

Keck v. Mix Creative Learning Ctr., L.L.C.
116 F.4th 448 (5th Cir. 2024)

Year	2024
Court	United States Court of Appeals for the Fifth Circuit
Key Facts	Plaintiff Michel Keck is a multimedia artist with registered copyrights in her works from her Dog Art and a registration of her name as a trademark. Defendant Jacqueline Kenneally, the sole proprietor of Mix Creative Learning Center, an art studio for children, began selling art kits online for at-home learning during the COVID-19 pandemic. These kits highlighted a specific artist, featuring biographical artist information and providing sample artworks to inspire the students to create their own art in the artist’s style. Keck’s Dog Art featured in one of the Mix Creative kits. Only six kits were sold – two purchased by Keck herself. Keck sued, asserting copyright and trademark claims. Kenneally stopped selling the Keck-inspired kits when she became aware of the lawsuit. The district court held that Mix Creative’s reproduction of the Dog Art works in the kits was a fair use as to both the copyright and trademark claims. It later awarded attorneys’ fees to Mix Creative. Keck appealed.
Issue	Whether reproduction of an artist’s registered images in educational art kits, sold commercially for educational instruction, is fair use.
Holding	Considering the first fair use factor, the purpose and character of the use, the panel found it weighed in favor of Mix Creative’s use. Though a commercial enterprise, Mix Creative’s use of Keck’s work was transformative “as the art kits had an educational purpose that was significantly different from the original, decorative purpose of Keck’s dog-themed artworks.” Because Mix Creative used the images of the artworks in lesson plans and PowerPoint slides to teach students about Keck’s style, the court found that the purpose of this specific educational use was not substantially the same as that of the original works, and there was little chance of substitution. The panel adopted the district court’s analysis of the second factor, the nature of the copyrighted work, which favored Keck because her work was expressive. Likewise, the panel agreed that the third factor, the amount and substantiality of the portion used, favored Keck because entire works were copied. With respect to the fourth factor, the effect upon the potential market for or value of the original, the panel determined that Mix Creative’s use of the works in the kits did not displace any market for or affect the value of Keck’s original works or licensed reproductions. The court noted the transformativeness of the use supports a conclusion that there is no market harm, as it “is less likely to usurp demand for the original work or its derivatives.” There was no evidence that Mix Creative’s educational uses were in the same market as Keck. Further noting that some sales were generated by plaintiff, the panel refused to recognize a “theoretical market” for Keck’s work. The court concluded that this factor weighed in favor of fair use, as “[w]idespread use cannot have an impact on markets that do not exist and are unlikely to be developed,” but not without remarking that widespread use of the works in educational lessons could positively impact Keck’s name recognition and the commercial value of her works. The appellate court affirmed the district court’s rejection of Keck’s copyright claim “because the two most important statutory factors governing fair use” favored Creative Mix.
Tags	Educational/Scholarship/Research; Painting/Drawing/Graphic
Outcome	Fair use found