

**An Empirical Study of the U.S. Fair Use Cases, 1978-2005  
Coding Form**

**General Opinion Information**

<b>chronorder</b>	<b>Number of opinion in chronological order</b>
<b>caption</b>	<b>Caption of the opinion</b>
<b>cite</b>	<b>Citation of the opinion</b>
<b>level</b>	<b>Level of court writing the opinion (1=Supreme Court opinion, 2=circuit court opinion, 3=district court opinion)</b>
<b>circ</b>	<b>Circuit of the appellate court or district court (12=D.C. , 13=Federal Circuit, 14=Supreme Court)</b>
<b>dist</b>	<b>District court (numerical code roughly based on AO's)</b>
<b>distalpha</b>	<b>Alphabetical abbreviation of district court</b>
<b>date</b>	<b>Date opinion was filed</b>
<b>lname</b>	<b>Last name of author of opinion</b>
<b>fname</b>	<b>First name of author of opinion (and middle initial if given in the opinion)</b>
<b>publappal</b>	<b>Appellate case is (citable(1)/not citable(0))</b>
<b>posture</b>	<b>Posture of FU issue</b>  1 Preliminary injunction 2 Temporary restraining order 3 SJ plaintiff 4 SJ defendant 5 SJ cross 6 Bench trial 7 Motion to dismiss 8 Motion for attorneys fees 87 JNOV 88 Jury trial 89 Unclear
<b>dj</b>	<b>Declaratory Judgment</b>  1 Plaintiff in caption seeks declaratory judgment that its use is FU (Defendant in caption is then coded as plaintiff in the data set and vice-versa) 0 P does not seek declaratory judgment that its use is FU
<b>concdiss</b>	<b>Opinion is a concurrence (1), dissent (2), or neither (0)</b>

**Copyright Specific Opinion Information**

<b>winfu</b>	<b>Disposition of FU defense</b>  1 Plaintiff wins (Court finds no FU) 2 Defendant wins (Court finds FU) 3 Mixed 4 Issue of fact
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**appeal** **Fate of FU ruling on appeal** (if district court opinion, then whether the district court was affirmed, reversed, etc.; if appellate court opinion, then whether appellate court affirmed, reversed etc.)

- 0 No appellate treatment of lower court's FU ruling
- 1 Affirmed
- 2 Reversed
- 3 Other

**set** **Fate of Appellate Court's FU ruling on appeal to S Ct**

- 0 No record of cert sought
- 1 Cert denied
- 2 Affirmed
- 3 Reversed
- 99 District court opinion

**facts** Very brief summary of the facts of the case

**Factor 1**

**f1** **Court finds that the outcome of factor one favors:**

- 1 Plaintiff
- 2 Defendant
- 3 Neutral
- 4 Court finds fact issue
- 5 Court finds that factor is not relevant
- 6 Court's finding is unclear
- 0 Not addressed

**f1comm** **Court characterizes D's use as commercial/non-commercial:**

- 0 Court does not address commerciality
- 1 Court characterizes D's use as commercial
- 2 Court characterizes D's use as non-commercial
- 3 Court's characterization is unclear
- 4 Court characterizes commerciality as "neutral"

**f1min** **Court minimizes the importance of the commerciality inquiry (1/0)**

**f1pres** **Court acknowledges the *Harper & Row* presumption that commercial uses are not FU**

- 0 No
- 1 Yes
- 2 Court acknowledges the *Acuff-Rose* retreat from the *Harper & Row* presumption

**flt** **Court explicitly finds that D's use (is / is not) "transformative" of and/or a "productive use" of P's work**

- 0 Court does not address
- 1 Court finds that D's use is transformative
- 2 Court finds that D's use is not transformative
- 3 Court minimizes the importance of the transformativeness inquiry
- 4 Court addresses, but analysis is unclear
- 5 Court finds the issue to be a fact issue

**f1par** **Court characterizes D's use as:**

- 0 Court does not address issue

- 1 Parody
- 2 Satire
- 3 Not parody
- 4 Neither

**f1educ** Court characterizes D’s use as having an educational purpose (1/0)

**f1res** Court characterizes D’s use as having a research purpose (1/0)

**f1crit** Court characterizes D’s use as criticism or comment (1/0)

**f1manner** Manner in which D obtained P’s work

- 1 Supports P
- 2 Supports D
- 0 Not addressed

**f1pream** Court identifies D’s use as mentioned / not mentioned in the preamble

- 0 Court not address whether D’s use is mentioned in preamble
- 1 Court finds that D’s use is mentioned in preamble, supports FU
- 2 Court finds that D’s use is not mentioned in preamble, disfavors FU

**Factor 2**

**f2** Court finds that F2 favors:

- 0 Not addressed/not argued
- 1 Favors plaintiff
- 2 Favors defendant
- 3 Neutral
- 4 Fact issue
- 5 Not relevant
- 6 Unclear

