

Working With Fair Use

Toolkit:[Fair Use Analysis Tool](#)[Fair Use Analysis Worksheet](#) (PDF)**Contents:**[What is Fair Use?](#)[The Fair Use Doctrine](#)[Understanding the Four Factors of Fair Use](#)[Guidelines](#)[Fair Use Analysis Tools](#)

What is Fair Use?

To create a balance between the interests of those who develop intellectual and creative works and those who benefit from accessing and using those works, copyright law includes exemptions that limit the exclusive rights of copyright holders. One such exemption is fair use, which allows users of copyrighted works to exercise some rights under certain circumstances without seeking permission or paying royalties. The Fair Use Doctrine is probably the most important exemption to copyright protections for educational settings, allowing many uses of copyrighted works for the purposes of teaching and research.

The complexity of fair use and its importance in academia make it imperative that every member of the campus instructional community understands how to make judgements concerning fair use. The information and tool links below are designed to assist your decision-making. When they are combined with thoughtful consideration of the legitimate interests of copyright owners and familiarity with the Libraries' [General Principles of Fair Use in Education](#), they will help assure good faith applications of fair use at the University.

The Fair Use Doctrine

U.S. Copyright Act, 17 U.S.C.**Section 107. Limitations on Exclusive Rights: Fair Use**

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified in 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. 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.

The statutory language of Fair Use (Section 107) is simple and seems clear, but it is intentionally vague and can be confusing. Nonetheless, conducting a four-factor fair use analysis is critical to any good faith fair use assertion. Without careful consideration of each of the factors you may inadvertently overstep the boundaries of fair use or you may miss opportunities the statute provides. The challenge in your analysis is to arrive at a conclusion you're comfortable with and that you believe is fair to all interested parties. Remember, the name of Section 107 is "fair use."

Because there are no bright line markers that define it, you must rely on your good sense and an "equitable rule of reason" to guide you to the safe harbors fair use can provide, or to seek permissions when your analysis leans in that direction. Balancing the four factors results in an opinion about an uncertain matter. Your opinion may differ from that of others. The strength of any fair use assertion results more from a careful assessment of the facts surrounding each case and an honest

consideration of the legitimate interests of users and owners alike than from any formula devised to arrive at a "right" answer to the question at hand.

Understanding the Four Factors of Fair Use

The fair use provision may be applied to the use of all copyrighted works, even those in digital form. To determine whether any particular use is a fair use, you should conduct a case-by-case analysis based on the factors below.

First Factor: Purpose and Character of the Use

Nonprofit, educational, and personal uses are generally favored fair uses while commercial uses are less likely to be deemed fair use. Although educational use in and of itself will not assure that your use is a fair use, by the same token not every commercial use will fail as a fair use. Transformative uses, uses that result in the creation of a new work, with a new purpose and different character are favored as fair uses over uses that merely reproduce an original work. The more transformative a particular use is the less significant the other factors will be as they weigh against fair use.

Second Factor: The Nature of the Copyrighted Work

Factual works, published works and scientific articles that are factual in nature are more likely to be considered available for fair use than are creative, imaginative, artistic, or unpublished works. Additionally certain "consumable" works, e.g. workbooks and standardized tests are not likely to be considered available for fair use.

Third Factor: Amount and Substantiality of the Portion Used

The statute gives no bright line indication concerning how much of a work may be used under fair use but the implication is that use of the whole work is less likely to be considered a fair use. Thus, use of only a small portion of a work is favored. However in some circumstance e.g. uses like research, classroom use, personal use that already weigh in favor of fair use, you may use more of a work. In fact in such cases use of the entire work may be appropriate and allowable as a fair use if using that much is required to accomplish your purpose. A commercial use of the same material in the same amount could weigh heavily against fair use. Amount and substantiality is also a qualitative measure and at times use of even a small portion of a work may be considered too much to qualify as a fair use if that portion used is considered to be the "heart of the work."

Fourth Factor: Effect on the Potential Market for or Value of the Work

Generally the consideration for this factor is whether or not there is some economic harm to the owner of the copyright as a result of your use. Courts have established the availability of permissions or licenses as one of the potential values for copyrighted works. This factor alone, however, cannot determine whether or not a use is fair. Positioned as the fourth factor it is a bit easier to consider market effects. If the first three factors weigh in favor of fair use then market harm should carry less weight even when considering the permissions market, since the market is for permissions that are required. Conversely, if the first three factors are tipping the balance in favor of permission then market harm will carry more weight in the balancing of the factors.

Guidelines

In the attempt to simplify some applications of fair use, guidelines have emerged over time. Originally, accompanying the Copyright Act of 1976 Congress included, in H.R. 94-1476, the most well known set of guidelines, [Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals](#). These guidelines served as a model for subsequent draft guidelines published later in the 70's and 80's, Guidelines for Educational Uses of Music and Guidelines for Off-Air Recordings of Broadcast Programming for Educational Purposes.

Later still, during the 90's, the Clinton administration commissioned the Conference on Fair Use (CONFU) to address concerns about emerging digital technology. CONFU released draft guidelines on distance education, multimedia, images, electronic reserve services in libraries, and interlibrary loan. No consensus agreement has been achieved surrounding CONFU guidelines and they remain in draft.

In considering guidelines it is important to note that they are not the law. In 1976 Congress intentionally omitted H.R.94-1476 from copyright statute. These guidelines along with all subsequent guidelines are quick to point that they not law and furthermore that they express minimum standards for fair use, and finally that there may be instances where use which does not fall within guidelines may nonetheless be permitted under fair use.