



المعهد القومي للملكية الفكرية

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## المجلة العلمية للملكية الفكرية وإدارة الابتكار

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# **Notion of Fair Use Determinants: A Comparative Study**

**Mira Adly Wadie**



## Notion of Fair Use Determinants: A Comparative Study

Mira Adly Wadie

### Abstract:

Fair use plays a critical role in copyright law, protecting certain socially valuable uses of a copyrighted work against claims of infringement so as to maintain the balance between the author's interest and the general public interest. This article examines the fair use concepts in U.S copyright law and Egyptian Copyright law. The article, according to cases, arranges the fair use factors to reach the methodology that the judges adopted.

Fair use outlines the legal boundaries of utilizing copyrighted material without the copyright holder's permission.

The fair use doctrine has been codified and refined over many decades of legal precedent in United States. Whether a work is considered fair use or not is determined solely by the courts. However, in Egypt it becomes codified in detail by law no. 82 for the year 2002 when the intellectual property law was issued.

If a copyright holder believes your application of their material is not fair use, he has the right to bring suit. The courts will decide if the purpose qualifies under the fair use doctrine - an often long and expensive process for everyone involved which is always defers from judge to another. In this paper we will determine the fair use determinants or limits to be a guide to the judges in the future.

The broad categories that fall under fair use are parody pastiches, caricature, commentary and critique, news reporting, teaching, education and research.

## Chapter One: The Research Argument and Methodology

### 1.1 The Introduction

Fair use is everywhere. You may not even realize how much you interact with this protected right to free expression, but it comes in the form of everyday activities, such as posting on social media, using search engines, parodying a known work, teaching or doing homework and remixing songs by your favorite artists.

First amendment protections are embodied in fair use which, allows everyone to use existing scientific and cultural material without permission, under certain circumstances. To determine if a particular use is fair use, four factors are applied: 1) the purpose and character of your use, 2) the nature of the work, 3) the amount and substantiality of the portion taken and 4) the effect of the use on the market for the original. What this means is that fair use allows users, creators and innovators to have more choice and the public to have greater access to information.

### 1.2 The Importance

Whether a use is fair or not is not a simple matter. The law regulates it by stating a certain factor that help to determine the fair use. However; they do not provide a guarantee that your use is a fair one.

There is no pre-determined percentage of an image, or number of words, or number of musical notes that activates copyright law. Nor does acknowledging the holder of the copyright in your derivative work absolve you from the obligation to seek the copyright holder's permission.

The importance of this paper is to determine the fair use determinants by arrange the factors that will be shown below to determine the most important factor that the court focus on.



### 1.3 The problem:

The problem concerning our research is how to balance between the private interest of the copyright holder and the public's interest by fair use and limitations of copyright, especially after the development of the technology field and the means of social communications, which facilitate the accessible of copyrighted material.

### The Methodology:

In order to successfully tackle the research's issues, the methods that will be used in this research paper are the Inductive method and comparative method.

**The Inductive Method** called the experimental method and this method based on understanding and explanation of the different phenomena, in order to reach the understanding of the ties that control the variable and formulate it as principles and general provisions<sup>1</sup>

The importance of the inductive method is the transition from the particles to wholes or from private to public, in order to uncover the common denominator between them, and by linking the cause and the cause, and then conclude to develop a general rule or general theory governing these issues.

The application of the abovementioned method on this research will be used to define the general rules of fair use determinants, as the law mentioned the exceptions and fair use without putting limits to them.

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<sup>1</sup> Salama, Ahmed. (2017). "Methodological Principles for the Preparation of Scientific Research (In Arabic)", Dar el Nahda, Cairo, Egypt. p.34.

**The Deductive Method** starts with the total facts, ending with the partial facts, transition from the general to the specific. This method used to apply general rule on special or individual situations.

As in this research, the general rule of the fair use determinants will be applied to the specific situation such as the fair use determinants on the education material and personal use exception.

Moreover, it should be noted that the two abovementioned methods are related to each other, and not opposite to each other, as the Inductive method puts the general rules and in order to test their effectiveness and validity, we shall apply the deductive method on special cases.

