

***NXIVM CORP. V. ROSS INSTITUTE****364 F.3d 471 (2d Cir. 2004)*

The Second Circuit ruled on the impact of misappropriation of copyrighted material on the balancing of the four fair use factors. The court held that the district court did not adequately analyze the propriety of the defendants' conduct. Despite this error, the court still found that the defendants' work would likely be protected under fair use and affirmed the denial of a preliminary injunction.

NXIVM created a seminar training program for paid subscribers, known as "Executive Success." The program included exclusive access to a 265-page training manual. All seminar participants signed non-disclosure agreements barring the public release of the manual. Rick Ross published two nonprofit websites connected to his commercial work as a paid "cult de-programmer." The websites provided information about groups alleged to use mind control techniques. Ross received a NXIVM manual indirectly from Stephanie Franco, a defendant and former NXIVM client. Ross had the manual analyzed by defendants John Hochman and Paul Martin. Hochman and Marin each authored reports on NXIVM which included quotes from the manual. The reports were posted on Ross's websites. NXIVM sued Ross and the other defendants for copyright infringement and other claims. The district court denied a motion by NXIVM seeking a preliminary injunction against Ross's use of the reports, finding the reports likely to be protected by the fair use doctrine. NXIVM appealed.

The Second Circuit held that the district court should have included a more extensive analysis of the misappropriation of the original work under the first fair use factor. However, after an independent review of the four factors, the court held that the fair use defense was likely to succeed and affirmed the denial of the preliminary injunction. The court balanced the four § 107 fair use factors: purpose and character of the use; nature of the copyrighted work; amount and substantiality of the portion used; and effect of the use upon the potential market.

Under the first factor, the court found that the district court did not fully consider the propriety of defendants' conduct. The court held that to the extent that Ross, Martin, or Hochman should have known that access to the manuscript was unauthorized or illegal, this subfactor would weigh against a finding of fair use. A finding of bad faith impacts the first factor, but is neither conclusive for that factor nor dispositive of the entire fair use defense. Rejecting bright line rules, the court held that all the fair use factors must be analyzed, even when there is bad faith. Finally, the court found that even assuming the defendants' bad faith, the first factor still weighed in favor of fair use because of the transformative critical nature of the reports.

Because the copyrighted work was unpublished, the court found the second factor to weigh against fair use. The court found the third factor favored fair use because the secondary work did not take too much of the heart from the original work. The court held the fourth factor weighed heavily in favor of fair use because criticism of the NXIVM seminar could not substitute for participation in the seminar and market harm caused by criticism is not cognizable under the Copyright Act. Balancing all four factors, the court held the reports were likely to be fair use.