

**Diversey v. Schmidly,
738 F.3d 1196 (10th Cir. 2013)**

Year	2013
Court	United States Court of Appeals for the Tenth Circuit
Key Facts	Plaintiff, a former graduate student at the University of New Mexico, was concerned that defendants, University faculty members and officials, did not properly review and consider his Ph.D. dissertation. Plaintiff communicated his concerns to ever higher levels of authority. The basis for plaintiff's copyright claims arose when a university official took the dissertation copy he had given a professor and sent a copy of it to the University's library, without plaintiff's knowledge or consent. Two dates of particular note are: (1) plaintiff received a letter on February 7, 2008, notifying him that the University sent a copy of his dissertation to its library, which they refused to return; and (2) plaintiff learned on June 16, 2009, that the Library made the copy available to patrons. Plaintiff filed suit on June 5, 2012. The district court determined that plaintiff's claim accrued on February 7, 2008, and the statute of limitation period elapsed by February 2011, making the June 2012 complaint untimely. Plaintiff's action was thus barred, and the court did not conduct a fair use analysis. Plaintiff appealed.
Issue	Whether it was fair use for the University to make a copy of plaintiff's dissertation and add it to a library collection where it was available to patrons.
Holding	While the Tenth Circuit agreed that the statute of limitations barred plaintiff's copying claim, it ruled that plaintiff's distribution claim did not accrue until June 16, 2009, when he learned that the library had made the dissertation available to patrons. The court then conducted a fair use analysis with regard to the distribution claim, finding that fair use did not permit the use. The court noted that defendants' non-commercial, educational purpose for adding the dissertation to their library was "at the heart of the protection for fair use." But the second factor, the nature of the work, weighed in plaintiff's favor, because the work was yet unpublished. The amount of the work used—its entirety—also weighed against a finding of fair use. Finally, while plaintiff did not argue that his work was intended for the commercial market, the court found that defendants' listing of the work in its libraries' catalogs nevertheless deprived plaintiff of the value of his dissertation by preventing him from effectively completing dissertation review and defense at another institution.
Tags	Tenth Circuit; Education/Scholarship/Research; Textual work; Unpublished
Outcome	Fair use not found

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