



# Fair Use

Copyright  
Eric E. Johnson  
ericejohnson.com



Konomark  
Most rights sharable

17 U.S.C. § 106

**Subject to sections 107** through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to **reproduce** the copyrighted work in copies or phonorecords;
- (2) to **prepare derivative works** based upon the copyrighted work;
- (3) to **distribute** copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (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**;
- (5) 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**.

“The limited scope of the copyright holder's statutory monopoly ... reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”

Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)

## **17 U.S.C. § 107**

### **Limitations on exclusive rights: Fair use**

“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 ... , scholarship, or research, is not an infringement of copyright.”

# 17 U.S.C. § 107

## Limitations on exclusive rights: Fair use

Fair use factors “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;
- (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.”

## Fair use factors

“(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”

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

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

## Fair use factors

“(1) the purpose and character of the use, <small>including whether such use is of a commercial nature or is for nonprofit educational purposes</small> ”	Purpose and character of defendant’s use
“(2) the nature of the copyrighted work”	Nature of plaintiff’s work
“(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole”	Portion defendant used compared to plaintiff’s work
“(4) the effect <small>of the use upon the potential market for or value of the copyrighted work</small> ”	Effect on market (plaintiff would lose \$ if defendant’s conduct widespread)

## Fair use factors

“(1) the purpose and character of the use, <small>including whether such use is of a commercial nature or is for nonprofit educational purposes</small> ”	Purpose and character of defendant’s use	PΔ
“(2) the nature of the copyrighted work”	Nature of plaintiff’s work	Nπ
“(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole”	Portion defendant used compared to plaintiff’s work	Q
“(4) the effect <small>of the use upon the potential market for or value of the copyrighted work</small> ”	Effect on market (plaintiff would lose \$ if defendant’s conduct widespread)	M

## Fair use factors

“(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”	Purpose and character of defendant’s use	<del>PA</del>
“(2) the nature of the copyrighted work”	Nature of plaintiff’s work	Nπ
“(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole”	Portion defendant used compared to plaintiff’s work	Q
“(4) the effect of the use upon the potential market for or value of the copyrighted work”	Effect on market (plaintiff would lose \$ if defendant’s conduct widespread)	M

## Fair use factors

“(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”	Purpose and character of defendant’s use	ΔU
“(2) the nature of the copyrighted work”	Nature of plaintiff’s work	Nπ
“(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole”	Portion defendant used compared to plaintiff’s work	Q
“(4) the effect of the use upon the potential market for or value of the copyrighted work”	Effect on market (plaintiff would lose \$ if defendant’s conduct widespread)	M

## On fair use:

“The inquiry is necessarily a **flexible** one, and the endless variety of situations that may arise precludes the formulation of exact rules.”

Sony Corp. of America v. Universal City Studios, Inc.  
(the Betamax case) 464 U.S. 417, 479-80 (1984)

**Realothenetics**

Elsmere Music, Inc. v. NBC (S.D.N.Y. 1980)

Fair use?



"I Love Sodom," a "Saturday Night Live" television parody of "I Love New York," was held to be a

Elsmere Music, Inc. v. NBC (S.D.N.Y. 1980)

Fair use?

Held: Yes.



*[This is discussed within the Campbell case ...]*  
"I Love Sodom," a "Saturday Night Live" television parody of "I Love New York," was held to be a fair use. (aff'd by 2d Cir, cited with approval by SCOTUS)

**Roy Export Co. Estab. of Vaduz v. CBS**  
672 F.2d 1095 (2d Cir. 1982)



**Roy Export Co. of Vaduz v. CBS**  
672 F.2d 1095 (2d Cir. 1982)

**Fair use?**



**CBS  
NEWS**

75 seconds of a 72 minute film were used in  
TV news report on Charlie Chaplin's death.



Roy Export Co. of Vaduz v. CBS  
672 F.2d 1095 (2d Cir. 1982)

Fair use?

