50 Documentaries
- § 3:63 File sharing
- § 3:64 Fortuitous and incidental reproduction
- § 3:65 Incidental, nonfortuitous uses
- § 3:66 —*Mura v. CBS*
- § 3:67 —*Amsinck v. Columbia Pictures Industries*
- § 3:68 —*House of Bryant Publications, LLC v. A&E Television Network*

## TABLE OF CONTENTS

§ 3:68.10	— <i>Bouchat v. Baltimore Ravens Limited Partnership</i>
§ 3:69	Freedom of Information Act requests
§ 3:70	Historical uses
§ 3:70.30	Homages
§ 3:70.50	Insurance claims
§ 3:71	Karaoke
§ 3:72	Governmental and litigation
§ 3:72.30	Libraries and archives
§ 3:73	News reporting
§ 3:74	News clipping services and rebroadcasts— <i>Pacific &amp; Southern v. Duncan</i>
§ 3:75	— <i>Cable News Network v. Video Monitoring Services of America</i>
§ 3:76	— <i>Los Angeles News Service v. Tullo</i>
§ 3:77	— <i>Los Angeles News Service v. KCAL-TV Channel 9</i>
§ 3:78	— <i>Los Angeles News Service v. Reuters Television International</i>
§ 3:79	— <i>Los Angeles News Service v. CBS Broadcasting</i>
§ 3:80	— <i>Associated Press v. Meltwater U.S. Holdings, Inc.</i>
§ 3:81	— <i>Fox News Network v. TVEyes, Inc.</i>
§ 3:82	— <i>Swatch Group Management Services Ltd. v. Bloomberg L.P.</i>
§ 3:83	Off-air taping— <i>Bruzzone v. Miller Brewing</i>
§ 3:84	— <i>Encyclopedia Britannica Educational Corp. v. Crooks</i>
§ 3:85	— <i>Sony Corp. of America v. Universal City Studios</i>
§ 3:86	— —District court
§ 3:87	— —Court of Appeals
§ 3:88	The <i>Hopper</i> cases
§ 3:89	Off-air taping— <i>Sony Corp. of America v. Universal City Studios</i> —Supreme Court
§ 3:90	Parody
§ 3:91	—What’s a parody?
§ 3:92	—Who decides whether it’s a parody?
§ 3:93	—Does the parody have to target the original?
§ 3:94	—May fair use parodies be vulgar or obscene?
§ 3:95	—Must the original be well-known?

- § 3:96 —The vehicle is not the message
- § 3:97 —Must the parody be funny or disparaging?
- § 3:98 —Post-*Campbell* parody cases
- § 3:99 —Parodies of the Barbie doll
- § 3:100 —Second fair use factor: separating sheep from goats
- § 3:101 —How much may a parody appropriate?
- § 3:102 —Fourth factor: how do you calculate harm from parodies?
- § 3:103 Conceptual and appropriation art
- § 3:104 Photocopying—Educational and government photocopying
- § 3:105 — —*Wihtol v. Crow*
- § 3:106 — —*Williams & Wilkins v. United States*
- § 3:107 — —*Addison-Wesley Publishing v. New York University*
- § 3:108 — —*Marcus v. Rowley*
- § 3:109 — —*Association of American Medical Colleges v. Mikaelian*
- § 3:110 — —*Association of American Medical Colleges v. Cuomo*
- § 3:111 — —*College Entrance Examination Board v. Cuomo*
- § 3:112 — —*Newport-Mesa Unified School District v. California*
- § 3:113 — —*National Association of Boards of Pharmacy v. Board of Regents of the University System of Georgia*
- § 3:114 —Photocopying by copy centers—*Basic Books v. Gnomon Corp.*
- § 3:115 —Corporate photocopying—*Harper & Row v. Tyco Copy Service*
- § 3:116 — —*Harper & Row v. American Cyanamid Co.*
- § 3:117 — —*Harper & Row v. Squibb Corp.*
- § 3:118 — —*Pfizer*
- § 3:119 — —*Aircraft Technical Publishers v. Cessna Aircraft Corp.*
- § 3:120 — —*Schuchart & Associates v. Solo Serve Corp.*
- § 3:121 —Photocopying by copy centers—*Basic Books v. Kinko's Graphics Corp.*
- § 3:122 — —*Princeton University Press v. Michigan Document Services, Inc.*

