

Evaluating Copyright and Fair Use

The Copyright Act gives the copyright owner certain exclusive rights, subject to certain limitations to be discussed in detail below.

Fair Use

Fair use of a copyrighted work does not constitute copyright infringement. The Copyright Act provides:

... the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified [in section 106], 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 The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

When determining whether use of a copyrighted work qualifies as fair use, each of the four factors should be considered and weighed together so that a reasonable, good faith determination that the proposed use is a fair one is made.

Purpose and Character of the Use

The first factor in a fair use analysis is the purpose and character of the use.

Factors favoring fair use

The copyrighted material is used for:

- **Teaching**
- **Research**
- **Scholarship**
- **Criticism**
- **Comment**
- **News reporting**
- **Nonprofit educational use**

The use of copyrighted material is:

- **Transformative or productive**

Fair use may apply if the use of a copyrighted material is transformative or productive, i.e., the original work is transformed in some way, for instance, something new is added so that the original work is given a "further purpose or different character" and is altered with "new expression, meaning, or message."

Factors opposing fair use

The use of copyrighted material is:

- **For profit or a commercial activity**
- **Bad-faith behavior**

Engaging in bad faith behavior when using copyrighted material, such as obtaining material through misrepresentation of intended use and knowingly using stolen material, will weigh against a finding of fair use.

Nature of the Use

The second factor of a fair use analysis looks at the nature of the copyrighted material.

Factors favoring fair use

The copyrighted material is:

- **Factual or nonfiction**
Generally, more protection is given to works of fiction than fact since copyright is intended to protect the expressive elements of a work; therefore the scope of fair use is greater for factual works.
- **Published**
The scope of fair use is narrower for unpublished works than published works since a copyright owner has the right of first publication.
- **Not usually available to a potential user**
The availability of a work must be considered. For instance, if a work is out of print and cannot be purchased through normal channels, copying the work may be considered fair use. However, if there is an organization licensed to provide a copy of the work, the user may not be able to use the work and claim fair use.

Factors opposing fair use

The copyrighted material is:

- **Fiction**
- **Highly creative work**
- **Unpublished**
- **Easily available to a potential user**

Amount and Substantiality of the Work that Is Copied

The third factor to be considered is the amount and substantiality of the work that is copied. This factor assesses whether the amount of material used is "reasonable in relation to the purpose of the copying." This factor has particular weight for materials such as music and videos.

Factors favoring fair use

The amount of copyrighted material that is used is:

- **Not central or significant to the entire work**
There is no rule stating how much of a work may be copied and still be considered "insubstantial" in a fair use analysis; however, even a fraction of a work may still be qualitatively significant, i.e., the heart of the work
- **Small compared to the entire work**

Copying even one journal article may weigh against a fair use conclusion since, in general, copying a whole work may not constitute a fair use. However, provided the amount copied is neither all or most of a single work nor represents the heart of the work, copying a small amount of an entire work may qualify as fair use.

Factors opposing fair use

The amount of copyrighted material that is used is:

- **Central to, or the heart of, the work**
- **Large in comparison to the whole work**

Effect upon the Potential Market or Value of the Work

The final factor to be considered is the copy's effect upon the potential market or value of the work. If a work is to be used in more than one course at a time, or for the same course on a repeated basis, permission should be obtained.

Factors favoring fair use

Use of the copyrighted material will:

- **Not significantly affect the market or potential market for the copyright holder**

In general, only the impact in a potential market or value the copyright holder has participated in or has interest in participating in will be considered. A determination should be made whether a market exists to pay the copyright owner for use and, if so, whether widespread unauthorized use of the work would have a substantially adverse impact on the market or value of the work.

The copyrighted material is:

- **Already legally owned by the university or by the professor**
- **Not subject to a licensing mechanism**

Factors opposing fair use

Use of the copyrighted material will:

- **Replace sale of the copyrighted work**
- **Significantly impair the market or potential market for the copyrighted work or a derivative of the copyrighted work**

Copying all or a significant part of a copyrighted work for commercial purposes runs counter to the goals of copyright protection. In addition, the copy serves as a market replacement for the original work. Repeated use of a copyrighted work (e.g., use for multiple classes or for multiple terms) is a factor that weighs strongly against fair use. In such a situation, permission should be obtained.

The following are available for the copyrighted work:

- **Licensing Mechanism**

An easily accessible means to obtain clearance to use copyrighted works weighs against a claim of fair use.