12-Fair Use
What Is Fair Use?

Fair Use is an exception to U.S. copyright law that allows use of copyrighted work under certain conditions.

Are you incorporating any materials in your research final product that were created by someone else, such as images or text from other works? These materials could be protected by copyright. For example, content you find online, text, books, movies, songs, email, images, and videos are most likely copyrighted. Fortunately, U.S. copyright law includes an exception that allows you to use copyrighted work in your assignments for class.

However, if you would like to share your research product outside of the classroom (such as on a webpage or blog or in your portfolio), you will need permission from the copyright owner(s) unless your use is covered under another statutory exception. Fair use is one such exception, and it can apply to a wide variety of uses.

**NOTE: Fair Use and Educational Use**

Fair Use plays an important role in education. Although educational use receives several protections in copyright law, not all educational use is automatically fair use. It’s important to know that there are limits to how you can use others’ creative works even as a student or teacher in the classroom.
In this section, you will learn about fair use and strategies to help determine whether or not a proposed use of someone else’s copyrighted works falls under the fair use exception. Understanding how to properly perform a fair use analysis and assert your fair use rights can help you to build upon others’ works with confidence.

Fair Use and Copyright – A Balance

Copyright in the U.S. is intended to promote the creation of new works by providing an incentive for creators. However, recognizing that new works often build on or incorporate existing works, the law strikes a balance between the rights of creators and the rights of users via exceptions to the exclusive rights of the creator.

The fair use exception is detailed in Section 107 of the U.S. Copyright Act. Unlike other copyright exceptions, fair use is flexible and can apply to a broad array of uses. It is designed to be adaptable to new uses and technologies so that Congress doesn’t have to create new exceptions before a new technology can be utilized.

MOVIE: What Is Fair Use?

Watch a short introduction to fair use from the OSU Libraries’ Copyright Resources Center.

View video
The Four Factors

Most of the copyright exceptions are very specific about what kinds of uses may qualify for the exception and often include various restrictions about who can use the exception and under what precise conditions.

Fair use, on the other hand, is much more flexible and can apply to a wide variety of uses. Instead of specifying an exact type of user, type of material or amount that qualifies for this exception, the fair use statute provides a framework for the analysis and application of four factors that determine whether or not a particular use may qualify as fair use.

The four factors of fair use are:

- Purpose & character of use, including whether commercial (i.e. publishing a book) or non-commercial (i.e. using in a classroom assignment)
- Nature of the original material (i.e., is the work published or unpublished? Fact or fiction? Highly creative?)
- Amount and substantiality of the original work (are you using the entire work or just a portion?)
- Effect on the marketplace or on the work’s value (will your use have a financial impact on the creator?)

When considering whether a proposed use of a copyrighted work may qualify as fair use, you must weigh all four factors together. Each factor is equally important.

Transformation

The courts have recently emphasized the concept of transformation or a transformative purpose, which falls under the first factor of fair use.

Transformation means that the way in which the work is being used is significantly different than the original use for which it was created.

In many cases a transformative use of a copyrighted work will strongly favor a determination of fair use.

There are two ways in which a use can be transformative.

First, you could actually make changes to the original work in order to use it for a new purpose. An example would be to take short clips of popular movies and remix them to create a video for the purpose of social commentary or teaching.

The second form of transformative use does not require that you alter the original work in any way.
Instead, you simply use the work for a purpose that is significantly different than the use for which it was created. An example of this would be using clips from a blockbuster movie that was originally sold for mass market entertainment for the purpose of teaching and research.

MOVIE: Remix Culture

See examples of remixing that fall under fair use.

View video
Evaluating Your Case for Fair Use

Copyright law lacks specificity, so it can be difficult to determine whether or not a particular use may qualify as fair use. Fortunately, there are a number of useful tools available online to help you consider the four fair use factors as they apply to your intended use.

A Fair Use Checklist can be very helpful for conducting a fair use analysis. The checklist indicates various criteria for each factor which have been found in a court of law to favor or oppose a finding of fair use. It is highly recommended that you use a fair use checklist to evaluate the strength of your argument for fair use.

MOVIE: Follow the Four Factors of Fair Use

Watch this video to see a fair use analysis using a fair use checklist.

In a fair use analysis, you consider each of the four factors in light of your proposed use and determine whether your use is favoring or opposing fair use for that factor.

You then weigh all four factors together. You cannot rely on a numerical tallying of criteria in favor and opposing fair use in order to make a determination. You must consider all four factors holistically and determine if, taken as a whole, they favor or oppose fair use, and to what extent (e.g. strongly favoring fair use, slightly favoring, etc.).

- If, overall, your use favors fair use, then you may proceed.
- If your use instead opposes fair use, you should reassess your use and determine if you can make any changes that could strengthen your case for fair use.

There are other tools in addition to the checklist that can help you conduct a fair use analysis. The American Library Association has developed a tool called the Fair Use Evaluator.

ACTIVITY: Fair Use Criteria

Visit the Fair Use Checklist and review the criteria for each of the four factors.

ACTIVITY: Fair Use or Not Fair Use?

Open activity in a web browser.
Tips for Best Practice

While it is important to perform a fair use evaluation for each and every use of copyrighted material, there are some general rules that can often help you to strengthen a fair use claim.

