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A Quick Guide To Spotting Potential Fair/Noninfringing Uses

As we've discussed, fair use is decided by courts on a case-by-case basis and can sometimes be hard to predict. That said, there are a number of factors that are helpful to determine what is generally a fair use and what is not:

COPYRIGHT:

- 1. Is the user making money from the use?** In general, non-commercial uses of other people's copyrighted works are presumptively fair. This isn't always the case, of course, but it's a factor that can weigh heavily in a user's favor if they are not making any money from the use.
- 2. Is the user providing commentary or criticism of the work?** The strongest fair use cases are those where the secondary user takes someone else's copyrighted work and uses it as the basis for commentary or criticism. For example, making a parody of a song using the same melody and some of the same lyrics will most likely be considered a fair use. So would a movie or music review that included a sample of the material reviewed.
- 3. Has the user added creative efforts to the work?** Many modern artists have begun to recast or "remix" older works in new ways. While there have been few court rulings on whether or not this is a fair use, many copyright lawyers and commentators believe such uses should be fair when the secondary user adds a substantial amount of her own creativity to the original.
- 4. Is the user making an educational or news reporting use of the copyrighted work?** Courts have often found that copyrighted works are useful for teaching or news reporting and, therefore, use of those works in the classroom or to help inform the public was a fair use.
- 5. Is the work primarily factual in nature vs. fictional?** Copyright does not protect facts; it only protects creative works. Similarly, creative works that contain a lot of facts allow for more fair uses. Thus, use of a newscast reporting the day's events is more likely to be fair, while use of a fictional story from a novel is less likely.
- 6. Has the user used only the parts of the work that were necessary to convey their message or accomplish their goal?** When assessing fair use, courts look to see how much the secondary user has taken of the original. The smaller the amount, the more likely it is fair. However, there is no magic number or cutoff. Sometimes small amounts can be infringing; sometimes taking the entire work can be fair. The key question is whether the secondary user only took as much as needed.
- 7. Does the secondary use substitute for purchasing or licensing the original?** Another key question for fair use is what impact, if any, the secondary use will have on the market for the original copyrighted work. If the secondary use is a verbatim copy of the original, it may substitute for it and thus take away sales from the copyright owner. On the

other hand, if the secondary use has little or no affect on the market for the original, it is much more likely to be fair. Note that the market for a work can be both sales of media (such as a CD or DVD) as well as a market for licensing the work (such as for use on a movie soundtrack or to play on the radio).

TRADEMARK:

- 1. Is the use associated with any goods or services?** The Lanham Act addresses use of a trademark in commerce, or, “trademark use.” A purely noncommercial use of a mark is not a trademark use (e.g., “evilpoptarts.com”).
- 2. Is the user commenting on the trademark owner, product, or service?** Trademark law allows anyone to use a trademark, even commercially, when it is reasonable and necessary to refer to the mark and there’s no implication of endorsement. When someone does this, it is called “Nominative Fair Use” and is not illegal. (E.g., USA Today’s “Who is the Cutest New Kid on the Block?” poll, comparative advertising).
- 3. Do the trademarked words also describe something else?** Trademarked words can also describe things other than the mark owner’s product or service. When someone uses a mark to do so, it is considered a “classic fair use” and not illegal. (E.g. “He sent me an e-card for my birthday.”)
- 4. Would anyone be confused by the use?** If no consumer is confused or likely to be confused, there’s no infringement. *Note:* A famous trademark owner might have a basis for suing if the use *dilutes* (blurs or tarnishes) the mark, but only if the use is commercial and not a fair use.