

# **AEM Center Brief: Fair Use and Accessibility for Persons with Disabilities**

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This brief presents an overview of the “fair use” doctrine under copyright law in relation to the provision of accessible texts to persons with disabilities. The doctrine of “fair use” allows for the use of previously copyrighted works under certain circumstances without first having to receive the permission of the copyright holder.<sup>1</sup> Section 121 of the U.S. Copyright Act (also known as the Chafee Amendment and updated by the Marrakesh Treaty Implementation Act) similarly exempts authorized entities from copyright infringement liability in the reproduction or distribution of copies of previously copyrighted works in accessible formats for use by eligible persons with disabilities.<sup>2</sup>

Part I of this brief describes the four factors pertaining to fair use that are specified under copyright law. Part II discusses the 2014 Second Circuit case, *Authors Guild, Inc. v. HathiTrust*,<sup>3</sup> which examined the issue of whether the provision of accessible texts to persons with disabilities constitutes a fair use. Finally, Part III offers additional resources in the area of fair use. Because determinations of fair use are highly case-specific, educators who are interested in learning more about this topic should consult with the general counsel’s office for their institution or district. For more information about the relationship between copyright law (including Section 121/the Chafee Amendment) and accessible educational materials, visit the [National AEM Center website](#).

## **Part I: The Four Factors Pertaining to Fair Use Specified under Copyright Law**

The U.S. Copyright Act grants copyright owners an exclusive right to reproduce their “original works of authorship.”<sup>4</sup> This right is subject to certain limitations, including the “fair use” doctrine.<sup>5</sup> Fair use allows other individuals to reproduce a previously copyrighted work for such purposes as “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”<sup>6</sup> In order to

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1 17 U.S.C. § 107.

2 *Id.* § 121.

3 755 F.3d 87 (2nd Cir. 2014).

4 17 U.S.C. § 102(a).

5 *Id.* at § 107.

6 *Id.*

present a successful fair use defense in response to an allegation of copyright infringement, individuals must argue that their actions constituted a fair use based on four factors specified in the U.S. Copyright Act.<sup>7</sup> To analyze fair use claims, courts engage in a balancing of these four factors, which “are to be explored, and the results weighed together, in light of the purposes of copyright.”<sup>8</sup>

The four factors that are considered in fair use cases are as follows:

- (1) Purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,
- (2) Nature of the copyrighted work,
- (3) Amount and substantiality of the portion used in relation to the copyrighted work as a whole, and
- (4) Effect of the use upon the potential market for or value of the copyrighted work.<sup>9</sup>

## **Factor 1: Purpose and Character of Use**

The first factor pertains to the purpose and character of the use. Key considerations for courts include whether the use was for profit and whether it was “transformative.” The more transformative a work is, the more likely it will contribute to a finding of fair use and the less significant the other factors will be.<sup>10</sup> A transformative use is one that “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>11</sup> A transformative use is distinguishable from a “straight reproduction” of the work.<sup>12</sup>

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7 Id.

8 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

9 17 U.S.C. § 107.

10 *Campbell*, 510 U.S. at 579.

11 Id.

12 Id. at 579 & n. 5.

## **Factor 2: Nature of the Copyrighted Work**

The second factor addresses the nature of the work being copied or reproduced. Works that are factual are more likely to contribute to a finding of fair use than works that are fictional or creative in nature.<sup>13</sup> Courts have also found, however, that the second factor may be less important when the purpose of the work is transformative.<sup>14</sup>

## **Factor 3: Amount of the Work Copied**

The third factor concerns the amount of the work being used in relation to the work as a whole. The amount that is allowed by courts varies depending on the purpose and character of the use.<sup>15</sup> Consideration of the amount of the work copied involves investigation of both quantitative and qualitative aspects.<sup>16</sup>

## **Factor 4: Impact on the Market for or Value of the Work**

The fourth factor examines the impact of the use on the market for the original work. This factor involves consideration of the effect not only on the current market but also on the potential market for the original work as well as any derivative works.<sup>17</sup> While actual harm need not be shown, there must be “some meaningful likelihood [that] future harm exists.”<sup>18</sup>

## **Part II: Discussion of *Authors Guild, Inc. v. HathiTrust***

In the seminal case, *Authors Guild, Inc. v. HathiTrust*, the Authors Guild had alleged copyright infringement by HathiTrust, a partnership of several research institutions and

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13 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985).

14 Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 612 (2nd Cir. 2006).

15 Campbell, 510 U.S. at 586-87.

16 Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1178-79 (9th Cir. 2012).

17 Harper & Row, Publishers, 471 U.S. at 567-68.

18 Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 451 (1984).

libraries that had developed a shared digital library containing millions of volumes.<sup>19</sup> According to HathiTrust, the digital library allowed for three uses of the copyrighted works: (1) full-text searches, (2) access for individuals with print disabilities; and (3) preservation of the copyrighted works in digital form.<sup>20</sup>

In 2012, the district court judge ruled in favor of HathiTrust on a motion for summary judgment based on a balancing of the four fair use factors.<sup>21</sup> The district court also dismissed the argument made by the plaintiffs that the Chafee Amendment precluded a fair use defense with respect to copies made for the purpose of promoting access for individuals with disabilities, noting that “provision of access to previously published non-dramatic literary works within the [digital library] fits squarely within the Chafee Amendment ...”<sup>22</sup>

In 2014, the U.S. Court of Appeals for the Second Circuit affirmed the judgment of the district court with respect to the doctrine of fair use.<sup>23</sup> The Second Circuit conducted its own analysis of the four fair use factors in relation to the various uses asserted by HathiTrust.<sup>24</sup> The following section discusses the Second Circuit’s analysis with respect to two of those uses - namely: (1) enabling a full-text search of works in the database; and (2) providing access to works for individuals with print disabilities.