## TABLE OF CONTENTS

§ 3:123	— — <i>Blackwell Publishing, Inc. v. Excel Research Group, LLC</i>
§ 3:124	— Corporate photocopying— <i>Pasha Publications v. Enmark Gas Corp.</i>
§ 3:125	— — <i>Television Digest v. United States Telephone Association</i>
§ 3:126	— — <i>American Geophysical Union v. Texaco</i>
§ 3:127	— — — First factor: purpose and character of use
§ 3:128	— — — Second factor: nature of copyrighted work
§ 3:129	— — — Third factor: amount and substantiality of portion used
§ 3:130	— — — Fourth factor: effect of use on market for or value of copyrighted work
§ 3:131	— — — Judge Jacob's dissent
§ 3:131.10	— <i>National Rifle Association of America v. Handgun Control Federation of Ohio</i>
§ 3:132	Political uses
§ 3:133	— <i>Keep Thomson Governor Committee v. Citizens for Gallen Committee</i>
§ 3:134	— <i>Chicago Lawyer v. Forty-Sixth Ward Regular Democratic Organization</i>
§ 3:135	— <i>New York Tribune v. Otis &amp; Co.</i>
§ 3:136	— <i>NRA v. Handgun Control Federation of Ohio</i>
§ 3:137	— <i>Phoenix Hill Enterprises v. Dickerson</i>
§ 3:138	— <i>MasterCard International Inc. v. Nader 2000 Primary Committee, Inc.</i>
§ 3:139	— <i>Fairey v. Associated Press</i>
§ 3:140	— <i>Hill v. Public Advocate of the United States</i>
§ 3:140.50	— <i>Grant v. Trump</i>
§ 3:140.60	— Uses by citizens' groups for political purposes
§ 3:141	Religious uses
§ 3:142	— <i>Wihtol v. Crow</i>
§ 3:143	— <i>Robert Stigwood Group v. O'Reilly</i>
§ 3:144	— <i>Worldwide Church of God v. Philadelphia Church of God</i>
§ 3:145	— <i>Penguin Books U.S.A. v. New Christian Church of Full Endeavor</i>
§ 3:146	— <i>Society of the Holy Transfiguration Monastery v. Archbishop Gregory of Denver, Colorado</i>

- § 3:146.10 —*In re DMCA subpoena to YouTube (Google, Inc.)*
- § 3:147 Social media uses
- § 3:148 Translations

## **CHAPTER 4. THE NATURE OF THE COPYRIGHTED WORK**

- § 4:1 The Nature of the Copyrighted Work—Generally
- § 4:2 Unpublished works
- § 4:3 Published works
- § 4:4 Out-of-print works

## **CHAPTER 5. AMOUNT AND SUBSTANTIALITY OF THE TAKING**

- § 5:1 Generally
- § 5:2 Third factor and transformative use
- § 5:3 Copying entire work
- § 5:4 Defining the “work”

## **CHAPTER 6. THE EFFECT UPON THE POTENTIAL MARKET FOR OR VALUE OF THE COPYRIGHTED WORK**

- § 6:1 Generally
- § 6:2 Problems with *Sony*
- § 6:3 —*Sony* did not regard fair use as an affirmative defense
- § 6:4 —*Sony* “presumption”
- § 6:5 *Harper & Row’s* treatment of fourth factor
- § 6:6 No presumption of market
- § 6:7 Type of harm from copying and public benefit
- § 6:8 Type of harm to be weighed—Market need not be completely ‘usurped’
- § 6:9 Identifying the relevant potential market for the copyrighted work
- § 6:10 Circularity argument against licensing as market harm
- § 6:11 How much harm is too much?
- § 6:12 Widespread harm from small uses
- § 6:13 Lack of harm does not by itself result in fair use
- § 6:14 What if the use impacts favorably on market?



## TABLE OF CONTENTS

- § 6:14.50 Value of the copyrighted work
- § 6:15 The erroneous functionality test
- § 6:16 Fair use and the right to prepare derivative works

## PART III. OTHER CONSIDERATIONS

### CHAPTER 7. OTHER CONSIDERATIONS

- § 7:1 Additional factors—Good faith/bad faith and custom/industry practice
- § 7:2 Aggregate assessment: actual fair use analysis
- § 7:3 Third-party claims
- § 7:4 Pleading
- § 7:5 Summary judgment, Rule 12(b)(6), Rule 12(c), Rule 12(f), and Rule 50 motions
- § 7:6 Appellate review: applying the proper standard
- § 7:6.10 Expert witnesses and fair use
- § 7:7 Media neutrality and fair use
- § 7:8 Statutory Provision Section 108. Limitations on exclusive rights: Reproduction by libraries and archives
- § 7:9 Library photocopying: section 108—Relationship between sections 107 and 108
- § 7:10 —Reports of Register of Copyrights on section 108—1983 report
- § 7:11 —Reports of Register of Copyrights on section 108-1988 report
- § 7:12 —Digital Millennium Copyright Act
- § 7:13 —Case law under section 108

## PART IV. INTERNATIONAL LAW

### CHAPTER 8. INTERNATIONAL LAW

#### I. IN GENERAL

- § 8:1 Introduction: limitations and exceptions to what?

