

Fair Use

The policy behind copyright law is not simply to protect the rights of those who produce content, but to "promote the progress of science and useful arts." [U.S. Const. Art. I, § 8, cl. 8](#). Because allowing authors to enforce their copyrights in all cases would actually hamper this end, first the courts and then Congress have adopted the fair use doctrine in order to permit uses of copyrighted materials considered beneficial to society, many of which are also entitled to First Amendment protection. Fair use will not permit you to merely copy another's work and profit from it, but when your use contributes to society by continuing the public discourse or creating a new work in the process, fair use may protect you.

[Section 107 of the Copyright Act](#) defines fair use as follows:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --

- 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. and the effect of the use upon the potential market for or value of the copyrighted work.*

Unfortunately, there is no clear formula that you can use to determine the boundaries of fair use. Instead, a court will weigh these four factors holistically in order to determine whether the use in question is a fair use. In order for you to assess whether your use of another's copyrighted work will be permitted, you will need an understanding of why fair use applies, and how courts interpret each part of the test.

The Four Fair Use Factors

1. Purpose and Character of Your Use

If you use another's copyrighted work for the purpose of criticism, news reporting, or commentary, this use will weigh in favor of fair use. See [Campbell v. Acuff-Rose Music](#), 510 U.S. 569, 578 (1994). Purposes such as these are often considered "in the public interest" and are favored by the

courts over uses that merely seek to profit from another's work. [Online Policy Group v. Diebold, Inc.](#), 337 F. Supp. 2d 1195, 1203 (N.D. Cal. 2004).

When you put copyrighted material to new use, this furthers the goal of copyright to "promote the progress of science and useful arts."

In evaluating the purpose and character of your use, a court will look to whether the new work you've created is "transformative" and adds a new meaning or message. To be transformative, a use must add to the original "with a further purpose or different character, altering the first with new expression, meaning, or message." *Campbell*, 510 U.S. at 579. Although transformative use is not absolutely necessary, the more transformative your use is, the less you will have to show on the remaining three factors. A common misconception is that any for-profit use of someone else's work is not fair use and that any not-for-profit use is fair. In actuality, some for-profit uses are fair and some not-for-profit uses are not; the result depends on the circumstances. Courts originally presumed that if your use was commercial it was an unfair exploitation. They later abandoned that assumption because many of the possible fair uses of a work listed in [section 107's preamble](#), such as uses for purposes of news reporting, are conducted for profit. Although courts still consider the commercial nature of the use as part of their analysis, they will not brand a transformative use unfair simply because it makes a profit. Accordingly, the presence of advertising on a website would not, in of itself, doom one's claim to fair use. If you merely reprint or repost a copyrighted work without anything more, however, it is less likely to qualify for protection under this prong. If you include additional text, audio, or video that comments or expands on the original material, this will enhance your claim of fair use. In addition, if you use the original work in order to create a parody this may qualify as fair use so long as the thrust of the parody is directed toward the original work or its creator.

Moreover, if the original work or your use of it has news value, this can also increase the likelihood that your use is a fair use. Although there is no particular legal doctrine specifying how this is weighed, several court opinions have cited the newsworthiness of the work in question when finding in favor of fair use. See, e.g., *Diebold*, 337 F. Supp. at 1203 (concluding "[i]t is hard to imagine a subject the discussion of which could be more in the public's interest"), *Norse v. Henry Holt & Co.*, 847 F. Supp. 142, 147 (N.D. Cal. 1994) (noting "the public benefits from the additional knowledge that Morgan provides about William Burroughs and other writers of the same era").

2. Nature of the Copyrighted Work

In examining this factor, a court will look to whether the material you have used is factual or creative, and whether it is published or unpublished. Although non-fiction works such as biographies and news articles are protected by copyright law, their factual nature means that one may rely more heavily on these items and still enjoy the protections of fair use. Unlike factual works, fictional works are typically given greater protection in a fair use analysis. So, for example, taking newsworthy quotes from a research report is more likely to be protected by fair use than quoting from a novel. However, this question is not determinative, and courts have found fair use of fictional works in some of the pivotal cases on the subject. See, e.g., [Sony Corp. v. Universal City Studios, Inc.](#), 464 U.S. 417, 456 (1984). The published or unpublished nature of the original work is only a determining factor in a narrow class of cases. In 1992, Congress amended the Copyright Act to add that fair use may apply to unpublished works. See [17 U.S.C. § 107](#). This distinction remains mostly to protect the secrecy of works that are on their way to publication. Therefore, the nature of the copyrighted work is often a small part of the fair use analysis, which is more often determined by looking at the remaining three factors.

3. Amount and Substantiality of the Portion Used

Unfortunately, there is no single guide that definitively states how much of a copyrighted work you can use without copyright liability. Instead, courts look to how such excerpts were used and what their relation was to the whole work. If the excerpt in question diminishes the value of the original or embodies a substantial part of the efforts of the author, even an excerpt may constitute an infringing use.

If you limit your use of copyrighted text, video, or other materials to only the portion that is necessary to accomplish your purpose or convey your message, it will increase the likelihood that a court will find your use is a fair use.

Of course, if you are reviewing a book or movie, you may need to reprint portions of the copyrighted work in the course of reviewing it in order to make your points. Even substantial quotations may qualify as fair use in "a review of a published work or a news account of a speech that had been delivered to the public or disseminated to the press." [Harper & Row, Publishers, Inc. v. Nation Enters.](#), 471 U.S. 539, 564 (1985). However, substantial quotations from non-public sources or unpublished works do not enjoy the same protections.

