

Teaching Copyright

Fair Use Frequently Asked Questions

What is fair use?

The Copyright Act gives copyright holders the exclusive right to reproduce works for a limited time period. Fair use is a *limitation* on this right. Fair use allows people other than the copyright owner to copy part or, in some circumstances, all of a copyrighted work, even where the copyright holder has not given permission or objects.

How does fair use fit with copyright law?

Copyright law embodies a bargain. It gives copyright holders a set of exclusive rights for a limited time period as an incentive to create works that ultimately enrich society as a whole. In exchange for this limited monopoly, creators enrich society by, hopefully, contributing to the growth of science, education and the arts.

However, copyright law does not give copyright holders complete control of their works. Copyrighted works move into “the public domain” and are available for unlimited use by the public when the copyright term expires (see *Public Domain FAQ*). But even before works enter the public domain, the public is free to make “fair uses” of copyrighted works.

By carving out a space for creative uses of music, literature, movies, and so on, even while the works are protected by copyright, fair use helps to reduce a tension between copyright law and the First Amendment’s guarantee of freedom of expression. The Supreme Court has described fair use as “the guarantee of breathing space for new expression within the confines of Copyright law.”¹

How does the court know if a use is fair?

Whether a use is fair will depend on the specific facts of the use. Note that attribution has little to do with fair use; unlike plagiarism, copyright infringement (or non-infringement) doesn’t depend on whether you give credit to the source from which you copied. Fair use is decided by courts on a case-by-case basis after balancing the four factors listed in section 107 of the Copyright Act. Those factors are:

1. The purpose and character of the use of copyrighted work

- *Transformative quality* - Is the new work the same as the copyrighted work, or have you transformed the original work, using it in a new and different way?
- *Commercial or noncommercial* - Will you make money from the new work, or is it intended for nonprofit, educational, or personal purposes? Commercial

¹ *Campbell v. Acuff-Rose Music, Inc.*, 114 S.Ct. 1164, 127 L. Ed. 2d 500 [1994].

uses can still be fair uses, but courts are more likely to find fair use where the use is for noncommercial purposes.

2. **The nature of the copyrighted work**

A particular use is more likely to be considered fair when the copied work is factual rather than creative.

3. **The amount and substantiality of the portion used in relation to the copyrighted work as a whole**

How much of the copyrighted work did you use in the new work? Copying nearly all of the original work, or copying its “heart,” may weigh against fair use. But “how much is too much” depends on the purpose of the second use. Parodies, for example, may need to make extensive use of an original work to get the point across.²

4. **The effect of the use upon the potential market for or value of the copyrighted work**

This factor applies even if the original is given away for free. If you use the copied work in a way that substitutes for the original in the market, that will weigh against fair use. Uses of copyrighted material that serve a different audience or purpose are more likely to be considered fair.

These factors are guidelines, and they are not exclusive. As a general matter, courts are often interested in whether or not the individual making use of a work has acted in good faith.

What has been recognized as fair use?

Many types of uses have been found to be fair. Here’s a small sample:

- **Criticism & Commentary**

A book publisher used several stills from the famous 1963 Zapruder footage of President Kennedy’s assassination for the historical book *Six Seconds in Dallas*. Time Inc., the owner of the footage, sued the book publisher for copyright infringement. In *Time Inc. v. Bernard Geis Associates*, the court ruled that the publisher’s use of the stills was “fair and reasonable,” in part because the use was based on a factual and historical news event.³

- **Parody**

An episode of the TV cartoon “Family Guy” made fun of comedian Carol Burnett’s image and signature characters from her 1960’s comedy variety show. In *Carol Burnett v. Twentieth Century Fox*, the court ruled that the show’s use was fair, in part because the “Family Guy” episode was designed to parody Burnett as a public figure, using a relatively small percentage of

² *MoveOn, Brave New Films v. Viacom*

<http://www.eff.org/cases/moveon-brave-new-films-v-viacom>

³ *Time Inc. v. Bernard Geis Associates*,

http://www.law.cornell.edu/copyright/cases/293_FSupp_130.htm.



copyrighted material, and would not substitute for the original in any market.⁴

- **News reporting**

The Washington Post newspaper used three brief quotations from Church of Scientology texts that were posted on the Internet. In *Religious Technology Center v. Pagliarina*, the court found the use to be fair, in part because the newspaper excerpted only a small portion of the work and the purpose was for news commentary.⁵

- **Art**

American artist Jeff Koons used a portion of a designer photo advertisement (a model's legs in Gucci sandals) amongst a collection of iconic images in his painting, "Niagara." In *Blanch v. Koons*, the court held that the painting's use of the copyrighted images was a transformative fair use, in part because it commented on fashion and consumer culture.⁶

- **Scholarship and Research**

A biographer of author Richard Wright quoted from six of Wright's unpublished letters and ten unpublished journal entries. In *Wright v. Warner Books, Inc.*, the court found that the biographer's use was fair, in part because the biographer's purpose was to educate and inform the public, and his use constituted less than 1% of Wright's unpublished letters.⁷

A researcher at a nonprofit foundation used quotations from an unpublished, historical literary work in her academic presentation. In *Sundeman v. The Seajay Society*, the court ruled that the researcher's use was fair and noted that the work was transformative and was used solely for the purpose of scholarly analysis.⁸

- **Time-shifting**

A major electronics manufacturer developed a video tape recording device that allowed the consumer to "time-shift"—record a complete TV program in real-time and hold the show for a later viewing. Several major film studios filed a copyright infringement suit against the electronics manufacturer claiming the device could be used for copyright infringement. In 1984's *Sony v. Universal Studios* (aka the Betamax case), the Supreme Court held that time-shifting with a VCR qualified as fair use. The courts noted that the private, non-commercial home taping of free television programs for later viewing was not infringing and did not hurt the market value of the copyrighted material.⁹

⁴ *Carol Burnett v. Twentieth Century Fox*, 491 F.Supp.2d 962, 967, 975 (C.D.Cal. 2007).

⁵ *Religious Technology Center v. Pagliarina*, 908 F. Supp 1353 (E.D. Va. 1995).

⁶ *Blanch v. Koons*, 2005 U.S. Dist. LEXIS 26299 (S.D.N.Y. 2005).

⁷ *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991).

⁸ *Sundeman v. The Seajay Society, Inc.*, 142 F.3d 194 (4th Cir. 1998).

⁹ *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984), <http://w2.eff.org/legal/cases/betamax/>.



- **Search Engines**

A Google search engine turned the photos on a subscription-only website into thumbnail images for its search results. In *Perfect 10 v. Amazon.com et al*, the court ruled that Google’s use of thumbnail photos was “highly transformative,” since the search engine changed the image’s original purpose of entertainment and aesthetics into providing Google’s users with links to images.¹⁰

¹⁰ *Perfect 10 v. Amazon.com et al*, 487, F.3d 701 (9th Cir 2007).