## **Second Circuit Analysis of Factor 1**

In analyzing the first factor, the Second Circuit concluded that **enabling a full-text search of works** constituted “a quintessentially transformative use.”<sup>25</sup> The court noted that rather than merely repackaging or republishing an original work, the HathiTrust

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19 Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445, 448 (S.D.N.Y. 2012).

20 Id.

21 Id. at 464, 466.

22 Id. at 465.

23 Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 105 (2nd Cir. 2014).

24 Id. at 94-104.

25 Id. at 97.

Digital Library (HDL) added something new with a different purpose and character.<sup>26</sup> The court further concluded that with respect to **providing access to works for individuals with print disabilities**, although the use was not transformative because the underlying purpose was the same, the purpose could still be considered valid.<sup>27</sup> The court pointed out that the Supreme Court had already identified the act of making copies of copyrighted works for individuals with disabilities as an example of fair use.<sup>28</sup> Similarly, the legislative history (House Committee Report), accompanying the codification of the fair use doctrine in the 1976 U.S. Copyright Act, stated that “the making of a single copy or phonorecord by an individual as a free service for a blind persons [*sic*] would properly be considered a fair use...”<sup>29</sup> Moreover, Congress had reaffirmed its commitment to improve hardships experienced by individuals with print disabilities through the passage of the Americans with Disabilities Act and the Chafee Amendment.<sup>30</sup>

## **Second Circuit Analysis of Factor 2**

In analyzing the second factor, the court determined that, with respect to both **facilitating full-text searches** and **providing access to individuals with print disabilities**, because the database included all types of works, there was no question that the collection would include those that are creative in nature and “are of the type that the copyright laws value and seek to protect.”<sup>31</sup> The court pointed out, however, that the second factor is rarely found to be determinative.<sup>32</sup>

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<sup>26</sup> Id. at 97.

<sup>27</sup> Id. at 101.

<sup>28</sup> Authors Guild, Inc., 755 F.3d at 102 (quoting Sony Corp. of Am., 464 U.S. at 455 n. 40).

<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> Id. at 98; see also id. at 102.

<sup>32</sup> Id. at 102; see also id. at 98.

## **Second Circuit Analysis of Factor 3**

Turning to the third factor, the court concluded that although the HDL had made use of entire works in order to facilitate **full-text searches**, these copies were reasonably necessary and not excessive.<sup>33</sup> The court also found that maintaining two libraries with identical servers was reasonably necessary to protect against the risk of disaster or data loss.<sup>34</sup> With respect to **providing access for individuals with print disabilities**, the court rejected the argument made by the Authors Guild that the copying was excessive because the HDL retained not only digital text files but digital image files as well.<sup>35</sup> The court noted that many users who are legally blind would be able to view the images with sufficient magnification or color contrasts.<sup>36</sup> Similarly, individuals with physical limitations that prevent them from holding a book or turning its pages would be able to view the images with the help of assistive devices.<sup>37</sup>

## **Second Circuit Analysis of Factor 4**

Finally, the court concluded that the fourth factor favored a finding of fair use because **full-text search** functionality was a transformative use that would not result in a “market substitution” that is necessary for economic harm under fourth factor analysis.<sup>38</sup> The court similarly rejected the two arguments made by the Authors Guild that each copy represented a lost sale because users were able to obtain the copy without a license and that the HDL created the risk of a security breach stemming from the fact that hackers would be able to obtain unauthorized access.<sup>39</sup> With respect to **providing**

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<sup>33</sup> Authors Guild, Inc., 755 F.3d at 98.

<sup>34</sup> Id. at 98-99.

<sup>35</sup> Id. at 102-03.

<sup>36</sup> Id. at 103.

<sup>37</sup> Id.

<sup>38</sup> Authors Guild, Inc., 755 F.3d at 99.

<sup>39</sup> Id. at 99-100.

**access to individuals with print disabilities**, the court found that the market for accessible books for this population was “insignificant.”<sup>40</sup>

## **Second Circuit Conclusion**

Based on a balancing of these four factors, the court concluded that the doctrine of fair use allows HDL: “to digitize copyrighted works for the purpose of permitting full-text searches”<sup>41</sup> and “to provide full digital access to copyrighted works to their print-disabled patrons.”<sup>42</sup> The court further noted in a footnote that, in light of the court’s holding with regard to fair use, it was unnecessary for the court to consider the extent to which the Chafee Amendment applied in this case.<sup>43</sup>

## **Part III: Additional Resources on Fair Use**

- [University of Minnesota Explanation of Fair Use](#)
- [University of Minnesota Fair Use Interactive Tool](#)
- [Stanford University Libraries Explanation of Fair Use](#)
- [Educational Fair Use Guidelines from U.S. Copyright Office: Reproduction of Copyrighted Works by Educators and Librarians \(1995\)](#)
- [Proposed Fair Use Guidelines, Final Report to the Commissioner from the U.S. Patent and Trademark Office Conference on Fair Use \(1998\)](#)
- [Association of Research Libraries Code of Best Practices in Fair Use for Academic and Research Libraries \(2012\)](#)

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40 Id. at 103.

41 Id. at 101.

42 Id. at 103.

43 Authors Guild, Inc., 755 F.3d at 103 n.7.