Below are a few tips to consider when relying on the fair use exception in order to use copyrighted works in your endeavors.

- **Use only lawfully acquired copyrighted works** – To be able to claim fair use you must have used a legal copy of the original work.
- **Acknowledge all of your sources with a bibliographic citation** – Giving proper credit to the original creator demonstrates good faith and may help strengthen your fair use case.
- **Use only the amount of the original work that you need to accomplish your goal** – Since the amount of the original work that is used is one of the fair use factors, it is always important to only use what you need and not add extra material.
- **Restrict the audience and/or make only the number of copies that you need** – The less you copy and share the parts of the original work, the less effect you have on the market for it.
- **Use Creative Commons licensed or public domain works** – If you use works that expressly allow you to use them or have no copyright protection, you do not need to rely on fair use and can be more confident that your use is legal.
- **Use works that you created** – If you created it, you own the copyright, with the exception of works made for hire. (When you create things for your job, typically your employer owns the copyright.)

If you are in doubt about your fair use claim, either reassess and make changes to your proposed use in order to make a stronger claim or ask for permission to use the copyrighted material – It is much easier to make changes or ask for permission before you use copyrighted material than to get hit with an infringement claim and have to make changes or face a lawsuit after your use.

Further Reading on Fair Use

A number of groups have developed Codes of Best Practices in Fair Use for different types of activities. These codes propose examples of fair use within specific communities of practice. Below are links to some of these Codes of Best Practices.

- Code of Best Practices in Fair Use for Online Video
- Code of Best Practices in Fair Use for Poetry
- Code of Best Practices in Fair Use for OpenCourseWare
- Documentary Filmmakers’ Statement of Best Practices in Fair Use
- Association of Research Libraries Codes of Best Practices in Fair Use for Academic and Research Libraries
Common Examples of Fair Use

Students and teachers rely on fair use in order to accomplish many of their educational goals. Below are some, but by no means all, educational activities that rely upon fair use.

Student Projects

Includes both media and text.

Your fair use analysis will change depending on how the project is presented, i.e. only the professor sees it, you present it to the whole class, you present it to a group outside of the class, or you post it online for anyone to see.

Course Reserves

Includes electronic reserves.

Instructors may copy or post small portions of books or journals for supplementary student readings, but cannot copy entire copyrighted works as a replacement for materials that students would normally be required to purchase.

Sound or Video Clips for Teaching

Students and teachers can make use of video or sound clips in creating multi-media presentations for use in the classroom.

Digitization Projects

Many university libraries rely on fair use in order to create large scale digitization projects that preserve older materials, as well as providing improved access to their collections for the purpose of research. For an example of this type of digitization project check out the HathiTrust Digital Library.

Content in Scholarly Articles
It is common to quote other researchers’ writings or use others’ images, graphs or charts in your own scholarly writing. These practices have long been considered acceptable under fair use.

**Access for the Disabled**

When specific exemptions don’t fit.

While there are specific exceptions that allow for making copies of copyrighted works in order to provide access to the visually handicapped, they are sometimes too narrow to provide complete access. In these cases it is possible to rely upon fair use in order to provide access to materials.

**Fair Use for Non-Educational Purposes**

Fair use is not only available for educational purposes. Many other commercial and non-commercial activities depend upon fair use. Some of these common fair uses include:

- Quotes in books, news reports and blogs
- Mash-ups and remixes
- Parody, such as on television shows like South Park or Saturday Night Live
- Video or sound clips in documentary films
- Thumbnail images on search engines

**MOVIE: Sesame Street: Gone With the Wind**

Check out this parody from Sesame Street.

[View video](#)

**Myths about Fair Use**

Many people have heard of fair use and have some ideas about what it is. Unfortunately, there are many myths or misunderstandings about exactly what fair use covers, what the law states or how it can be applied. Below we dispel just a few of the most common myths about fair use.

**Myth 1: All educational use is fair use.**
Fact: While many educational uses are considered fair use, there are some activities that do not meet the fair use criteria. For example, a teacher can’t make copies of an entire text book so that students don’t have to buy it.

Myth 2: Every educational use is transformative.

Fact: Using copyrighted works for teaching can often be a transformative use, but not always. For example, using a text book created to teach Biology 101 to teach Biology 101 is not transformative.

Myth 3: All socially beneficial use is fair use.

Fact: Fair use is designed to help balance the rights of the creator and the social benefit of using copyrighted works in certain ways. Not all uses of copyrighted works that would be socially beneficial, however, qualify as fair use. For example, scanning and posting an entire medical text book online for anyone to access for free is socially beneficial but probably not fair use.

Myth 4: All commercial use precludes fair use.

Fact: Many commercial activities, such as newspapers and online news sites, rely heavily on fair use.

Myth 5: It is not possible to have a fair use when a permissions scheme exists for a work.

Fact: Just because rights holders are willing to charge you to use their copyrighted material, does not mean that fair use cannot apply. For example, the Associated Press created a licensing scheme to quote from AP stories but quoting from news stories has long been considered fair use.

Myth 6: Fair use specifies a percentage or amount of a work that is okay to use.

Fact: The law does not state that using 10% of a book or 30 seconds of a song or video clip is fair use. You can often use more than these arbitrary limits, while sometimes using even less might not be fair use. The amount of the original work used is only one of the four factors to consider.