**Fair Use**

Limitations have been built into copyright law to allow for continued scientific, scholarly, and artistic advancement in our society. The limitations can be found in sections 107 through 118 of the copyright law (title 17, U. S. Code). The most prominent of these exceptions to a copyright holder’s exclusive rights is known as *fair use*.

Unless the work you would like to use is in the public domain, has a creative commons license, you have created it yourself, or you have already received permission from the copyright holder by written request or contract, you will need to evaluate whether your utilization of the work falls under fair use. In fact, even the process of informing yourself and evaluating your use of a source under fair use can protect you under the law. The University of Texas Copyright Crash Course offers this information:

> There is one special provision of the law that requires a court to refuse to award any damages at all, even if the copying at issue was not a fair use. It is called the good faith fair use defense [17 USC 504(c)(2)]. It only applies if the person who copied material reasonably believed that what he or she did was a fair use - as would likely be the case if you followed your institutional copyright policy or any of the other excellent resources available online these days!

Completing and keeping fair use worksheets is an excellent way to protect yourself with a good faith fair use defense [17 USC 504(c)(2)]. Find worksheets, which you can complete and then print as a PDF to keep for your records, at these sites:

- University of Minnesota’s “Thinking through Fair Use” http://www.lib.umn.edu/copyright/fairthoughts
- The American Library Association’s Fair Use Evaluator http://librarycopyright.net/fairuse/

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**Definitions**

**COPYRIGHT**

Adapted from Black’s Law Dictionary 9th ed. The right to copy; specifically, a property right in an original work of authorship fixed in any tangible medium of expression, giving the holder exclusive right to reproduce, adapt, distribute, perform, and display the work.

**FAIR USE**

Adapted from Black’s Law Dictionary 9th ed. A reasonable and limited use of a copyrighted work without the author’s permission, such as quoting from a book in a book review or using parts of it in a parody. Fair use is a defense to an infringement claim.

**PUBLIC DOMAIN**

Adapted from Black’s Law Dictionary 9th ed. When copyright, trademark, patent, or trade secret rights are lost or expire, the intellectual property they protected becomes part of the public domain and can be appropriated by anyone without liability for infringement.

**CREATIVE COMMONS**

A non-profit organization which aims to expand the universe of work legally available to be built upon and shared. The organization has created several types of copyright licenses to be freely used by the public, which allow creators to clearly communicate which rights they retain, and which rights they waive.

**OPEN ACCESS**

A publishing model which is intended to make scholarly output widely available on the open web. It is often combined with a Creative Commons licensing model.

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**The Four Fair Use Factors**

Section 107 lays out a description of the various purposes for which the reproduction of a particular work may be considered fair, such as criticism, comment, news reporting, teaching, scholarship, and research. Section 107 also sets out four factors to be considered in determining whether or not a particular use is fair:

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?

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**Before you conduct a four factors analysis (see reverse), ensure that you have met these preliminary requirements:**

- The work was legally acquired
- Your use of the work does not conflict with any other contractual agreements.
Fair Use Analysis

The following explanation is used with permission from University of Texas, Austin’s Copyright Crash Course.

FACTOR 1: What is the character of the use?

<table>
<thead>
<tr>
<th>Nonprofit</th>
<th>Educational</th>
<th>Personal</th>
<th>Commercial</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criticism</td>
<td>Commentary</td>
<td>News reporting</td>
<td>Parody</td>
</tr>
<tr>
<td>Otherwise &quot;transformative&quot; use</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Fair Use ← Not Fair Use

Uses on the left tip the balance in favor of fair use. The uses on the right tip the balance in favor of the copyright owner - in favor of seeking permission. The uses in the middle are very beneficial: they add weight to a fair use claim, either cumulatively, if you have other factors on the left in your favor, or by minimizing the importance of a commercial use.

FACTOR 2: What is the nature of the work to be used?

<table>
<thead>
<tr>
<th>Fact</th>
<th>Published</th>
</tr>
</thead>
<tbody>
<tr>
<td>A mixture of fact and imaginative</td>
<td>Imaginative</td>
</tr>
<tr>
<td>Unpublished</td>
<td></td>
</tr>
</tbody>
</table>

Fair Use ← Not Fair Use

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, sort of cancelling out this factor entirely.

FACTOR 3: How much of the work will you use?

<table>
<thead>
<tr>
<th>Small amount</th>
<th>More than a small amount</th>
</tr>
</thead>
</table>

Fair Use ← Not Fair Use

This factor has its own peculiarities. 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.

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

| Proposed use is transformative and not merely duplicative and amount used is appropriate for the transformative purpose | Password protection; technological protection; limited time use |
| Original is out of print or otherwise unavailable | Use is not transformative |
| Copyright owner is unidentifiable | Competes with (takes away sales from) the original |
| No ready market for permission | Avoids payment for permission (royalties) in an established permissions market |

Fair Use ← Not Fair Use

This factor’s interaction with the first factor is quite important, and contentious. There is considerable controversy about the extent to which a market for permission should affect the rest of the fair use analysis in a nonprofit educational setting.

There is a range of opinion about whether courts would apply the strictly macroeconomic commercial holdings regarding research copies and coursepacks to a nonprofit educational setting. The question comes down to how much of a difference you think being nonprofit and educational will make where there's a mature permissions market, that is, where it's easy to get permission and the price is appropriate for educational uses. And it comes down to how tolerant your institution is for the risk that not knowing for sure entails.