

small parts, [limited times](http://www.utsystem.edu/ogc/intellectualproperty/copypol2.htm#image) and limited access are the keys to fair use..  
<http://www.utsystem.edu/ogc/intellectualproperty/copypol2.htm#image>

## Using the Four Factor Fair Use Test

The Rules of Thumb do not describe the outer limits of fair use; they describe a "safe harbor" within the bounds of fair use. So, a use that exceeds the suggestions of the Rules of Thumb may still be fair.

Most people think that the fair use test is difficult. Actually, it's not so much difficult as it is uncertain - susceptible to multiple interpretations. Two people can review the same facts about a proposed use and come to different conclusions about its fairness. That's because one must make many judgments in the course of weighing and balancing the facts.

Attorneys read the "judgments of judges" to learn how to make judgments ourselves, but judges see things differently (one from another) too. Because "reasonable minds can disagree" about fair use, perhaps it is unrealistic to try to predict what a judge would think about a proposed use. But that's just what this test is about.

### Here's how it works:

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   | • Criticism          | • Commercial |
| • Educational | • Commentary         |              |
| • Personal    | • Newsreporting      |              |
|               | • Parody             |              |
|               | • Otherwise          |              |
|               | "transformative" use |              |

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, if they apply, are very beneficial: they add weight to the tipping force of uses on the left; they subtract weight from the tipping force of a use on the right.

Imagine that you could assign a numerical weight to each use. A nonprofit educational use *other than the middle uses*, for example, making a copy of a journal article for a university class, might weigh 5 in favor of fair use. But a nonprofit educational use that is also criticism, for example, the inclusion by a faculty member of a quote from another's work in a scholarly critique, would weigh

even more in favor of fair use: about 6 or 7. That's because the uses in the middle are "core" fair uses; the ones most dearly protected.

Even if they are for-profit, the core fair uses weigh in favor of fair use: that's why they subtract from the weight against fair use of a commercial use. A commercial duplication of an article from a journal might weigh 5 against fair use. But a commercial commentary or quotation would barely tip the scale, if at all.

This is not to suggest that fair use can be precisely quantitatively analyzed. Numbers are just a tool to illustrate how the facts interact and affect each other. Actually, numbers wouldn't make the analysis any easier: copyright owners and users would have just as much trouble agreeing on weights as we have agreeing on any other judgment about fair use.

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## **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.

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

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## **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 copyshop 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!

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

- After evaluation of the first three factors, the proposed use is tipping towards fair use
- Original is out of print or otherwise unavailable
- No ready market for permission
- Copyright owner is unidentifiable
- Competes with (takes away sales from) the original
- Avoids payment for permission (royalties) in an established permissions market

This factor is a chameleon. Under some circumstances, it weighs more than all the others put together. Under other circumstances, it weighs nothing! It depends on what happened with the first three factors.

Here's why:

This factor asks, "If the use were widespread, would the copyright owner be losing money?" Well, actually, it asks, "If the use were widespread, **and the use were not fair**, would the copyright owner be losing money?" After all, if the use were fair, the copyright owner would not be entitled to any money at all, so he couldn't "lose" what he never would have had to begin with.

When you include in your assumptions the very conclusion that you are trying to reach (you **assume** a use is not fair in the process of trying to figure out **whether it is** fair), you violate a principle of logic - you engage in "circular reasoning."

Courts deal with this propensity of the fourth factor to encourage circular reasoning by looking at the first three factors before evaluating the fourth. If the first three factors indicate that the use is likely fair, courts will not permit the fourth factor to convert an otherwise fair use to an infringing one. On the other hand, if the first three factors indicate that the use is likely not fair, courts are willing to consider lost revenues under the fourth factor. In this case they do not have to assume the conclusion in order to reach it. They reach the conclusion based on good evidence that the use is not fair. This means that if a use is tipping the balance in favor of fair use after the first three factors, the fourth factor should not affect the results, even if there is a market for permissions, even if the owner would lose money because of the use.

On the other hand, if a use is tipping the balance in favor of asking for permission one need not "assume" it's not fair, the first 3 factors show that it's not. Add to that an active permissions market and the fourth factor will decisively tip the balance. Forget fair use. Get permission.

The facts in the middle illustrate circumstances that also supports fair use, as they indicate a lack of harm to the owner's economic incentive. Does the balance for your use tip in favor of fair use or in favor of getting permission after consideration of all four factors?

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