4. The Effect of Your Use Upon the Potential Market for the Copyrighted Work

In examining the fourth factor, which courts tend to view as the most important factor, a court will look to see how much the market value of the copyrighted work is affected by the use in question. This factor will weigh in favor of the copyright holder if “unrestricted and widespread” use similar to the one in question would have a “substantially adverse impact” on the potential market for the work.

Although the copyright holder need not have established a market for the work beforehand, he or she must demonstrate that the market is “traditional, reasonable, or likely to be developed.” Ringgold v. Black Entm't TV, 126 F.3d 70, 81 (2d Cir. 1997). An actual effect on the number of licensing requests need not be shown. The fact that the original work was distributed for free, however, may weigh against a finding that the work had publication value. See Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 25 (1st Cir. 2000). Likewise, the fact that the source is out of print or no longer sold will also weigh in favor of fair use.

The analysis under this factor will also depend on the nature of the original work; the author of a popular blog or website may argue that there was an established market since some such authors have been given contracts to turn their works into books. Therefore, a finding of fair use may hinge on the nature of the circulated work; simple e-mails such as those in the Diebold case (discussed in detail below) are unlikely to have a market, while blog posts and other creative content have potential to be turned into published books or otherwise sold. In addition, the author of a work not available online, or available only through a paid subscription, may argue that the use in question will hurt the potential market value of that work on the Internet.

Assessing the impact on a copyrighted work’s market value often overlaps with the third factor because the amount and importance of the portion used will often determine how much value the original loses. For instance, the publication of five lines from a 100 page epic poem will not hurt the market for the original in the same way as the publication of the entirety of a five-line poem.

This fourth factor is concerned only with economic harm caused by substitution for the original, not by criticism. That your use harms the copyright holder through negative publicity or by convincing people of your critical point of view is not part of the analysis. As the Supreme Court has stated:

[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because “parody may quite legitimately aim at garroting the

original, destroying it commercially as well as artistically," the role of the courts is to distinguish between '[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.'"

Campbell, 510 U.S. at 591-92 (citations omitted).

The fact that your use creates or improves the market for the original work will favor a finding for fair use on this factor. See Nunez, 235 F.3d at 25 (finding fair use when the publication of nude photos actually stirred the controversy that created their market value and there was no evidence that the market existed beforehand).

In summary, although courts will balance all four factors when assessing fair use, the fair use defense is most likely to apply when the infringing use involves criticism, comment, news reporting, teaching, scholarship, or research. In addition, some general rules of thumb can be helpful in analyzing fair use:

- A use that transforms the original work in some way is more likely to be a fair use;
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- A non-profit use is more likely to be considered a fair use than a for-profit use;
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- A shorter excerpt is more likely to be a fair use than a long one; and
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- A use that cannot act as a replacement for the original work is more likely to be a fair use than one that can serve as a replacement.

Some Special Considerations

Publishing the Contents of Private Letters and E-Mail (including letters from lawyers threatening legal action): Fair use may protect the publication of the content of private letters and email, including communications from lawyers threatening legal action. As mentioned above, unpublished materials sometimes enjoy greater protection than published documents. Although an author may argue that the "unpublished" nature of his or her correspondence warrants a finding against fair use, such an argument carries weight only when the use involves a heretofore secret work "on its way" to publication, which is never the case for lawyers' cease-and-desist letters. Recently, two students at Swarthmore college posted an archive of internal emails among Diebold employees; an online newspaper linked to the archive in an article critical of Diebold's voting machines. A court held that although the emails were not published, publishing them was nonetheless protected by fair use. Diebold, 337 F. Supp. 2d at 1203. The court found that the important fourth

fair use factor weighed in favor of fair use because Diebold had no intention of selling the archive for profit and therefore it lost no value when the archive was published online. The court also noted the students and newspaper use was intended to support criticism of the company, which was a transformative use under the first factor.

Copyright as a Tool to Silence Criticism: Sometimes, copyright owners try to use copyright law as a weapon to squelch speech that is critical of them or their works of authorship. For example, in [Savage v. CAIR](#), a conservative radio host has filed a copyright infringement lawsuit against the Council on American-Islamic Relations for using excerpts of his radio show in order to criticize his rabidly anti-Muslim views and to call for sponsors to withdraw their support from his program. CAIR's use of these audio excerpts, and similar uses of copyrighted material in order to criticize a copyright owner, are almost certainly protected by fair use. As EFF argues in its [brief](#) asking the court to dismiss Savage's lawsuit:

The fair use doctrine exists precisely to prevent copyright holders from doing what Savage attempts here -- abusing a limited monopoly granted to encourage creativity to punish dissenters and to chill speech aimed at criticizing copyrighted works. For all his ironic appeals to the First Amendment, Savage asks this Court to punish CAIR for publicly criticizing the offensive content of his radio program. That CAIR's criticism might result in Savage losing popularity (and advertisers) is of no moment to either a free speech or copyright infringement analysis and indeed, should be expected in the marketplace of ideas that the First Amendment and Copyright Act strongly protect.

For another case involving an attempted use of copyright to silence criticism, see our database entry, [ABC v. Spocko](#).

Practical Tips for Avoiding Copyright Liability

While there is no definitive test for determining whether your use of another's copyrighted work is a fair use, there are several things you can do to minimize your risk of copyright liability:

- Use only as much of the copyrighted work as is necessary to accomplish your purpose or convey your message;
- Use the work in such a way that it is clear that your purpose is commentary, news reporting, or criticism;
- Add something new or beneficial (don't just copy it -- improve it!);
- If your source is nonfiction, limit your copying to the facts and data; and

- Seek out Creative Commons or other freely licensed works when such substitutions can be made and respect the attribution requests in those works.

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