Held: No.



**CBS**  
**NEWS**

75 seconds of a 72 minute film were used in TV news report on Charlie Chaplin's death.

Roy Export Co. of Vaduz v. CBS  
672 F.2d 1095 (2d Cir. 1982)

Fair use?

Held: No.

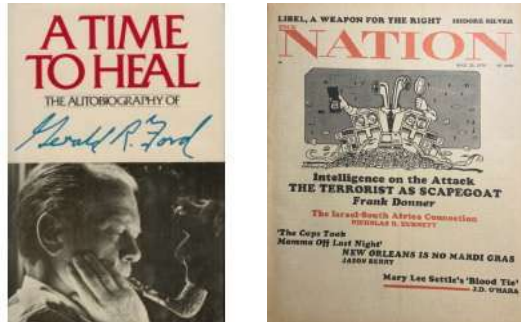


**CBS**  
**NEWS**

75 seconds of a 72 minute film were used in TV news report on Charlie Chaplin's death.

**Not a fair use.** *Keys:* The court found the portion taken substantial and the "heart" of the film.

## Harper & Row v. Nation Enters. (U.S. 1985)

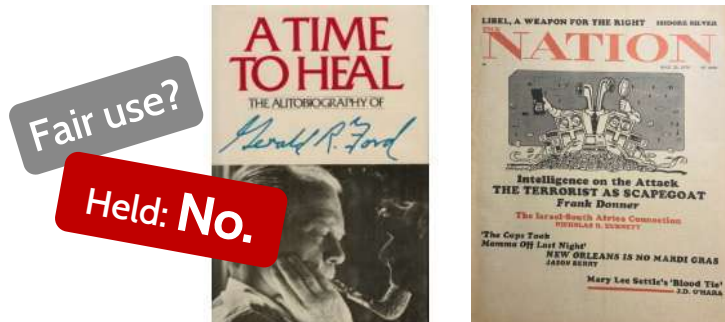


## Harper & Row v. Nation Enters. (U.S. 1985)



The Nation magazine got an unauthorized copy of the unpublished, forthcoming memoirs and used 300-400 words of verbatim quotes from the manuscript. Time magazine canceled its excerpt publication agreement with Harper & Row.

## Harper & Row v. Nation Enters. (U.S. 1985)



Fair use?

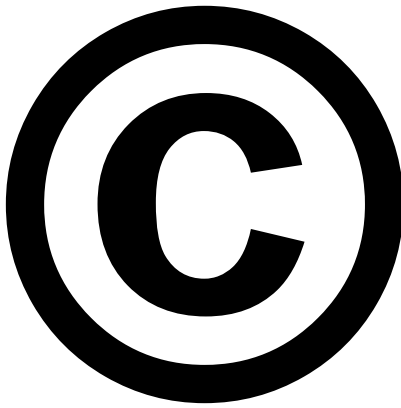
Held: **No.**

**Not a fair use.** Keys: [F2] Unpublished nature favors  $\Pi$ . [F3] While quotes were quantitatively insubstantial, they were “the heart of the book,” favoring  $\Pi$ . [F4] The “single most important element of fair use” favored  $\Pi$  with “clear-cut evidence of actual damage.”.

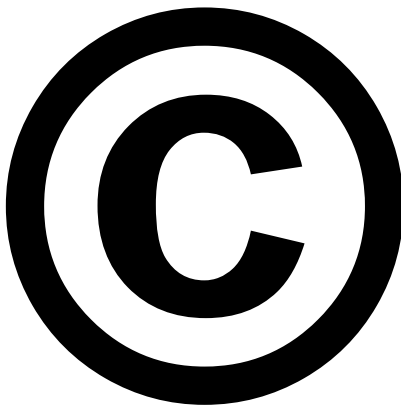


### Copyright Office Records:

- In 1982, no games registered in the name of the NFL
- In 1983:
  - 12 games, from CBS and NBC, registered in the name of the NFL
  - 1 game from ABC registered in the name of ABC
- Today, the NFL registers copyright in all game telecasts in its own name



