



Supplemental



Is it Fair Use?

Fair use is very context-dependent, so each user needs to assess fair use independently for each use. You may find it helpful to consult with an attorney or other specialist for further input. This form does not substitute for such consultation.

This tool can help you organize your thoughts around the issues, although it does NOT tell you whether a proposed use is fair or not, and does NOT provide any kind of legal advice. It simply helps you structure your own reflections about the fair use factors, and provides a record that you did consider relevant issues.

Remember that no single factor is decisive of fair use, and on any given factor, you may find that some aspects of your proposed use fall in the “favors fair use” column, while others simultaneously “weigh against” fair use. There also may be other relevant considerations that do not appear in this general-purpose tool! Many considerations are relevant, and only by looking at the whole picture, across all the issues, can you make a reasonable guess about whether your use is fair or not.

“Is it Fair Use?” is a derivative of “[Thinking Through Fair Use](#)” and “[Understanding Fair Use](#)” by [University of Minnesota Libraries](#) and licensed under Creative Commons [BY-NC 3.0](#)/reformatted from original.

General Information About the Copyrighted Work

What is the name/title of the copyrighted work you want to use?

Who owns the copyright? Who is the publisher?

How did you obtain a copy of this work? Is it a copy you lawfully obtained? (e.g. Not just downloaded from the internet without the permission of the copyright holder or ripped from a CD or DVD)

How do you plan to use the work? Who will see or have access to the copyrighted material if you use it?

Face-to-Face Teaching Exemption

Will your use qualify as a face-to-face teaching exemption? To qualify:

- The work must be shown in a classroom or other similar place devoted to instruction. (This excludes the auditorium and the school library, unless the space is being used for classroom instruction with a certified teacher present. Activities with more than one classes or the whole student body do not fall under the face-to-face teaching exemption.)
- The work must be shown by a teacher, a student, or guest lecturer.
- The work must be part of a regular instructional activity, not reward or entertainment activities, and the teacher must be present with the students face-to-face.
- The work must be a lawfully obtained copy.
- The work must be shown in a non-profit institution.

Your use must meet ALL of these stipulations to qualify as a face-to-face teaching exemption. If not, use the rest of this Fair Use form to help you determine whether the work can be used fairly and how much of the work can be used.

Factor #1: Purpose and Character of the Use

Purposes that favor fair use include education, scholarship, research, and news reporting, as well as criticism and commentary more generally. Non-profit purposes also favor fair use (especially when coupled with one of the other favored purposes.) Commercial or for-profit purposes weigh against fair use, which leaves for-profit educational users in a confusing spot!

Favors Fair Use

- Educational, scholarly, and research uses, and/or news reporting
- Criticism or commentary
- Non-profit use, including personal uses

Weighs Against Fair Use

- Commercial activity
- Profiting from the use
- Decorative or other non-critical, non-commentary use

Additional thoughts:

Overall thoughts on your purpose:

- | | | | | |
|--------------------------|--------------------------|--------------------------|----------------------------------|----------------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Strongly favors fair use | Somewhat favors fair use | Neutral | Somewhat weighs against fair use | Strongly weighs against fair use |

Factor #2: The Nature of the Copyrighted Work

One element of Factor #2 is whether the work is published or not. It is less likely to be fair to use elements of an unpublished work, which makes sense, because making someone else's work public when they chose not to is not very fair, even in the school-yard sense. Nevertheless, it is possible for use of unpublished materials to be legally fair.

Another element of this factor is whether the work is more "factual" or more "creative" in nature. Borrowing from a factual work is more likely to be fair than borrowing from a creative work. This is related to the fact that copyright does not protect facts and data. With some types of works, this factor is relatively easy to assess: a textbook is usually more factual than a novel. For other works, it can be quite confusing: is a documentary film "factual" or "creative" or both?

Favors Fair Use

- Published source
- Factual or non-fiction source

Weighs Against Fair Use

- Unpublished source
- Creative, artistic, or fictional source

Additional thoughts:

Overall thoughts on the nature of the original:

- | | | | | |
|--------------------------|--------------------------|--------------------------|----------------------------------|----------------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Strongly favors fair use | Somewhat favors fair use | Neutral | Somewhat weighs against fair use | Strongly weighs against fair use |

Factor #3: Amount and Substantiality of the Portion Used

Amount: Many guidelines give bad advice about how much of a work can be used fairly. A use is usually more in favor of fair use if it uses a smaller amount of the source work, and usually more likely to weigh against fair use if it uses a larger amount. But the amount is proportional! So a quote of 250 words from a 300-word poem might be less fair than a quote of 250 words from a many-thousand-word article. Because the other factors also all come into play, sometimes you can legitimately use almost all (or even all) of a source work, and still be making a fair use. But less is always more likely to be fair.

