

Fair Use: Weighing the Factors

Is your intended use a Fair Use? It is your responsibility to conduct a good faith assessment of your intended use of copyrighted resources to claim fair use. This worksheet walks through each of the factors that contribute to a fair use determination. Consider each factor individually and assess all of them together to make a fair use determination for your intended use.

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Factor One: Purpose of the Use

Favoring Fair Use

- Educational, scholarly, and research uses, and/or news reporting
- Criticism or commentary
- Non-profit use, including personal uses

Disfavoring Fair Use

- Commercial activity
- Profiting from use
- Decorative or other non-critical, non-commentary use

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Factor Two: Nature of the Copyrighted Material

Favoring Fair Use

- Published source
- Factual or non-fiction source

Disfavoring Fair Use

- Unpublished source
- Creative, artistic, or fiction source

3

Factor Three: Amount Copied

Favoring Fair Use

- Proportionally small excerpt, extract, or clip
- Portion used is peripheral or not significant to the entire work
- Only as much as absolutely necessary for a favored "purpose"

Disfavoring Fair Use

- Entire work, or proportionally large extract
- Portion used is "heart of the work"

4 Factor Four: Effect on the Market for the Original

Favoring Fair Use

- User owns lawful copy of the work (bought or otherwise legitimately acquired)
- Only one or a few copies made
- One-time use
- Difficult to redistribute, or to make additional copies of the product of your use
- Use stimulates market for original work
- No impact on market for original work
- No product marketed by copyright holder similar to your use
- No way to pay or seek permission for your use

Disfavoring Fair Use

- Use directly substitutes for a sale that would otherwise have been made
- Many copies made
- Repeated or long-term use (Note: this is relevant only if the cumulative uses may start to effect the market; repeated use that is fair use, remains fair use.)
- Impairs market for original work
- Easily-obtained and affordable license or permission
- Easy to redistribute, or to make additional copies of the product of your use (i.e. digital file, online use) (Note: this is relevant only if you share or redistribute additional copies of the product of your use, in such a way as to effect the market for the original. Sharing by downstream users is rarely relevant.)

5 The “Fifth Factor”: Transformative Use

Favoring Fair Use

A derivative work is transformative if it uses a source work in completely new or unexpected ways.

- Creates a new work with a new purpose, including parody and transformative technologies

6 Consider Factors in Concert

Remember that no single factor is decisive of fair use, and on any given factor, you may find that some aspects of your proposed use favor fair use, while others weigh against fair use. There may be other relevant considerations that do not appear in this general-purpose tool.

Many considerations are relevant, and only by looking at the whole picture, across all the issues, can you make a reasonable guess about whether your use is fair or not.

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