**The Comparative Method** in legal research is the method that compares different legal systems by studying the phenomena, social facts, and the application of the legal principles to these phenomena to reach the ties between the social facts and the legal principles for instance and the reasons behind them and their development.<sup>1</sup>

## **Chapter Two: Exclusive rights granted by copyright law**

### **Introduction:**

In this chapter we will define the copyright and the exclusive rights granted by the copyright whether these rights were economic rights or moral rights. The conventions regulate this matter, also the Egyptian Copyright Law, US copyright Law (Title 17) and UK Law which is the copyright, Designs and Patents Act.

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<sup>1</sup> Salama, Ahmed. (2017). "Methodological Principles for the Preparation of Scientific Research (In Arabic)", Dar el Nahda, Cairo, Egypt. p.43.

As there is no legal definition of copyright in the Egyptian law, United Kingdom law and United States law nor in Berne convention and Rome convention, the World Intellectual Property Organization (WIPO) defined **Copyright (or author's right) as a legal term used to describe the rights that creators have over their literary and artistic works.** Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings.<sup>1</sup>

## 2.2 In Egypt

The authors shall have exclusive rights over their works, such rights divided into two categories. The first one is economic rights and the second one is moral right. The economic rights according to Egyptian Law No.82 of the year 2002 are ability of the owner of a copyright-protected work to decide how to use the work, and to prevent others from using it without permission. The Egyptian law grants copyright owners' exclusive rights to allow third parties to use their works, subject to the legally recognized rights and interests of others. Moreover, the Egyptian copyright law states that authors have the right to authorize or prevent certain acts in relation to a work.

The Author's economic rights which he can authorize or prevents the acts according to the law are **Reproduction Rights** which refers to the right of the authors to prohibit or authorize the reproduction of their work in various forms., **Right to Create Adaptations (called derivative works) and Translation Rights** which is the right to prohibit or authorize the creation of new works based on the copyrighted work and the right to authorize or prohibit translation of the original work into the languages.

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1 [www.wipo.int/copyright/en/](http://www.wipo.int/copyright/en/) Last accessed on 7<sup>th</sup> May, 2019 at 9:30 P.M.

**Performance and Display Rights** are the rights to authorize or prohibit the performance of the protected work or its display in public.

**Recording and Broadcasting Rights** are the rights that allow the owner to prohibit or authorize recording of the work on compact discs, cassettes, videotapes, and its broadcast by radio, cable or satellite. In addition to **Distribution Rights**, refer to the right to prohibit or authorize the sale or distribution of copies of the work.

Copyright owners can authorize or prohibit the reproduction of the work in various forms, distribution of copies of the work, public performance of the work, broadcasting or other communication of the work to the public, and translation of the work into other languages. However, the author is forbidden in Egyptian copyright law to waive his moral rights or sell it, such rights as the right to make the work available to the public for the first time, the right to claim authorship; and the right to prevent any modification considered by the author as distortion or mutilation of the work.<sup>1</sup>

### 2.3 United States copyright Law

In addition to United States copyright Law stipulates that the owner of copyright has the **exclusive rights** to control any of the following:

- (1) Reproduction of a copyrighted work in copies or phonorecords;
- (2) Derivative works based upon the copyrighted work;
- (3) Distribution of copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

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<sup>1</sup> The Egyptian law of the protection of Intellectual property rights, law No. 82 of the year 2002.

(4) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

In addition to moral rights of authors to attribution and integrity, the author shall have the right to claim authorship of that work, and to prevent the use of his or her name as the author of any work of visual art which he or she did not create; Also the author shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation.

Besides, The author shall have the right, which is his moral rights, to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

As mentioned above the author has the right to allow or prevent anyone from using his works, however, the law states some exception that allow the users to use the work without the prior acceptance of the author, or without asking him. Such exceptions are personal use, educational purpose, fair use ...etc.

## Chapter Three : Copyright Exceptions and Fair Use Determinants

### 3.1 Introduction

Fair use lies in the heart of copyright law; it is a flexible doctrine which allows the usage of copyrighted works without taking author's permission or pay for the usage. Under title 17 section 107 of the U.S. copyright law. Fair use of a copyrighted law is not infringement of the rights granted under section 106 or 106A. The statute doesn't define "fair use".<sup>1</sup> Also, in Egyptian copyright law in Articles 171 and 172 states the exceptions on the copyright works in this chapter we will discuss the fair use determents and comparing the U.S Copyright law with the Egyptian copyright law.