Substantiality: In essence, the question of substantiality asks whether you are using something from the “heart” of the work (less fair), or whether what you are borrowing is more peripheral (and more fair). In some contexts, it is easy to gauge substantiality: borrowing the melodic “hook” of a song is borrowing the “heart” - even if it’s a small part of the song. In many contexts, however, it can be much less clear.

Favors Fair Use

- Proportionally small excerpt, extract, or clip
- Portion used is peripheral or not significant to the entire work
- Only as much as absolutely necessary for a favored “purpose”

Weighs Against Fair Use

- Entire work, or proportionally large extract
- Portion used is “heart of the work”

Additional thoughts:

Overall thoughts on the amount and substantiality of your use:

- | | | | | |
|--------------------------|--------------------------|--------------------------|----------------------------------|----------------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Strongly favors fair use | Somewhat favors fair use | Neutral | Somewhat weighs against fair use | Strongly weighs against fair use |

Factor #4: Effect on the Potential Market for or Value of the Work

Factor #4 is truly challenging -- it asks users to become amateur economists. To evaluate this factor it is necessary to analyze existing and potential future markets for a work, and predict the effect a proposed use will have on those markets. But it can be thought of more simply. Is the use in question substituting for a sale the source's owner would otherwise make -- either to the person making the proposed use, or to others? 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.

Favors Fair Use

- User owns lawful copy of the work (bought or otherwise legitimately acquired)
- Only one or a few copies made
- One-time use
- Difficult to redistribute, or to make additional copies of the product of your use
- Use stimulates market for original work
- No impact on market for original work
- No product marketed by copyright holder similar to your use
- No way to pay for or seek permission for your use

Weighs Against Fair Use

- Use directly substitutes for a sale that would otherwise have been made
- Many copies made
- Repeated or long-term use
- Easy to redistribute, or to make additional copies of the product of your use (i.e. digital file, online use)
- Impairs market for original work
- Easily-obtained and affordable licenses or permissions available

Additional thoughts:

Overall thoughts about the effect of your use on the market for the original:

- | | | | | |
|--------------------------|--------------------------|--------------------------|----------------------------------|----------------------------------|
| <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Strongly favors fair use | Somewhat favors fair use | Neutral | Somewhat weighs against fair use | Strongly weighs against fair use |

Factor #5: Transformative Use

Transformative use is a relatively new addition to fair use law, having been first raised 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 source work in completely new or unexpected ways. Importantly, a work may be transformative, and thus a fair use, even when all four of the previously mentioned factors would traditionally weigh against fair use!

Parody: Parody is one of the most clearly identified transformative uses, but any use of a source work that criticizes or comments on the source may be transformative in similar ways. Legal analysis about this kind of transformative use often engages with free speech issues.

New Technologies: Courts have sometimes found copies made as part of the production of new technologies to be transformative uses. One very concrete example has to do with image search engines. Search companies make copies of images to make them searchable, and show those copies to people as part of the search results. Courts found that those thumbnail images were a transformative use because the copies were being made for the transformative purpose of search indexing, rather than simple viewing.

Other Transformative Uses: Because transformative use is a relatively new part of copyright law, the definition is still developing. Many commentators suggest that audio and video mixes and remixes are examples of transformative works, as well as other kinds of works that use existing content to do unexpected and new things. There is a lot of room for argument and interpretation in transformative use!

Favors Fair Use

- Transformative use (creates a new work with a new purpose), including parody and transformative technologies

Favors Fair Use

- Does not transform the work; uses the work as it was originally intended to be used

How my use is transformative:

Overall thoughts on your transformation of the work:

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Strongly favors fair use	Somewhat favors fair use	Neutral	Somewhat weighs against fair use	Strongly weighs against fair use

Overall assessment

	Favors fair use	Weights against fair use	Neither favors nor weighs against fair use
Factor 1:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Factor 2:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Factor 3:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Factor 4:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Factor 5:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Given my reflection, I feel comfortable using _____
under fair use for the purpose of _____.*

Yes No

*In checking yes or no, I recognize that, if I am taken to court, the court system may weigh in on my use differently.