

The Fair Use Guide

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A program of the Arts & Business Council of Greater Philadelphia



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The Fair Use Guide

Copyright owners receive the rights to reproduce, distribute, adapt, publish, perform, and display their copyrighted work. When another party uses the copyright without authorization, it may give rise to a copyright infringement claim. However, there are instances where a copyright may be used without permission without infringing upon the copyright owner's rights. This is called "fair use," a doctrine that seeks to allow reasonable use of the copyrighted work, balancing the interest of the public with the interest of the copyright owner.

Why does the "fair use" doctrine exist?

Since our Constitution grants the copyright power as a means of promoting "the Progress of Science and useful Arts," fair use is the realization that to achieve this goal it is sometimes necessary for a copyrighted work to be used by others. While the Copyright Act of 1976 marked the first time the fair use doctrine appeared as a statute, American courts have invoked the doctrine since the early 19th century. When doing a fair use inquiry, courts are looking at the fine line between the public's need to have reasonable use for purposes of education, criticism, or information and the need to protect the private copyright holder from unreasonable use committed by another for piracy purposes.

How do I know the difference between fair and unfair uses?

Since there is no precise line dividing fair and unfair use, courts apply the doctrine on a case-by-case basis, and let the circumstances guide their decisions. Section 107 of the Copyright Act of 1976 — the statute dealing with fair use — sought only to reflect the judicially-created doctrine as it already existed and did not attempt to "change, narrow, or enlarge it in any way."

The courts typically use four factors as guidelines when determining whether a use is fair, and are free to give different weights to each of the factors depending on the circumstances. Also, courts consider all four factors as they relate to one another, rather than as isolated factors. As a result, the outcomes of the cases are highly individualized and difficult to predict. The factors the court uses — provided by Section 107 — are:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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; and
4. The effect of the use upon the potential market for or value of the copyrighted work.

How can I tell if the use is fair?

Since each case is different, courts have identified additional criteria for the factors, making fair use a complex inquiry. It is helpful to see what courts look for when making their decisions. Below are examples of some of these additional criteria, but note that none of the factors *by themselves* will determine whether a use is fair or not.

Uses more likely to be considered fair:

- A not-for-profit use.
- A "transformative" use which replaces the object of the original creation or alters it with a new expression, meaning, or message. Examples of transformative uses are criticisms, commentaries, and parodies.
- A productive use adding benefit to the public in some way.
- A use that is private (or personal).

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- Using works that are informational — such as a biographical or historical work — is more likely to be fair, although this may vary depending on the amount of creativity displayed by the original work.
- Use or sale in a different market where the copyright owner would not naturally plan to develop or license the work.
- The fourth factor from Section 107 — effect upon the potential market for or value of the copyrighted work — balances the public benefit of the use with the personal loss by the copyright owner.
- Courts will look at how the unauthorized party obtained the copyrighted work. If they took the work unlawfully, or acted in bad faith in some manner, courts are unlikely to find fair use.

Uses less likely to be considered fair:

- A commercial (for-profit) use.
- Using an original work that is creative, instead of informational, is more likely unfair, since works with greater expression tend to be granted more copyright protection. An example would be a use based on a song or film.
- An unpublished work, since courts want to leave the decision of how, when, and/or whether publication should occur to the creator of the work.
- Using multiple small portions of a work that, when added together in aggregate, amounts to a large taking.
- Copying an entire work.

Other considerations:

- The intent of the user — how they plan to use the work — matters to the court.
- Absence of monetary harm to the copyright holder may weigh in favor of fair use, but note that courts consider both *actual* monetary harm **and** *potential* monetary harm.
- The third factor from Section 107 — the amount and substantiality used in relation to the copyrighted work as a whole — is both a *qualitative* and a *quantitative* factor. Therefore, even using a small amount of a work can be unfair if that small amount is the “heart” of the work, despite the fact that courts will typically find fair use if the use only involves the necessary portion of the work.

What about my creation?

To determine whether the fair use doctrine will apply to your creation, run through the inquiry using *all* of the above factors. If the outcome indicates to you that the use may be considered fair, remember that these are simply guidelines. A court may or may not disagree with the analysis, and may weigh certain factors more than others. No situation is pre-determined as a fair use.

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