### 3.2 Fair Use according to U.S

Section 107 · Limitations on exclusive rights: Fair use states that:

"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. 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;

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<sup>1</sup> McJohn, Stephen. (2012). "Intellectual Property: Examples & Explanations", Wolters Kluwer Law & Business, New York, United States. p.169.

(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) The effect of the use upon the potential market for or value of the copyrighted work....”

As mentioned, the judges depend on case by case study to determine whether the usage consider fair use or not, the four factors stated in the law are the purpose and character of the use, the nature of the copyrighted work, the amount of the work used in relation to the whole copyrighted work, and the effect of the use on the market for or value of the copyrighted work. Each is more closely analyzed below in a fair use checklist<sup>1</sup>

### 3.3 Fair use Checklist

Purpose of use	
Favoring Fair Use	Opposing Fair use
<ul style="list-style-type: none"> <li>○ Teaching (including classroom use copies)</li> <li>○ Research</li> <li>○ Scholarship</li> <li>○ Nonprofit Educational Institution</li> <li>○ Criticism</li> <li>○ Changing the work for a new utility</li> <li>○ Parody</li> </ul>	<ul style="list-style-type: none"> <li>○ Commercial activity</li> <li>○ Profiting from the use</li> <li>○ Entertainment</li> <li>○ Denying credit to original author</li> </ul>

1 Office General Counsel, “Fundamentals of copyright and fair use”, California state university, United States, published at: <https://www.calstate.edu/gc/Docs/FairUse.pdf> , last visited on 7<sup>th</sup> May, 2019. At 9:45 P.M.

<b>Natural of work</b>	
<b>Favoring Fair Use</b>	<b>Opposing Fair use</b>
<ul style="list-style-type: none"> <li>○ Published work</li> <li>○ Factual or Nonfiction based</li> <li>○ Important to favored educational objectives</li> </ul>	<ul style="list-style-type: none"> <li>○ Unpublished work</li> <li>○ Highly creative work (art, music, plays, etc.)</li> <li>○ Fiction</li> </ul>
<b>Amount used</b>	
<b>Favoring Fair Use</b>	<b>Opposing Fair use</b>
<ul style="list-style-type: none"> <li>○ Small Quantity</li> <li>○ Portion used is not central to entire work</li> <li>○ Appropriate portions for educational purpose</li> </ul>	<ul style="list-style-type: none"> <li>○ Large portion or whole work used</li> <li>○ Portion used is central to work</li> </ul>

<b>Market Effect</b>	
<b>Favoring Fair Use</b>	<b>Opposing Fair use</b>
<ul style="list-style-type: none"> <li>○ User lawfully acquired or purchased copy of original work</li> <li>○ One or few copies made</li> <li>○ No significant effect on the market or potential market for copyrighted work</li> <li>○ Lack of licensing mechanism</li> </ul>	<ul style="list-style-type: none"> <li>○ Avoids payment of royalties/permission</li> <li>○ Significantly impairs market or potential market for copyrighted work or derivatives</li> <li>○ Licensing mechanism is reasonably available</li> <li>○ Permission is available</li> <li>○ Numerous copies made</li> <li>○ Placed it on Web or another public forum</li> </ul>



The abovementioned checklist is an illustration of fair use factors and what is support the fair use and what is not. However, that is not always like this, in the end the judge issuing judgment based on case by case study.

In **Sony corp. of America v. Universal City Studios** case, the court held fair use applicable to unauthorized home recording of television programs, which were made to watch programs at a later time. The purpose of the use was a non-commercial, the nature of work varied, as many programs were copied, but some were highly protected creative works. Amount copied was the entire work<sup>1</sup>. It should be noted that the last two mentioned factors don't support fair use but weight against it. However, the fact that the material copied had been broadcast for free viewing. With respect to the final factor, the plaintiffs have no intention to harm the market or loss the value from the practice of time-shifting<sup>2</sup>

Another case is **Harper& Row**, publishers v. Nation Enterprises, the Notion magazine managed to get a copy of President Gerald Ford's autobiography before its publication. The notion article included verbatim quotations of 300 words including substantial portion. As a result, time magazine canceled its agreement to print prepublication excerpts from the book. The court held that the fair use inapplicable. The nature if the use was news reporting, but also commercial.<sup>3</sup>

However, the Notion copied not only the facts but took expressive elements of the work. Moreover, the work was unpublished. The amount

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<sup>1</sup> McJohn, Stephen. (2012). *"Intellectual Property: Examples & Explanations"*, Wolters Kluwer Law & Business, New York, United States. p.170.

