

# CONCERNING © COPYRIGHT #2

## FAIR USE

In the United States, “fair use” is a provision of copyright law that limits the exclusive rights of copyright owners. In other words, the doctrine of fair use allows a person or entity other than the owner of a copyrighted work to reproduce the work, prepare derivatives of the work, and/or distribute, display, or perform the work under certain conditions without infringing copyright law. Specifically, the legal provision says “the fair use of a copyrighted work... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” is not a violation of copyright law (17 U.S.C 107).

## FAIR USE FACTORS

Nevertheless, the same provision of law states that there are four factors that shall be considered by an individual or entity when “determining whether the use made of a work in any particular case is fair use.” The four factors are:

- 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.”
- 4 “the effect of the use upon the potential market for or value of the copyrighted work.”

Further, “the fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors” (17 U.S.C. 107).

### ► THE PURPOSE OF THE USE

Rebecca Butler, author of *Copyright for Academic Librarians and Professionals*, says this factor addresses how a person or entity copying the work plans to use it. “Works copied for educational, nonprofit, or personal purposes are much more likely to be considered within fair use,” she notes, “than those items that are copied with the intention of earning money.” So the question to ask when considering this factor is: Why do you intend to copy, distribute, display, or perform the work?

### ► THE NATURE OF THE WORK

Butler says this factor deals with characteristics of a work like whether it is fiction or nonfiction, published or unpublished. In her opinion, nonfiction, published works like magazine articles are the most usable type of works under factor two. She says copying an article for a class is less likely to infringe copyright than reproducing a published novel or unpublished letter. For this factor, the question to ask is: What kind of work do you desire to copy, distribute, display, or perform?

### ► THE AMOUNT OF THE WORK

Butler states this factor involves the quantity of the work that a person or entity intends to borrow. In general, she cautions that “the smallest amount borrowed is usually the best.” But she also notes this factor is measured both quantitatively and qualitatively. The former considers whether, for example, one uses five or sixty minutes of a video. The latter considers the concept of substantiality – or how significant is the portion of video used, regardless of its size. In this case, the question to ask is: How much of the work do you need to copy, distribute, display, or perform?

### ► THE EFFECT OF THE USE

“In essence,” Butler says, “this means that if this work were to be copied and sold, either as part of a newly created item or by itself, would such a sale affect the amount of money that the owner or creator of the original work could earn from it?” So the question to ask for this factor is: If you copy, distribute, display, or perform this work, could your actions potentially negatively impact the earnings of the copyright owner?

## FAIR USE FALLACY

Using the four factors to determine whether a particular use of a copyrighted work constitutes fair use may involve some uncertainty, especially for someone who is not by training or experience a copyright expert. However, this method is based on and authorized by U.S. copyright law. On the other hand, there is another method that is frequently used by persons or entities to determine the fair use of copyrighted works that is certainly more precise, but is in fact fallacious and not found in U.S. copyright law. It is the method of using a prescribed amount of a work. For example, one popular notion declares that fair use allows an individual to use up to 10 percent of a text or video. But this method of determining fair use is based on guidelines proposed by library and education groups in the 1990s that were not endorsed by industry groups and cannot be legally cited to authorize the use of copyrighted works.

## FAIR USE EVALUATOR

To help educators and librarians better understand and apply the fair use factors, the American Library Association created the [Fair Use Evaluator](#). This online tool can help you to learn more about the fair use provision of copyright law and guide you through the process of making a fair use evaluation. Also it allows you to collect, organize, and archive the information you might need to support a fair use evaluation. Further, the tool provides access to various copyright education resources and contact information for local and national copyright help.

Source: The information and quotations in this factsheet were adapted from Rebecca Butler, “Fair Use,” in [Copyright for Academic Librarians and Professionals](#), Chicago: American Library Association, 2014.