

FAIR USE IN HIGHER EDUCATION

"Fair Use" is described in copyright law as a permitted use of copyrighted works without the copyright holder's permission. Fair use first became statutory law as part of the Copyright Act of 1976, prior to the Act it was common law. Copyright law states that certain limited uses of copyrighted materials for teaching, criticism, commentary, reporting, scholarship, and research are considered a "fair use" and do not constitute an infringement of copyright. Fair use allows copyrighted materials to be placed in educational institutions, especially for in class presentations, projects and on reserve in the libraries. However, just because copyrighted materials are used in an educational environment DOES NOT automatically make it a "fair use" of the materials; you may still be violating copyright laws.

FAIR USE ANALYSIS

Usually, permission should be obtained to use a copyrighted work unless it would be considered "fair use" of the work or obtaining permission is impossible. The distinction between "fair use" and infringement can be unclear and is not easily defined. There is no right number of words, lines, notes or amount of information that qualify as a fair use threshold. Although recent cases have suggested copying 10% or one chapter is the fair use standard. (*See Cambridge University Press v. Becker, a.k.a Georgia State University 2012*). Many situations usually fall into the gray area between fair use and infringement and usually there are no prior court cases that fully explain the issue. Until a court renders a decision in a case with specific facts similar to yours, no one knows for sure if a proposed use is *fair use* or *infringement*.

A copyright owner has the following rights:

- (1) to *reproduce* the copyrighted work; (make copies)
- (2) to create *derivative works* based upon the copyrighted work;
- (3) to *distribute* the copyrighted work to the public;
- (4) to *perform* the copyrighted work in public; and
- (5) to *display* the copyrighted work in public.

The author also has the right to authorize another person to exercise and enforce these rights.

Copyright law sets forth a four factor test to determine whether a particular use of a copyrighted work is *fair use*, and if so, the use would not require the copyright owner's permission. The [Fair Use Checklist](#) should be used during your fair use analysis.

Fair Use Test

Factors:

- (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; (fact based v. creative 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 economic value* of the copyrighted work.

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- Factor (1) reviews the intended use of the work, is it for non-profit educational uses or for commercial uses? Fair use is favored when a work is used by a non-profit educational institution for non-profit educational activities. Fair use is not favored when the work is commercialized in for-profit activities.
- Factor (2) reviews the creativity level, if any, of the work. The more creative the work, the less likely fair use is favored since copyright law seeks to protect the creative expression of the author. Fair use is favored when the work is fact based, such as a factual account of some event in a newspaper article. A creative or artistic work is the result of the creative intellect of the author and fair use is less favored.
- Factor (3) assesses the amount and substantiality of the original copyrighted work that you want to use. In general, the less that is used in relation to the whole, the more likely your proposed use would be considered a fair use. For example, copying a few pages from a book to use in a hand out or using only one item from a book of such items (*e.g.* one or two poems from a book containing 25 poems), fair use would be favored since only a small portion of the entire book was used. If you want to use information that is a large part of a compilation of works, then the unauthorized use would probably weigh against fair use.

If the portion of work you wish to use is the most substantial part of the copyrighted work, although a small portion, fair use may not be favored. (*e.g.* Magazine company's unauthorized publication of 300-400 words from President Ford's unpublished 7500 word manuscript of his memoirs was "qualitative substantial" and weighed against fair use.)

- Factor (4) looks at how the commercial market and economic value of the work will be affected by the proposed use. Courts usually consider this factor as the *most important factor* in the test. If the work's value will not be diminished or the commercial market not effected in a negative way or the effect is *de minimus*, fair use is favored. The issue becomes unclear when there is some minor affect that impacts the monetary aspect of the copyrighted work.

Note: You must also review the terms of any license or subscription agreement that covers the work, if any have been obtained by the college or university (*e.g.* library). A license or subscription may resolve this question by authorizing your proposed use of the copyrighted work. If it does, a fair use analysis is not needed. The license or subscription would be the determining factor regarding what uses are permitted and how much of the copyrighted work may be used. Some license agreements require an institution to give up its "fair use" rights under copyright law, which then turns your proposed use into a "contract law" issue. If the license or subscription agreement is silent on the issue, then perform a fair use analysis.

Conclusion:

Each case requires the specific facts to be identified and then analyzed under the 4 part test. The results from the different factors are often in conflict with each other, which makes finding a conclusive answer, sometimes illusive.