<sup>2</sup> McJohn, Stephen. (2012). *"Intellectual Property: Examples & Explanations"*, Loc. Cit. p.170.

<sup>3</sup> McJohn, Stephen. (2012). *"Intellectual Property: Examples & Explanations"*, Ibid. p.171.

was small but the portion taken was the heart of the book. Finally, the times terminate the agreement which is considered market harm.

In addition to **Kelly v. Arriba Soft Corp.** case, the plaintiff, a professional photographer, placed some of his images on his Web site, as well as on other web sites with which he had a license agreement. Arriba Soft operated an Internet search engine that displayed results in the form of small pictures (“thumbnails”). When Kelly discovered that his photographs were part of Arriba’s search engine database, he brought a claim against Arriba for copyright infringement.

The District Court found that Kelly had established a prima facie case of copyright infringement based on Arriba’s unauthorized reproduction and display of Kelly’s works, but that this reproduction and display constituted a non-infringing “fair use” under Section 107 of the Copyright Act. Kelly appealed that decision, and the Ninth Circuit Court of Appeal affirmed in part and reversed in part. The creation and use of the thumbnails in the search engine were a fair use.<sup>1</sup>

In my opinion the court held the use was fair use as there is no commercial purpose. Also, the District Court did not have decided whether the display of the larger image was a violation of Kelly’s exclusive right to publicly display his works. But apparently the court put the commercial use factor on top.

In **Campbell v. Acuff-Rose Music case**, the court addressed parody as fair use, “2 live crew” made a rap parody version of “Roy Orbison's song -Pretty woman” by changing the lyrics and music somewhat, they inverted the viewpoint of the song. The lower court had

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<sup>1</sup><https://fairuse.stanford.edu/case/kelly-v-arriba-soft-corp/>, last visited on 7<sup>th</sup> May 2019. At 10:00 P.M.

rejected fair use, relying on the commercial nature of the use and the fact that the parody had used substantial amounts of the original.

The Supreme Court reversed and remanded for a more nuanced analysis. A parody must borrow some from the original to make its point. The parody issue was a criticism and commentary on the original song. So was more likely to be fair use.

One of the Judges came to the same conclusion, that the 2 Live Crew song "was clearly intended to ridicule the white bread original"<sup>1</sup> which means that the parody on the song was so obvious.

The fair use factors and its checklist helps to determine fair use, but it's not enough for the judges, so the judges' judgment based on case by case study to determine whether its fair use or not. After viewing the previous cases, in my opinion the judges directly mainly based on a ranking for the factors, the first factor the judge take into consideration is whether the use is commercial or noncommercial, the second one the effect on the market, these are the two main factors the judge determine whether the use is fair or not.

### 3.4 In Egypt

The Intellectual Property Law No. 82 of the year 2002, Article 171 and Article 172 states the exceptions on the exclusive rights of the author. The author may not, after the publication of the work, prevent third parties from carrying out certain acts based on the exceptions provided by the law. The exceptions are as follow:

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<sup>1</sup> <https://www.law.cornell.edu/supct/html/92-1292.ZO.html>, last visited on 7<sup>th</sup> May 2019. At 10:45 P.M.

(1) Perform the work in family context or student gathering within an educational institution, to the extent that no direct or indirect financial remuneration is obtained;

(2) Make a single copy of the work for one's exclusive personal use, provided that such a copy shall not hamper the normal exploitation of the work nor cause undue prejudice to the legitimate interests of the author or copyright holders;

(3) Make, with the consent of the legitimate owner of the program, a single copy or an adaptation of a computer program, even if exceeding the extent necessary for the use of the program inasmuch as it remains within the limits of the purpose for which consent was initially granted, for archiving purposes or to replace a lost, destroyed or invalid original copy. In either case, the original or adapted copy shall be destroyed upon expiration of the property title. The Regulations shall determine the terms and conditions of adaptation from the program.

(4) Make an analysis of the work, or excerpts or quotations therefrom, for the purpose of criticism, discussion or information.

(5) Reproduction from protected works for use in legal or administrative proceedings, in as much as required by such proceedings, provided that the source and the name of the author are mentioned.

