

COPYRIGHT

Fair Use of Copyrighted Information

The Fair Use Test should be used to determine if copyrighted material can be used, in accordance with CY(LEGAL), without express permission from the author of the material. The following fair use test was created by Georgia K. Harper as part of the Copyright Crash Course.

FAIR USE TEST

Using the Four Factor Fair Use Test

This test does not describe the outer limits of fair use; it describes a “safe harbor” within the bounds of fair use. So, a use that exceeds these suggestions may still be fair but the employee should be aware he or she risks liability by using copyrighted material outside the bounds of this “safe harbor.”

With a particular use in mind:

- Read each question and the comments about it.
- Answer each question about your use.
- See how the balance tips with each answer.
- Make a judgment about the final balance: overall does the balance tip in favor of fair use or in favor of getting permission?

The four fair use factors:

1. What is the character of the use?
2. What is the nature of the work to be used?
3. How much of the work will you use?
4. What effect would this use have on the market for the original or for permissions if the use were widespread?

FACTOR 1: What is the character of the use?

- Nonprofit
- Educational
- Personal
- Criticism
- Commentary
- News reporting
- Parody
- Otherwise “transformative” use
- Commercial

Uses on the left tend to tip the balance in favor of fair use. The use on the right tends to tip the balance in favor of the copyright owner—in favor of seeking permission. The uses in the middle are very beneficial:

they add weight to a fair use claim, either cumulatively, if you have other factors on the left in your favor, or by minimizing the importance of a commercial use. Even commercial uses can be fair when they involve parody, criticism, and commentary.

FACTOR 2: What is the nature of the work to be used?

- Fact
- Published
- A mixture of fact and imaginative
- Imaginative
- Unpublished

Again, uses on the left tip the balance in favor of fair use. Uses on the right tip the balance in favor of seeking permission. But here, uses in the middle tend to have little effect on the balance, sort of canceling out this factor entirely.

Which way is your balance tipping after assessing the first two factors?

FACTOR 3: How much of the work will you use?

- Small amount
- More than a small amount

This factor has its own peculiarities. The general rule holds true (uses on the left tip the balance in favor of fair use; uses on the right tip the balance in favor of asking for permission), but if the first factor weighed in favor of fair use, you can use more of a work than if it weighed in favor of seeking permission. A nonprofit use of a whole work will weigh somewhat against fair use. A commercial use of a whole work would weigh significantly against fair use.

For example, a nonprofit educational institution may copy an entire article from a journal for students in a class as a fair use; but a commercial copy shop would need permission for the same copying. Similarly, commercial publishers have stringent limitations on the length of quotations, while a student writing a paper for a class assignment could reasonably expect to include lengthier quotes.

Which way does your balance tip after assessing the first three factors? The answer to this question will be important in the analysis of the fourth factor.

FACTOR 4: If this kind of use were widespread, what effect would it have on the market for the original permissions?

- Password protection; technological protection; limited time use
- Proposed use is transformative and not merely duplicative (first factor)
- Competes with (takes away sales from) the original

- Original is out of print or otherwise unavailable
- Copyright owner is unidentifiable
- No ready market for permission
- Avoids payment for permission (royalties) in an established permissions market

We are not confident that courts are likely to give educators a special break when they make hundreds of thousands of copies of materials for which permission is easily available. Thus, you should discount the value of a good outcome on the first factor, except where the use is creatively transformative.

If there is a mature permissions market for purely duplicative uses, you should weigh the presence of such a market (on the right, above) strongly against fair use. Where such a permissions market does not exist, a fair use claim is quite strong (illustrated by the points on the left.) Similarly, if you are making a transformative use, even where there is a permissions market, such uses are likely fair.

Generally, transformative means using a work in a new way, serving a new market from the one the original was intended to serve, adding to it, using part of it in another work. Using a small image of a poster to illustrate a time line is transformative; creating a parody of a song is transformative; scholarly criticism that quotes to illustrate a point is transformative; a mode's glossy used in a news report is transformative. But it's not just a matter of finding a way, any way, to call making tons of copies transformative. Yes, including an article with other articles in a group in some respect transforms the article because it's in a new context. Providing a scientific journal article to a student to read makes a different use of it than its author might have intended (he may have written only for other scholars). But there is a little evidence that stretching the definition of transformative use in that way would be allowed. It seems to have more to do with the overall social and economic impact of a decision either way—what will seem to the judge like the right thing to do in case in point. Judges are not likely to mechanically do the fair use analysis and “see” how it comes out. They are more likely to decide how it should come out and then they “do” the fair use analysis to justify their gut instincts.

What does your gut tell you about how the balance for your use is tipping after consideration of all four factors?

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