

Can I Use That? Fair Use in Everyday Life

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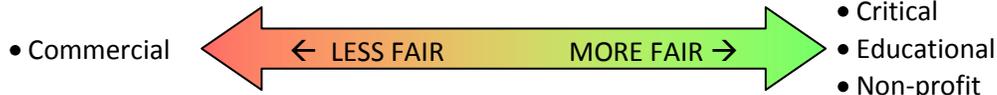
Can I Use That? Fair Use in Everyday Life

Quick Reference

A cut-to-the-chase summary for use in your discussions, or to cut out and stick up on a bulletin board!

Four factors

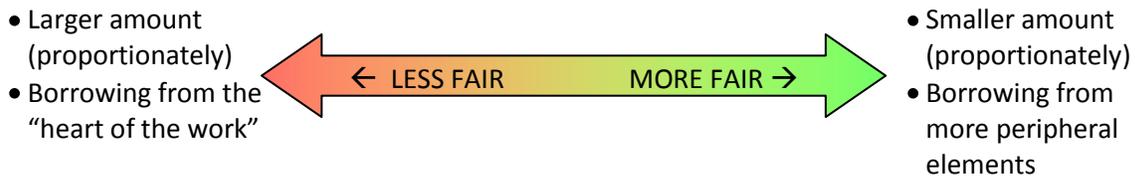
- **Purpose** (of the use in question)



- **Nature** (of the source work)



- **Amount & Substantiality** (of the source work)



- **Effect on the potential market** (for the source work)



Transformativeness

- Are you doing something **really new** with the original work?
- Does it involve criticism or commentary, such as a parody?
- Does it provide significant value to the public?

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Copyright Groundwork

Who

The rights provided by copyright usually belong (at least initially) to the **creator(s)** of a work. Creators often transfer some or all of their rights to other individuals or entities, and often creators who are working as employees or under commission don't own the copyright to their works in the first place. So **copyright owner** or **copyright holder** refers to the owner of the legal rights – who is often not the creator!

What

Copyright protects “**fixed**” works of original expression – which may include visual art, literary works, music, drama, other performing arts, multimedia compositions, and a host of other types of works.

Copyright holders have the “exclusive right” to do and to authorize others to:

- make copies of the work
- make derivative works (such as translations or adaptations for other media)
- distribute copies by sale, rental, or lending, and
- to perform or display the work publicly

These rights are **not paramount or unlimited**. Several important **exemptions** apply to particular uses by libraries, educators, people with visual disabilities, and small business owners, to name just a few. Similarly, some uses may fit under an **exception** such as **fair use**.

When

Copyright attaches at the moment a work is created and lasts until 70 years after the death of the creator (or for corporate works, for 95 years from creation.)

Where

Copyright law varies internationally, although many nations have similar laws as a result of international treaties. Both where a work was created and where it is used or copied may be relevant to copyright questions.

How

There is no action that must be taken in order to own a copyright – it attaches **automatically**, at the moment a work is created. You cannot “copyright” a work – if the work exists, it is already protected. A work may be **registered** with the U.S. Copyright Office, and there are some good reasons for doing so, but it is *not* required in order to own a copyright.

There is no longer any need to put the copyright symbol “©”, name of copyright holder, or date of publication on a work in order to claim a copyright in the work. However, these formalities may be important for the copyright status of older (pre-1978) works.

Why

Fundamentally, the creative process is iterative – new works build on old ones. One main idea of copyright is to encourage greater production by providing creators with opportunities to control and profit from the distribution of their works. Greater production of expressive works, suggests the U.S. Constitution, produces public benefits in the progress of learning, art, and human knowledge.

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“Escape Hatches”

Fair use is one of several different ways copyright law allows use of materials without explicit permission from the copyright holder. It is the most flexible and expansive, but also the most complicated. Fair use is a little bit of a monster. Several parts of the law spell out **other non-infringing uses** – which sometimes allow the “Can I Use That?” question to be answered without having to deal with the complexities of fair use! Here are some ways to escape the fair use monster:



Public Domain

The public domain is the collection of all expressive works for which no one owns the copyright - or to look at it another way, the collection of works which everyone owns! A work may be in the public domain if it **was never covered by copyright in the first place** (U.S. federal government works are not eligible for copyright protection), or if a **copyright holder dedicated it to the public domain**.

