

FUNDAMENTALS OF COPYRIGHT AND FAIR USE



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FUNDAMENTALS OF COPYRIGHT AND FAIR USE

I. COPYRIGHT PROTECTION

Original works, protected under copyright law, include literary, dramatic, artistic and certain other types of intellectual works. Copyright gives the original author certain rights, including the right to reproduce the work, to prepare derivative works, to distribute or sell copies, to transfer ownership, to perform the work publicly, and in the case of sound recordings to perform or broadcast the work. General information about copyright can be found at the Patent and Trademark Office web site, www.copyright.gov.

To use or reproduce work that has been copyrighted, it is necessary either to obtain the permission of the copyright holder, or come within an exception to the exclusive rights of the copyright holder. Permission is always the clearest and safest means to be certain that use is authorized.

II. THE FAIR USE EXCEPTION

One of the most frequently used exceptions to the exclusive rights of a copyright holder is the doctrine of fair use. [Section 107](#) of the Copyright Law, 17 USC 107, makes clear that a fair use does not constitute copyright infringement and is present when the work is used for, among other things, criticism, comment, news reporting, and teaching, scholarship or research.

There are four factors to be considered in determining whether a use is fair. Each must be considered, and each has a sliding scale. Application of these factors is complicated because one factor may suggest a fair use, and the next may suggest the opposite. Hence, the determination of whether a particular use is fair is rarely clear, certain or free of doubt.

The following are the four factors that must be weighed in any fair use determination:

1. the purpose and character of the use;
2. the nature of the copyrighted work;
3. the amount of the work that will be used in relation to the whole copyrighted work; and
4. the effect the use would have on the market for or value of the copyrighted work.

Each is more closely analyzed below.

Factor 1: The purpose and character of the use.

On the lists below, items on the left weigh in favor of fair use, whereas the commercial use listed on the right weighs against fair use, and permission to use the work would be required. The items listed in the middle can add weight to the uses on the left and make the fair use determination more likely.

Nonprofit
Educational
Personal

Criticism
Commentary
News reporting
Parody

Commercial

No one factor by itself determines fair use, but it is helpful for CSU classroom uses that an educational use of a copyrighted work is in the left column. If the work is used in the classroom as a part of some commentary and criticism, the case is even stronger. When a copyrighted work is used for an exclusively commercial purpose, permission from the copyright holder is almost always necessary.

Factor 2: The nature of the copyrighted work.

If the work is factual and has been published, the balance tips in favor of fair use. If the work is creative and unpublished, it is more likely that permission will be required. The balancing of items under this factor thus looks like this:

Factual
Published

Mixture of fact and imaginative

Imaginative
Unpublished

The middle column is not a weighing factor but more a recognition that some works are both imaginative and factual, in which case whether it is or is not published will move it more in one direction or the other.

Factor 3: The amount of the work used in relation to the whole copyrighted work.

Here, the items on the left weigh in favor of fair use and those on the right weigh in favor of not a fair use, in which case permission from the copyright holder is required.

Small amount
Not the “heart” of the work

Large amount
“Heart” of the work

Like all of the factors, this factor, in particular, must be considered in relation to the other factors. For example, if the use is educational and for commentary purposes (factor 1, strongly in favor of fair use) then more of the work could be used and still be within fair use. Similarly, if the use is commercial, even a small amount of use would weigh in favor of it not being a fair use, therefore, requiring permission.

Factor 4: The effect of the use on the market for or value of the copyrighted work.

This factor is sometimes considered the most important, although the copyright law makes no such distinction. It requires a comparison of the first three factors against the effect on the commercial market for the copyrighted work. If the proposed use is likely to become widespread and would have a negative effect on the marketability for the copyright holder, the balance will tip towards not a fair use, and permission will be required.

After evaluation of the first three factors, the proposed use tips toward fair use	Original is out of print	Competes with sales of the original
	No ready market for permission	Avoids payment for permission (royalties) in an established permissions market
	Copyright owner is not identifiable	

The items in the middle here support a fair use determination. If the copyright holder is not identifiable, even though the use would compete with commercial sales, the scale tips towards fair use because of the difficulty in obtaining the permission. Interestingly, the ability to get permission, unlike all items on all of the other lists, has nothing to do with the use or the character of the work. Nevertheless, if it is not difficult to get permission, it will generally be required.

