What to Know before and while Making a Fair Use Evaluation

You can use others’ copyrighted content when you have a solid argument for fair use (Section 107 of U.S. copyright law).*

First, ensure you have a legal copy.

- If you cannot find content in the public domain or content with an open license, you should first ensure that you have a legal copy of the copyrighted work before making a fair use evaluation.
  - This condition must be met to rely on any exception in U.S. copyright law.
  - If obtained online, you should also ensure that the terms of use on the website do not restrict you from downloading the copyrighted content from their site. When reviewing the terms of use, look for key words that allow you to download the content for your "own use" or your "personal use."
    - If the website does not allow for "your own use" or "your personal use," or if it explicitly prohibits fair use, then you should assume that you do not have a legal copy of the copyrighted work.
  - If there are no terms of use included on the website, then you are not bound by any legal agreements, and therefore, you likely have a legal copy of the copyrighted work.

Next, ensure that the copyrighted content and the amount used is crucial to your purpose.

- Ensure that the copyrighted content you are using is crucial for you to complete your educational, analytical, scholarly, or creative objective.
- If you can use alternative content that is in the public domain or has a Creative Commons License (CCL), then your argument for fair use will be considerably weaker.
- Only use the amount needed to complete your objective.
  - If using an image, you can fulfill the minimal use standard by reducing the resolution/DPI to a minimal level in order to complete your objective.

Then, when you are ready to make a fair use evaluation, consider the four factors of fair use:

1. Purpose of your use - why are you using the work?
2. Nature of the copyrighted work - what kind of work are you using?
3. Amount and substantiality used - how much of the work are you using and/or is it the "heart of the work"?
4. Effect on the potential market - does your use affect the market (i.e. economic value) of the copyrighted work, and if so, to what extent?
   - In other words, is your use an effective substitute for the original work’s purpose? Examples of effective substitutes:
     - Online piracy of motion pictures

* Fair use is the most used and litigated exception in U.S. copyright law, but if you are using content in an educational, religious, or library context, consider those exceptions first.
- Copying an **entire textbook** and uploading it to an online learning management system
  - Students will likely not buy the textbook.
  - If provided freely and publicly online, there is greater potential for harming the market.
  - **Exception**: when using select chapters or sections, it is not as likely to act as an effective substitute and affect the market.
    - Examples of transformative fair use (i.e. using the existing work in a new way) in which the market is not affected:
      - Parody
      - Pastiche
      - Educational materials
- Evaluate fair use in a **holistic** manner rather than a mathematical manner.
  - For example, a parody of a film may have commercial success (seemingly not in favor of the fourth factor), but the purpose of the use (the first factor) is highly transformative (i.e. its purpose has changed from the original purpose in order to invite new perspectives), and therefore, it would likely be considered a fair use. In addition, the market harm would be little to none, because the new work creates a new market and a new audience in contrast to the original work.

Finally, remember that:
- Using a work for educational purposes does not automatically make the use fair, although these uses are generally more in favor of fair use.
- If your use is not educational or scholarly, it does not automatically mean that your use is not a fair use. Check out [these fair use cases](#) to give yourself a better idea of what is and is not considered fair use.

**Tools/Resources**

**Fair use evaluator tool**

This tool will generate an (optional) time- and date-stamped PDF of your evaluation that you can save for your records in the unlikely case of a rights holder's request for you to takedown the content or an even more unlikely case of a copyright infringement lawsuit. The courts view such documentation as evidence of your “good faith effort.”

**MIT Fair Use Tutorial and Quiz**

This tool helps students better understand the core concepts of copyright law’s “fair use” provision, the flexible — but notably ambiguous — exception under US copyright law that makes it possible to use others’ copyrighted works without permission.

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