The largest portion of the public domain is made up of works for which **the term of copyright protection has ended**. It can be very difficult to tell if the term has ended, because the law has changed several times over the years. The *Copyright Slider* (<http://www.librarycopyright.net/digitalslider/>) is a tremendously useful (and fun!) tool for looking up copyright term and public domain possibilities via date and various conditions of publication. Peter Hirtle’s chart on *Copyright Term and the Public Domain in the United States* (<http://copyright.cornell.edu/resources/publicdomain.cfm>) takes this information to the next level of detail.

The Classroom Use Exemption

There are a number of provisions in the law that authorize specific uses in specific situations. The Classroom Use Exemption is one of the most straightforward of these exemptions. For the exemption to apply, you must be **in a classroom** ("or similar place devoted to instruction"), **in person**, engaged in **face-to-face teaching activities**, at a **nonprofit educational institution**. And you must be working with **legitimate** (i.e., legally-acquired) **copies**. If these very specific conditions are met, both instructors and students have broad rights to **perform or display** any works.

But be careful! The classroom use exemption does not apply outside the nonprofit, in-person, classroom teaching environment! It **doesn't apply online** - even to wholly course-related activities and course websites. It **doesn't apply to interactions that are not in-person** - even simultaneous distance learning interactions. It **doesn't apply at for-profit educational institutions**. It also **only authorizes performance or display**. If you are making or distributing copies (i.e., handing out readings in class), that is not an activity that the Classroom Use Exemption applies to. You do have to engage with fair use when distributing copies.

Creative Commons

Creative Commons licenses allow copyright holders to share works with the public under a variety of preset conditions. If you meet the conditions of the license on a particular work, you can make use of the work without payment or further permission. One must own a copyright in the work in order to grant a Creative Commons license. (<http://www.creativecommons.org>)

The standard licenses are mix-and-match, and may require *Attribution* (CC-BY ) , permit all *NonCommercial* uses (CC-NC ) , permit uses that make no changes – *No Derivatives* (CC-ND ) , or permit uses as long as you also share the subsequent work you create – *ShareAlike* (CC-SA ) This handout is licensed CC BY-NC – so it can be used for any noncommercial purposes as long as the user provides attribution!

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Fair Use Basics

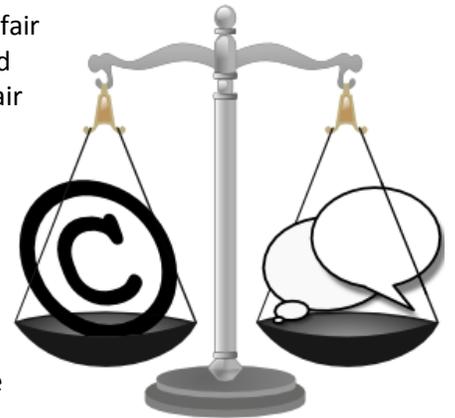
If copyright holders had complete control of every use of every bit of their works, there are many uses that are essential parts of communication, creativity, and scholarship which they would not allow. Luckily, the law recognizes that there are some uses that copyright holders should not be able to control, and for which people should not have to request permission. This concept is codified in U.S. Copyright law as **fair use**.

“...[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is **not an infringement of copyright**.”

17 U.S.C. § 107

Similar provisions in other countries’ laws, where they exist, are often called “fair dealing.” Often, fair dealing authorizes specific categories of users or uses, and anything outside of those categories is still an infringement. By comparison, fair use in the United States is uniquely flexible and expansive – which has both positive and negative effects.

A large part of the flexibility of U.S. fair use is because the legal system recognizes that it is related to the essential freedom of expression provided for in the First Amendment to the U.S. Constitution. Fair use is often called the “breathing space” for First Amendment values in copyright law. Fair use strives to protect the expressive rights both of the copyright holder and of the public at large.



Uncertainty, “Guidelines”, and Fair Use

Due in no small part to its valuable flexibility, U.S. fair use is more complex and unpredictable than some of the straightforward categorical exceptions in other countries’ laws. **Each possible use** of an existing work **must be looked at in detail** before an impression can be formed as to whether that use is fair or not. Several factors must be considered, and much of the time experts talk about a factor as “being in favor” of a use (or not), and about all the factors adding up to a use that is “likely to be fair” or “not likely to be fair.” There are rarely definitive answers outside of courts.

This uncertainty can be frustrating – it’s tempting to try to use the categories listed in the statute (“criticism, comment, news reporting, teaching [...], scholarship, or research”) as hard-and-fast rules. However, the key words in that paragraph are “for purposes **such as...**”- the list is illustrative, not exhaustive. There are both fair and unfair uses within those categories, and many fair uses outside of them, too.