**All rights reserved.**



**More rights reserved  
than we even have.**

**“This telecast is copyrighted by the NFL for the private use of our audience. Any other use of this telecast or any pictures, descriptions, or accounts of the game without the NFL’s consent is prohibited.”**

**“The copyright owner has never been accorded complete control over all possible uses of a work.”**

**Princeton Univ. Press v. Michigan Document Svcs., 99 F.3d 1381, 1395 (6th Cir. 1996)**

**Fair use**

**Fair use**





## Permitted:

- Up to 6 minutes of highlights on game day
- Up to 2 minutes on non-game days from games in preceding 7 days
- Only on regularly scheduled news programs and sports wrap-up shows

NFL Video Highlights License, 2010



## “Regularly scheduled news program”:

- Means “traditional news programs that regularly include news, sports and weather segments”
- The segment on sports must “not unduly focus on the NFL”
- NFL’s examples of programs that do not meet this definition:
  - 60 Minutes
  - The Rachel Maddow Show

NFL Video Highlights License, 2010

The screenshot shows a web browser window displaying a video player. The browser's address bar shows the URL [www.msnbc.msn.com/id/26315908/vp/40691396#40691396](http://www.msnbc.msn.com/id/26315908/vp/40691396#40691396). The page title is "Rachel Maddow: TRMS: The Left Knee Of Doom". The video player is titled "RACHEL MADDOW SHOW" and "9pm ET/PT, M-F on #1 msnbc tv". The video content shows Rachel Maddow sitting at a desk in a studio. A large screen behind her displays the text "TODAY IN CHEATING" over a green field. The video player interface includes a progress bar showing 00:08 / 03:04, and buttons for "full screen", "pop-out", "subtitles", "transcript", and "clip & share". The video player also has a search bar with the text "Find term in this clip: See". The bottom of the page features the Cisco logo and the slogan "together we are the human network".



Rachel Maddow: TRMS: The Left Knee Of Doom

www.msnbc.msn.com/id/26315908/vp/40691396#40691396

MSN Home Mail Sign Out msn

# RACHEL MADDOW SHOW

9pm ET/PT, M-F on msnbc tv

RACHEL MADDOW SHOW LIVE msnbc

**TODAY IN CHEATING**

THEY GET VERY PROPRIETARY ABOUT ANYBODY USING THEIR FOOTAGE, I CANNOT ROLL TAPE TO SHOW

00:23 / 03:04 full screen pop-out subtitles transcript clip & share

Find term in this clip: See

together we are the human network CISCO

Rachel Maddow: TRMS: The Left Knee Of Doom

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# RACHEL MADDOW SHOW

9pm ET/PT, M-F on msnbc tv

RACHEL MADDOW SHOW LIVE msnbc

00:42 / 03:04 full screen pop-out subtitles transcript clip & share

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Rachel Maddow: TRMS: The Left Knee Of Doom  
www.msnbc.msn.com/id/26315908/vp/40691396#40691396

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# RACHEL MADDOW SHOW

9pm ET/PT, M-F on msnbc tv

RACHEL MADDOW SHOW LIVE msnbc



01:32 / 03:04 full screen pop-out subtitles transcript clip & share

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together we are the human network CISCO

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Rachel Maddow: TRMS: The Left Knee Of Doom  
www.msnbc.msn.com/id/26315908/vp/40691396#40691396

MSN Home Mail Sign Out msn

# RACHEL MADDOW SHOW

9pm ET/PT, M-F on msnbc tv

RACHEL MADDOW SHOW LIVE LEAN FORWARD



01:39 / 03:04 full screen pop-out subtitles transcript clip & share

Find term in this clip: See

together we are the human network CISCO

el Maddow  
The Left Of Doom  
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