**9.25 Copyright – Defenses – Affirmative Defense – Fair Use**

[Name of defendant] claims, as an affirmative defense, that [his/her/its] use of [name of plaintiff]’s copyrighted work is a fair use. A fair use isn’t an infringement of copyright. [Name of defendant] must prove fair use by a preponderance of the evidence.

To determine whether [name of defendant]’s use of [name of plaintiff]’s work qualifies as a “fair use,” consider the following four factors:

 The purpose and character of [name of defendant]’s use of the work;

 The nature of [name of plaintiff]’s work;

 The amount and importance of the portion of [name of plaintiff]’s copyrighted work that [name of defendant] used; and

 the effect of the use upon the potential market for or value of [name of plaintiff]’s copyrighted work.

Certain uses recognized as favoring fair use include criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research. These examples are illustrative.

 The Purpose and Character of [Name of Defendant]’s Use.

The first factor looks at whether [name of defendant]’s use supersedes the use of [name of plaintiff]’s copyrighted work or, instead, adds new meaning, expression, or otherwise uses [name of plaintiff]’s work for a different purpose. It asks whether, and to what extent, [name of defendant]’s use is transformative. One example of a transformative use is a parody, which uses the original copyrighted work to comment on or criticize it.

The first factor also looks at whether the use is commercial or noncommercial. The focus of this distinction isn’t whether the motive of the use is monetary gain, but whether the user stands to profit from using the copyrighted work without paying the customary price.

Analysis of the first factor can affect the remaining factors. The more transformative the use, the less likelihood that the use substitutes for the copyrighted work, and thus the less significance is to be afforded other factors, such as the effect on the potential market for or value of [name of plaintiff]’s work.

 The Nature of [Name of Plaintiff]’s Copyrighted Work.

The second factor recognizes that some works may be used more freely, or more fairly, than others. Uses of factual, purely useful, or derivative works are more likely to amount to fair use than uses of works such as fiction. Similarly, uses of published works are more likely to amount to fair use than uses of unpublished works.

Also, out-of-print works that are no longer available for purchase through normal channels are more susceptible to fair use.

 The Amount and Importance of the Portion Used.

The third factor considers whether the amount and importance of the portion taken was reasonable in light of the purpose of [name of defendant]’s use and the likelihood that [name of defendant]’s use will supersede the use of [name of plaintiff]’s copyrighted work.

Also, out-of-print works that are no longer available for purchase through normal channels are more susceptible to fair use.

 The Effect on the Potential Market or Value of [Name of Plaintiff]’s Copyrighted Work.

Under this factor, you should consider not only actual markets for [name of plaintiff]’s copyrighted work, but also markets likely to be developed. And you should consider not only the harm caused by [name of defendant]’s use, but also whether widespread uses of the same sort by others would result in a substantial adverse effect on a market, or potential market, for [name of plaintiff]’s copyrighted work. Ask yourself: does [name of defendant]’s use supersede or impermissibly harm the market or potential market for [name of plaintiff]’s copyrighted work?

[Name of plaintiff] can’t preclude some transformative uses – even if the use may result in some harm to [his/her/its] markets. For example, an effective parody may lower demand for the original copyrighted work, but this isn’t the type of harm considered under this factor.

Balancing the Four Factors

You should explore all four factors and weigh the results together. You should consider the purposes of copyright: first, to promote public access to knowledge and new ideas, and second, to give authors an incentive to create copyrighted works for the public’s benefit.

**Special Interrogatories to the Jury**

**Do you find from a preponderance of the evidence:**

 That [name of defendant]’s use is for the purpose of criticism, comment, news reporting, teaching, scholarship, or research?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

 That [name of defendant]’s use adds new meaning or expression to [name of plaintiff]’s copyrighted work or otherwise uses [name of plaintiff]’s work for a different purpose?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

 That [name of defendant]’s use of [name of plaintiff]’s copyrighted work is noncommercial?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

 That [name of plaintiff]’s copyrighted work is factual – not creative – in nature?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

 That [name of plaintiff]’s copyrighted work was previously published?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

 That the amount and importance of the portion taken by [name of defendant] is reasonable in light of the purpose of [his/her/its] use?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

 That [name of defendant]’s use doesn’t affect a protected (nontransformative) market, or potential market, for [name of plaintiff]’s copyrighted work?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_

 Balancing the factors and your responses to above questions, do you find that [name of defendant] has proved fair use by a preponderance of the evidence?

Answer Yes or No \_\_\_\_\_\_\_\_\_\_\_\_\_