It’s also tempting to look for guidance from sources that give hard-and-fast rules: “quoting 250 words is okay”, “any video clips over 30 seconds are not fair use”. But a lot of those guidelines are too simplistic, and err on the very conservative side. To fully understand and exercise your fair use rights, you have to embrace the uncertainty with the flexibility!

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The “Four Factors”

The law specifies four factors that are to be considered when determining if any given use is fair. Note that most of the factors have to do with the **work which is being borrowed from**, not with the use to which it is being put. This reinforces the necessity of thinking fair use through in detail, every time you borrow from an existing work.

“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.”

17 U.S.C. §107

Each one of these factors is important in every fair use determination, and each one can be unpacked in more detail. While the language of the statute can provide initial insight into some of the factors, more complex nuances have been developed in various court cases.

Purpose and character

No use is “presumptively fair”, but an educational purpose definitely helps this factor weigh in favor of fair use. Criticism (and general commentary to a slightly lesser extent) tends to also be a highly favored purpose - and enshrining a (surprisingly?) common-sense construct of “fairness”, commentary or criticism of the work from which you are borrowing tends to be considered more “fair” than borrowing from one work in order to critique another. Criticism is a valued purpose in part because of the First Amendment elements of fair use - copyright owners would tend not to authorize critical uses, so fair use tends to protect them. In a twist that is counterintuitive to some, fair use actually offers less protection to homage than to criticism.

Clearly, a commercial purpose help this factor weigh against fair use – and in some cases, a commercial purpose has weighed very strongly among the factors. But note that some commercial uses can still be fair use. Most would agree that a short dialogue quotation in a theater review published in a for-profit magazine are a fair use, for example – the purpose is commercial, but also critical.



What about for-profit educational purposes?



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Nature of the copyrighted work

This factor has two separate elements.

Published/Unpublished

All other factors being equal, a use of an unpublished work is less likely to be a fair use than a similar use of a similar, but published, work. It *can* be a fair use to use an unpublished work, but it is usually smart to err on the conservative side in such a situation.

The basic idea is that creators should usually get to make the decisions about when or if to share their work with the public; it is thus less fair to involuntarily subject their work to public exposure – however, this element is never conclusive:

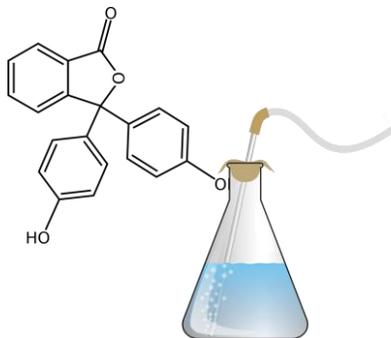
“The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”

17 U.S.C. §107

Factual/Creative

Courts have often considered whether a source work is factual when assessing fair use. One fundamental tenet of copyright law is that **facts are not copyrightable**, and although the means used to *express* a fact can be copyrightable, courts are very interested in protecting the ability of the public to communicate about factual issues. Recognizing that there may be limited ways to communicate factual concepts, courts tend to consider re-uses of factual works more likely to be fair.

Whether or not the perception is correct, courts have also tended to perceive a continuum between factual and creative works. A work may be “more factual” or “more creative” –for example, textbooks and scientific diagrams are considered more factual, and fine arts or fictional works considered more creative. Borrowing from creative works tends to be considered less fair than borrowing from factual ones.



“Factual”?



“Creative”?

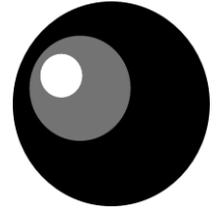
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Amount and substantiality of the portion used

Amount

The “amount” element is purely quantitative: how much, *proportionately*, of the source work is being used? The smaller the amount, proportionately, the more likely a use is to be fair.

The unit of measurement varies: for literary works, “amount” tends to be assessed in word- or page-counts. For music it tends to be counted in notes; for video in seconds. Images present a bit of a challenge, because it is often impossible to “quote” just part of an image in situations that otherwise look like fair use; some courts have held that use of thumbnail-sized or lower-resolution images is analogous to quoting text.



Substantiality

The “substantiality” element is much less well-known than the “amount” aspect, perhaps because it is so much more subjective. Uses that borrow from the “heart” of a work are considered less fair than uses that borrow from a more peripheral part of the work. This element tends to arise most often when the source work is “creative”, as with literary fiction, music, or visual art (although it is a relevant consideration in any fair use determination.) Hence, quoting a small amount of the climactic scene in a novel may be less fair than a longer quotation from a side plotline or minor character.