#### II. TREATIES AND CONVENTIONS

- § 8:2 The Berne Convention “three-step test” and “limitations and exceptions”

- § 8:2.10 Fair use is not “open-ended”
- § 8:2.20 The three-step test
- § 8:2.30 U.S. adherence and fair use compatibility
- § 8:2.40 GATT/TRIPs questions about fair use
- § 8:3 *[Reserved]*
- § 8:4 The TRIPs agreement
- § 8:5 The 1996 WIPO copyright treaty

### **III. REVIEW OF VARIOUS COUNTRIES**

- § 8:6 The United Kingdom
- § 8:7 Ireland
- § 8:8 Canada
- § 8:9 Australia
- § 8:10 India
- § 8:11 Israel
- § 8:12 Jamaica
- § 8:13 South Korea
- § 8:14 Singapore
- § 8:15 Conclusion on fair use versus fair dealing

## **PART V. THE LEGISLATIVE HISTORY OF FAIR USE**

### **CHAPTER 9. THE LEGISLATIVE HISTORY OF FAIR USE**

#### **I. THE PRELIMINARY STUDIES AND REPORTS (1958-1963)**

- § 9:1 The Latman study
- § 9:2 The Varmer study
- § 9:3 The Register of Copyrights’ Tentative Draft Report
- § 9:4 The Register’s Official 1961 Report with  
Discussions and Comments thereon
- § 9:5 The 1962 fair use circular
- § 9:6 The 1963 preliminary draft bill

#### **II. THE EARLY REVISION BILLS AND HEARINGS (1964–1967)**

- § 9:7 The 1964 bills

## TABLE OF CONTENTS

- § 9:8 The Register's Supplementary Report and the 1965 bills
- § 9:9 The 1965 House hearings
- § 9:10 The 1965 Senate hearings
- § 9:11 The 1966 House bill, H.R. Report No. 2237, and the June 1966 "summit" meetings
- § 9:12 The 1967 House bills and H.R. Rep. No. 83
- § 9:13 The 1967 Senate bill and hearings
- § 9:14 The 1967 House debates

### **III. THE PERIOD 1968-1972**

- § 9:15 Legislative action 1968-1972
- § 9:16 Cosmos Club talks
- § 9:17 Dumbarton Oaks talks

### **IV. THE FINAL REVISION BILLS AND HEARINGS (1973-1976)**

- § 9:18 S. 1361 and the 1973 Senate hearings
- § 9:19 Senate Report No. 93-983
- § 9:20 The "Upstairs-Downstairs" talks
- § 9:21 The 1975 House hearings
- § 9:22 The Register's Draft Second Supplementary Report
- § 9:23 Senate Report No. 94-473
- § 9:24 The 1976 Senate debates
- § 9:25 Development of the agreed-to guidelines
- § 9:26 S. 22 as reported by the House subcommittee and H.R. Rep. No. 94-1476
- § 9:27 The 1976 House debates
- § 9:28 The conference report and passage of the bill
- § 9:29 Differences between the Senate and House reports

### **V. LIBRARY PHOTOCOPYING AND FAIR USE**

- § 9:30 The relationship between Sections 107 and 108
- § 9:31 The reports of the Register of Copyrights on Section 108

### **VI. POST-1976 LEGISLATION AND PROPOSALS AFFECTING FAIR USE**

- § 9:32 National Commission on New Technological Uses of Copyrighted Works

- § 9:33 The Betamax bills
- § 9:34 Semiconductor computer chip design bills
- § 9:35 The Visual Artists Rights Act of 1990
- § 9:36 Unpublished works
- § 9:37 Video clipping service bills

## **APPENDICES**

- Appendix A. Statutory Evolution of Section 107
- Appendix B. Legislative Reports on Fair Use
- Appendix C. Statutory Evolution of Sections 108(f)(2) and (4)
- Appendix D. Legislative Reports on Sections 108(f)(2) and (4)
- Appendix E. Statutory Evolution of Section 118(f)
- Appendix F. Legislative Reports on Section 118(f)
- Appendix G. Statutory Evolution of Sections 504(c)(2)(i) and (ii)
- Appendix H. Legislative Reports on Sections 504(c)(2)(i) and (ii)
- Appendix I. Visual Artists' Rights Act of 1990
- Appendix J. Legislative Report on Visual Artists' Rights Act of 1990
- Appendix K. Fair Use of Unpublished Works
- Appendix L. Legislative Reports on Fair Use of Unpublished Works

### **Table of Cases**

### **Index**