**f2nat** Court finds that P’s work is:

- 0 Not addressed
- 1 Primarily creative
- 2 Primarily factual
- 3 Compilation
- 4 Unclear
- 5 Both creative and factual
- 6 A “computer program”

**f2pub** Court finds that P’s work is published / unpublished:

- 0 Not addressed
- 1 P’s work is unpublished and this supports a finding of no FU
- 2 P’s work is published and this supports a finding of FU
- 3 P’s work is published and this supports no FU (because can purchase)
- 4 P’s work is unpublished and this supports FU (because not available otherwise)
- 5 Unclear
- 6 P’s work is unpublished but this is not important to the FU analysis
- 7 P’s work is published but this is not important to the FU analysis

**Factor 3**

**f3** Court finds that F3 favors:

- 0 Not addressed

- 1 Favors plaintiff
- 2 Favors defendant
- 3 Neutral
- 4 Fact issue
- 5 Not relevant
- 6 Unclear

**f3ref**                      **The work to which the court refers in determining the amount and substantiality of the taking**

- 1 P's work
- 2 Both P and D's work
- 3 D's work
- 4 Unclear
- 0 Not addressed

**f3amount**                      **Court finds that D copied entirety of P's work?**

- 1 Yes, Court finds that D copied "entire" work
- 0 Court does not address / Court finds that D did not copy "entire" work
- 3 Unclear

**f3heart**                      **Court finds that D copied the "heart" of P's work**

- 0 Not Addressed
- 1 Yes
- 2 No
- 3 Unclear

**f3work**                      **Court acknowledges ambiguity over scope of "work"**

- 1 Yes
- 0 No

**Factor 4**

**f4**                      **Court finds that f4 favors:**

- 0 Not addressed / not argued
- 1 Favors plaintiff
- 2 Favors defendant
- 3 Neutral
- 4 Fact issue
- 5 Not relevant
- 6 Unclear

**f4commpres**                      **Court explicitly acknowledges the presumption that a commercial use will lead to market harm:**

- 0 Court does not acknowledge presumption
- 1 Court explicitly acknowledges presumption and finds that favors P
- 2 Court explicitly acknowledges presumption and finds that favors P but finds that nevertheless favors D
- 3 Court explicitly rejects presumption

**f4tpresum**                      **Court explicitly acknowledges the presumption that a nontransformative use will lead to market harm:**

- 1 Court explicitly acknowledges presumption
- 0 Court does not acknowledge presumption

**f4slip**                      **Court explicitly relies on the doctrine that if D's use should become widespread....:**

- 1 Yes, supports P

- 0 Court does not explicitly rely on this doctrine
- 2 Yes, supports D
- 3 Yes, unclear whom it supports

**f4sub** **Court explicitly acknowledges the doctrine of supercession/market substitution (from F1):**

- 1 Court acknowledges and finds that favors P
- 2 Court acknowledges and finds that favors D
- 0 Court does not acknowledge

**f4crit** **Court acknowledges the doctrine that there is no derivative right in criticism of the P's work**

- 1 Court acknowledges
- 0 Court does not acknowledge

**frimport** **C's explicit statement as to the importance of F4:**

- 0 Not addressed
- 1 States most important factor
- 2 States not most important
- 3 States that is not sure
- 4 C's treatment of the importance of F4 not clear

### Other Factors

**fother** **Court explicitly considers other factors**

- 0 No
- 1 Yes, and the factor is considered relevant
- 2 Yes, but the factor is considered irrelevant
- 3 Yes, and one additional factor is accepted, another rejected

### General FU Analysis Information

**leghist** **Does Court refer to the legislative history of the Copyright Act?**

- 1 Yes, Court directly refers to the legislative history
- 0 No
- 2 Court does not directly refer to the legislative history, but cites to a case which does, and the Court notes parenthetically that the cited case is referring to the legislative history

**bfaithfactor** **Does the Court address good/bad faith anywhere in the FU analysis?**

- 1 Yes, under F1
- 2 Yes, under F2
- 3 Yes, under F3
- 4 Yes, under F4
- 5 Yes, as a separate factor
- 6 Yes, under F1 and again as a separate factor
- 0 No

**bfaithoutcome** **Good/bad faith supports:**

- 1 Supports P (no FU)
- 2 Supports D (FU)
- 3 FI
- 4 Not relevant
- 5 Unclear

**val** Does Court tend explicitly to state “This factor favors...” (The analysis of at least three factors must adopt this rhetoric):

1 Yes  
0 No  
2 No, but valences are obvious

**rev** At the conclusion of its analysis, does the Court review the valences of the factors, however briefly, in stating its overall finding? (1/0)

**f1count-fucount** Word count of analysis of each factor and overall analysis

**circ#ref** Number of references in the fair use analysis to the circuit’s case law