(6) Reproduction of short extracts from a work for teaching purposes, by way of illustration and explanation, in a written form or through an audio, visual or audiovisual recording, provided that such reproduction is within reasonable limits and does not go beyond the desired purpose, and provided that the name of the author and the title of the work are mentioned on each copy whenever possible and practical.

(7) Reproduction, if necessary, for teaching purposes in educational institutes, of an article, a short work or extracts therefrom, provided that:

- reproduction is made once or at different separate occasions;
- the name of the author and the title of the work are mentioned on each copy.

(8) Making a single copy of the work, through the intermediary of a documentation and archive center or through a bookshop not aiming at making any direct or indirect profit,

(9) Ephemeral reproduction of a work where such reproduction is made in relay, during a digital transmission of the work or in the course of a process of reception of a digitally stored work, within the normal operation of the device used by an authorized person.

In addition to **Appeal No. 1985 of the year 82, Circuit Court 28/3/2017** states that " Article 171 of Law No. 82 of the year 2002 concerning Intellectual property rights indicates that the legislator wanted to make a balance between ensuring all the protection of the authors' rights and powers over their creations from one hand, and from another hand to grantee the availability of creative works to encourage spreading the knowledge & creative movements on a large scale, As it's known that the majority of creative works occurs because of the cumulative of successful generations of humanity.

The legislator mentioned a series of license and permits as exceptions on the authors' exclusive rights, also the legislator allows this license without permission and free of charge and without compensation.

The exceptions include permitting the performance of the work within the family members as parents, children, and grandchildren. Or within educational institutions as it is considered personal use.

Such use shall be for teaching purpose to encourage the scientific research and raise the level of teaching through the provisions which is considered the fruits of the human mind creation.

However, the scope of implementation of the license contained in the first paragraph of Article 171 of the Intellectual property Law has excluded the usage of material gaining, whether direct to indirect. And this matter is a matter of facts that the competent court estimates independently, However, this is dependent on a certain condition being fulfilled which is proven in documents”

**Fahmy v. Jay-Z case** is one of the recent cases that illustrate the Fair use,

Jay-Z used a sample from the arrangement in the background music to his hit single BIG Pimpin as mentioned in the 9th US Circuit Court of Appeals, No. 16-55213.

The district court’s grant of judgment as a matter of law to Jay-Z and other defendants in an action brought by the heir to the Egyptian composer Baligh Hamdy, alleging copyright infringement in the song Khosara. The panel held that the heir to Hamdy’s copyright may not sue Jay-Z for infringement based solely on the fact that Egyptian law recognizes an inalienable “moral right” of the author to object to offensive uses of a copyrighted work. The panel held: (1) that Egyptian law recognizes a transferable economic right to prepare derivative works; (2) that the moral rights the heir retained by operation of Egyptian law were not enforceable in U.S. federal court; and (3) that, even if they were, the heir has not complied with the compensation requirement of Egyptian

law, which did not provide for his requested money damages, and which provided for only injunctive relief from an Egyptian court.<sup>1</sup>

Apparently, the District Court recognized only the economics rights as the Court considered the part taken from “khosara” song as a transferable economic right “adoption right” despite the fact that the song distortion the real song. The Court rely on the transferable agreement from Fahmy to Mohamed Jaber in 2002 that concluded the right to create derivative works. The court believed that the adoption right is an economic right not a moral right.

The defendant said that they thought the music was part of the public domain and did not obtain permission to use it. However, even the work falls in public domain, the authors should be mentioned in all cases. This right called right of “Integrity” which is totally separated from a copyright holder’s economic rights according to the Egyptian Law.

In addition, the legislator permits the users to use the works without a prior consent of the owner and he gave legitimacy to this right which makes the user prevent the errors. But the legislator put some exceptions to allow the user to use the work.<sup>2</sup> However, the legislators puts the exceptions without determine its limits. For example, a college professor sells his books to his student with affordable price, but the students don’t want to buy it, instead they print the book under the “personal use” exception. The legislator shall put limits for these as it effects the professor ‘s interest and don’t achieve the purpose of the exception which is balancing the copyright holder interest with the users “public interest”.

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<sup>1</sup> <https://fairuse.stanford.edu/case/fahmy-v-jay-z/>, last visited on 7<sup>th</sup> May 2019. At 11:00 P.M.

<sup>2</sup> Anwar, Ahmed. (2015). “*protecting Intellectual property rights*”, Bass printing company, Cairo, Egypt. pp.69-70.

