

The Permissible Fair Use of a Copyrighted Work

The fair use law is based on the free speech rights provided by the First Amendment of the United States Constitution. The fair use of a copyrighted work, including reproducing, copying, or other duplication is permissible for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. These uses are considered “fair use” and are not an infringement of copyright. To determine whether the use of a copyrighted work is a permissible fair use, there are four factors to be considered:

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.

1. Purpose and character:

The first factor considers whether the use of the copyrighted work interferes with the purpose of copyright law which is to stimulate creativity. This factor considers whether the use goes against the intent of copyright law by using copyrighted work for personal profit. If the use is fair, it must either advance knowledge, encourage the arts, or add something new. A fair use is derivative of the original work rather than transformative. Even if the use results in some measure of commercial gain from the use, it can still be a fair use because many secondary uses may have some commercial gain.

2. Nature of the copied work:

The U.S. Supreme Court has ruled that copyright protection does not depend on the artistic quality or merit of the work. Fair use may consider whether the copied work has been previously published or copied. The fair use provision was amended by adding a final sentence: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

3. Amount and substantiality:

The third factor considers the quantity or percentage of the copyrighted work that has been copied. In general, the less of the copyrighted work, the more likely that the sample will be considered fair use. Since 1991, all music samples must be licensed, and there are no fair use exceptions.

4. Effect upon work's value:

The fourth factor measures the effect that the use has on the copyright owner's ability to benefit from his original work. The use of the work cannot significantly harm the copyright owner's ability to sell and profit from his work. The use cannot harm the potential market or act as a direct market substitute for the original work. In other words, the use cannot negatively impact the owner's business. However, certain kinds of market harm are still considered fair use, such as a parody, negative review, or criticism.

Final comments on the fair use doctrine:

It is usually possible to quote or copy a copyrighted work in order to criticize or comment upon it and to teach students about it. It is acceptable for a teacher to print a few copies of a copyrighted poem to illustrate a technique to students. A book reviewer may quote a paragraph of a copyrighted work as an example of the author's style. However, even a non-profit educational website probably cannot reproduce whole articles from technical magazines if the copyright owner can demonstrate that the website's use negatively affects the market for the magazine. Fair use of thumbnail pictures and inline linking from a website's search engine are considered fair use.

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