Amount/Substantiality and Guidelines

The “amount and substantiality” factor in particular sharply highlights how counterproductive some of the hard-and-fast fair use guidelines can be. One commonly-seen guideline is that any use of less than 30 seconds of video footage is fair use, and over 30 seconds is not. But since “amount” is measured proportionately, 25 seconds from a work that totals 35 seconds could well be unfair, and 5 minutes from a 2-hour film might be fair. And taking “substantiality” into account, even 3 seconds of the “heart” of a short video could be unfair!

Effect of the use on the potential market

This factor is often called the “market harm” factor. Though contentious, it often boils down to a fairly simple question – is the use in question substituting for a sale the source’s owner would otherwise make? Market harm may be direct - is the source owner willing to sell or license the right to make the use in question? If so, it is less likely that the use is fair. But this question may also relate to “down-the-line” uses – would a third party, having been exposed to the fair use, skip buying a copy of the original that they otherwise would have purchased?

There is a fairly deep ongoing debate among copyright experts about whether the “potential market” must already exist for a use to be causing market harm to the point of defeating a fair use claim. To put it another way, if the copyright owner is willing to sell a license to make a particular use, even if no one has ever had to pay for such a license before, does a user’s unwillingness to buy that license create market harm that would weigh against fair use? Generally speaking, where markets exist or are actually developing, courts tend to favor them quite a bit. Nevertheless, it is possible for a use to be fair even when it causes market harm.

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The “Fifth Factor” – Transformativeness

Transformativeness, or transformativity, is a relatively new addition to fair use analysis, having been first found to be relevant in a Supreme Court decision in 1994. (*Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).)

A derivative work is **transformative** if it uses a prior work in a completely new or unexpected way. The legal analysis can be messy, with transformativeness considered in relation to any of the statutory factors. However, it is most frequently thought of in relation to the first statutory factor, the purpose and character of the use. It also often pops up in discussions of market harms, where some courts have held that since transformative uses necessarily are so different from uses for the original work, they are unlikely to cause significant market harms.

Importantly, a work may be transformative, and thus a fair use, *even when all four of the statutory factors would traditionally weigh against* fair use!

Parody

Transformative parodies are valued for the criticism and commentary they provide, and the legal analysis often references First Amendment concerns. The 1994 Supreme Court case mentioned above was about 2 Live Crew’s song “Pretty Woman”, which extensively referenced the melody lines and lyrics of Roy Orbison’s song “Oh, Pretty Woman.” Even though almost all of the traditional factors weighed against fair use, the court held that the 2 Live Crew song was a parody of Orbison’s song, which transformed the original to produce new insight for consumers of the derivative work. The court noted that there was no effective way to parody the original without quoting extensively, and that they had attempted to get a license and been turned down. Moreover, they said, there was no way to enjoy the 2 Live Crew version as a parody without having at some point listened to Orbison’s original – presumably in a way that provided some revenue back to the copyright holders.

Courts do distinguish **parody** from **satire** in the context of transformative fair use. Parody borrows from Source A in order to make fun of Source A. Satire borrows from source A in order to make fun of source B, or just to make social commentary generally. Parody is generally accepted as more likely to be a fair use, since people enjoying the derivative work have to have consumed the work from which it borrows in order to understand the commentary. With satire, people enjoying the derivative work do not have to have consumed the work from which it borrows in order to understand the commentary. It’s a pretty subtle distinction, and difficult to actually apply in many practical situations.

Other Transformative Uses

The most clear-cut transformative use cases that have nothing to do with parody involve image online search engines, and the copies they make of image files. In a couple of different cases in recent years, the Ninth Circuit found that storing and displaying small, low-quality image thumbnails was a transformative use of the images, even in cases where the search engine was a commercial product, and the source images were commercial creative works. In these cases, the court often commented on the *value to the public* provided by having working image search tools. Google relied on this line of reasoning to argue that scanning books for search indexing was a transformative fair use; because the Google Books lawsuit is likely to end in a settlement, this question remains unresolved.

Many advocates argue that “mash-up” music and videos are transformative uses. Very recently, the U.S. Copyright Office, in an administrative proceeding related to the Digital Millennium Copyright Act, lent support to the idea that documentary films and noncommercial videos that criticize or comment on their source materials *or other sources or social issues* may be transformative fair uses.