## Chapter Four: Differentiation between Fair Use and Fair Dealing

The previous chapter discussed Fair use as it allows the usage of copyrighted works without taking author's permission or paying any charges for the author. The Fair use doctrine as mentioned has four factors to determine the fair of the usage. The factors are (1) The purpose and character of the use, (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; and (4) The effect of the use upon the potential market for or value of the copyrighted work. While The fair dealing permits use of a copyright-protected work without permission from the copyright owner or the payment of copyright royalties.

This chapter refers to differences between fair dealing and fair use differences since it is important to understand that fair dealing and fair use are not equal terms as their meaning and scope are defined by different legal systems.

Fair dealing as fair use, depends on some factors to determine whether the act considered fair or not and its relation to copyright and whether something is 'fair' will depend on the circumstances. Courts will normally consider factors such as:<sup>1</sup>

- The purpose of the dealing (Is it commercial or research /educational?)
- The character of the dealing
- The amount of the dealing
- Alternatives to the dealing (Was the work necessary for the end result? Could a different work have been used instead?)
- The nature of the work (Is there a public interest in its dissemination? Was it previously unpublished?)

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<sup>1</sup> <https://www.lib.sfu.ca/help/academic-integrity/copyright/fair-dealing>, last visited on 7th May 2019. At 11:15 P.M.



- The effect of the dealing on the original work (Does the use compete with the market of the original work?)

In addition, the “dealing” must be for a purpose stated in the Copyright Act: research, private study, criticism, review, news reporting, education, satire, and parody. Fair dealing cannot apply to any act which does not fall within one of these categories. However, Fair use depends on the four factors without any other restrictions.

**Hubbard v Vosper** is a leading English copyright law case on the defense of fair dealing. A book was published called *The Mind Benders*. It was written by Mr. Cyril Vosper, it was very critical of the cult of Scientology. The issue was whether the extracts in *The Mind Benders* constituted copyright infringement. In writing *The Mind Benders* Mr. Vosper has made free use of Mr. Hubbard’s books, letters and bulletins. He has taken very little from some, but from others he has taken very substantial parts. For instance, he has taken quite big extracts from the *Introduction to Scientology Ethics*, and put them into his book. He has also taken substantial parts of the letters and bulletins.<sup>1</sup> His defense is that his use of them is fair dealing within section 6 (2) of the Copyright Act 1956. This says that:

“No fair dealing with a literary, dramatic or musical work shall constitute an infringement of the copyright in the work if it is for purposes of criticism or review, whether of that work or of another work, and is accompanied by a sufficient acknowledgment.”

### **The three-step test**

Berne three-step test. The Berne three-step test is a clause that is included in several international treaties on intellectual property.

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<sup>1</sup> <http://uniset.ca/other/cs3/vosper.html>, last visited on 7th May 2019. At 11:30 P.M.

Signatories of those treaties agree to standardize possible limitations and exceptions to exclusive rights under their respective national copyright laws.

The three-step test was first enacted in the 1967 of the Berne Convention under Article 9(2) of the Berne Convention for the Protection of Literary and Artistic. Article 9(2) of the Berne Convention states that:

" ... (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such Works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author..."

Also, Article 13 "Limitations & Exceptions" of the trips states that "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

### **Conclusion:**

It can often be difficult to determine whether or not a particular use is a "fair use". The four factors described in the statute often lead to conflicting results. One may make fair use of a copyrighted work without the copyright holder's permission. The determination of whether a use of a copyrighted work is within fair use depends upon making a reasoned and balanced application of the four fair use factors set forth in Section 107 of the U.S. Copyright Act and in Egyptian Copyright Law No.82 of the year 2002. Those factors are

The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

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- The nature of the copyrighted work;
  - The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
  - The effect of the use upon the potential market for or value of the copyrighted work.

All four factors shall be evaluated in each case, and no one factor will determine the outcome. While fair use is intended to apply to teaching, research, and other such activities, an educational purpose alone does not make a use fair. The “purpose and character of the use” is only one of four factors that users must analyze in order to conclude whether or not the use is fair, and therefore lawful.

Moreover, each of the factors is subject to interpretation as courts work to apply the law. Working through the four factors is important. In this paper we arranged the factors and determine the limits which help in define fair use determinants through discussing cases.

**References:**

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