III. REACHING A DECISION

The law provides no clear or direct answer as to when fair use applies in a specific situation because each must turn on its own unique facts. Congress intentionally specified flexible factors that can be adapted for changing needs and circumstances. Attached is a checklist to assist in the analysis of the fair use factors.

To reach a decision each proposed use must be carefully analyzed in terms of the four factors outlined above. Reasonable minds may differ on the applicability of fair use in a particular circumstance, and as a result there is necessarily some risk incurred in arriving at a decision. If most factors outlined above lean in favor of fair use, the proposed use is most likely allowed without permission; if most lean the opposite direction, the action will most likely not fit the fair use exception and permission is required.

Time may also have a bearing on the decision. When a copyrighted work is new or has just been published, there may not yet be an established method for gaining permission. Therefore, it may be possible for there to be a fair use of the work without permission, as opposed to a copyrighted work that has been in circulation for some time where there is an established method of gaining permission and an established commercial market. But the analysis may lead to an entirely different result for the same work used the very next year. In short, the fair use of a publication may have time limits.

IV. GETTING PERMISSION

If the proposed use is not fair, getting permission from the copyright holder is essential. An acknowledgement that the work was authored by someone else is not enough and is not the same as express permission.

If the work to be used is a book or journal, the best source to gain information about the author, so that permission can be requested, is the Copyright Clearance Center (see, www.copyright.com). In many cases the campus library will have helpful information about getting permission to use copyrighted works. For permission to use music, there are several organizations such as the American Society of Composers, Authors and Publishers (ASCAP) and the Recording Industry Association of America (RIAA) that have information about authorization to use works.

Permission must come from the owner of the copyright or an authorized agent of that owner and must be in writing. For more information about obtaining permission to use copyrighted works see <http://www.copyright.iupui.edu/permorg.htm> and <http://www.utsystem.edu/ogc/intellectualproperty/permisn.htm>, or contact the University Counsel assigned to your campus.

FAIR USE FACTORS CHECKLIST

This checklist can be used to help determine if your use of a copyrighted work falls within the fair use exception to copyright.

<i>Purpose of Use</i>	
<i>Favoring Fair Use</i>	<i>Opposing Fair Use</i>
<input type="checkbox"/> Teaching (including classroom use copies) <input type="checkbox"/> Research <input type="checkbox"/> Scholarship <input type="checkbox"/> Nonprofit Educational Institution <input type="checkbox"/> Criticism <input type="checkbox"/> Changing the work for a new utility <input type="checkbox"/> Parody	<input type="checkbox"/> Commercial activity <input type="checkbox"/> Profiting from the use <input type="checkbox"/> Entertainment <input type="checkbox"/> Denying credit to original author
<i>Nature of work</i>	
<i>Favoring Fair Use</i>	<i>Opposing Fair Use</i>
<input type="checkbox"/> Published work <input type="checkbox"/> Factual or Nonfiction based <input type="checkbox"/> Important to favored educational objectives	<input type="checkbox"/> Unpublished work <input type="checkbox"/> Highly creative work (art, music, plays, etc.) <input type="checkbox"/> Fiction
<i>Amount Used</i>	
<i>Favoring Fair Use</i>	<i>Opposing Fair Use</i>
<input type="checkbox"/> Small Quantity <input type="checkbox"/> Portion used is not central to entire work <input type="checkbox"/> Appropriate portions for educational purpose	<input type="checkbox"/> Large portion or whole work used <input type="checkbox"/> Portion used is central to work
<i>Market Effect</i>	
<i>Favoring Fair Use</i>	<i>Opposing Fair Use</i>
<input type="checkbox"/> User lawfully acquired or purchased copy of original work <input type="checkbox"/> One or few copies made <input type="checkbox"/> No significant effect on the market or potential market for copyrighted work <input type="checkbox"/> Lack of licensing mechanism	<input type="checkbox"/> Avoids payment of royalties/permission <input type="checkbox"/> Significantly impairs market or potential market for copyrighted work or derivatives <input type="checkbox"/> Licensing mechanism is reasonably available <input type="checkbox"/> Permission is available <input type="checkbox"/> Numerous copies made <input type="checkbox"/> Placed it on Web or other public forum <input type="checkbox"/> Repeated or long term use

