

Fair dealing/ Fair use

Four factors of fair use

- ① the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit 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.

Factor 1: The Purpose and Character of the Use

- ❖ The fair use statute itself indicates that nonprofit educational purposes are generally favored over commercial uses.
- ❖ In addition, the statute explicitly lists several purposes especially appropriate for fair use, such as criticism, comment, news reporting, teaching, scholarship, or research.
- ❖ These activities are also common and important at the university. But be careful: Not all nonprofit educational uses are “fair.”
- ❖ A finding of fair use depends on an application of all four factors, not merely the purpose.

Factor 1: The Purpose and Character of the Use

- ❖ However, limiting your purpose to some of these activities will be an important part of claiming fair use.
- ❖ Courts also favor uses that are “transformative,” or that are not merely reproductions.
- ❖ Fair use is more likely to be found when the copyrighted work is “transformed” into something new or of new utility, such as quotations incorporated into a paper, or perhaps pieces of a work mixed into a multimedia product for your own teaching needs or included in commentary or criticism of the original.

Factor 2: The Nature of the Copyrighted Work

- ❑ This factor centers on the work being used, and the law allows for a wider or narrower scope of fair use, depending on the characteristics or attributes of the work.
- ❑ For example, the unpublished “nature” of a work, such as private correspondence or a manuscript, can weigh against a finding of fair use.
- ❑ The courts reason that copyright owners should have the right to determine the circumstances of “first publication.”

Factor 2: The Nature of the Copyrighted Work

- ❑ Use of a work that is commercially available specifically for the educational market is generally disfavored and is unlikely to be considered a fair use.
- ❑ Additionally, courts tend to give greater protection to creative works; consequently, fair use applies more broadly to nonfiction, rather than fiction.
- ❑ Courts are usually more protective of art, music, poetry, feature films, and other creative works than they might be of nonfiction works.

Factor 3: The Amount or Substantiality of the Portion Used

- Although the law does not set exact quantity limits, generally the more you use, the less likely you are within fair use.
- The “amount” used is usually evaluated relative to the length of the entire original and in light of the amount needed to serve a proper objective. However, sometimes the exact “original” is not always obvious.
- A book chapter might be a relatively small portion of the book, but the same content might be published elsewhere as an article or essay and be considered the entire work in that context. The “amount” of a work is also measured in qualitative terms.
- Courts have ruled that even uses of small amounts may be excessive if they take the “heart of the work.” For example, a short clip from a motion picture may usually be acceptable, but not if it encompasses the most extraordinary or creative elements of the film.

Factor 3: The Amount or Substantiality of the Portion Used

- ✓ Similarly, it might be acceptable to quote a relatively small portion of a magazine article, but not if what you are quoting is the journalistic “scoop.”
- ✓ On the other hand, in some contexts, such as critical comment or parody, copying an entire work may be acceptable, generally depending on how much is needed to achieve your purpose.
- ✓ Photographs and artwork often generate controversies, because a user usually needs the full image, or the full “amount,” and this may not be a fair use.
- ✓ On the other hand, a court has ruled that a “thumbnail” or low-resolution version of an image is a lesser “amount.” Such a version of an image might adequately serve educational or research purposes.

Factor 4: The Effect of the Use on the Potential Market for or Value of the Work

- ✧ Effect on the market is perhaps more complicated than the other three factors.
- ✧ Fundamentally, this factor means that if you could have realistically purchased or licensed the copyrighted work, that fact weighs against a finding of fair use.
- ✧ To evaluate this factor, you may need to make a simple investigation of the market to determine if the work is reasonably available for purchase or licensing.
- ✧ A work may be reasonably available if you are using a large portion of a book that is for sale at a typical market price. “Effect” is also closely linked to “purpose.”

Factor 4: The Effect of the Use on the Potential Market for or Value of the Work

- ✧ If your purpose is research or scholarship, market effect may be difficult to prove.
- ✧ If your purpose is commercial, then adverse market effect may be easier to prove.
- ✧ Occasional quotations or photocopies may have no adverse market effects, but reproductions of entire software works and videos can make direct inroads on the potential markets for those works.

**Basic Books, Inc. v. Kinko's Graphics Corp., 758
F.Supp. 1522 (S.D.N.Y. 1991).**

- Kinko's was held to be infringing copyrights when it photocopied book chapters for sale to students as “coursepacks” for their university classes.

THE ANALYTICS

- **Purpose:** When conducted by Kinko's, the copying was for commercial purposes, and not for educational purposes. Because the purpose was also not transformative, this factor weighed against fair use.
- **Nature:** Most of the works were factual—dealing with history, sociology, and other fields of study—a factor which weighed in favor of fair use.
- **Amount:** The court analyzed the percentage of each work, finding that copying between five and 25 percent of the original full book was excessive, particularly because the parts copied were critical to the works and each of the chapters could stand alone.
- **Effect:** The court found a direct effect on the market for the books, because the course packs competed directly with the potential sales of the original books as assigned reading for the students.

Conclusion:

- Three of the four factors leaned against fair use.
- The court specifically refused to rule that all course packs are infringements, requiring instead that each item in the “anthology” be subject individually to fair use scrutiny.
- Notice that the copying was made by a commercial user for a profit; the court left open the question of fair use by the nonprofit institution itself.

**Encyclopedia Britannica Educational Corp. v.
Crooks, 542 F.Supp. 1156 (W.D.N.Y. 1982)**

- Commercial producers of educational motion pictures and videos sued a consortium of public school districts, which systematically recorded programs as they were broadcast on public television stations and provided copies of the recordings to member schools.

THE ANALYTICS

- **Purpose:** Although the court was largely sympathetic with the educational purpose, it also said that convenience should not be a significant factor in the reasonableness of the purpose of the use, thus weighing against fair use.
- **Nature:** Although the films had educational content, they were commercial products intended for sale to educational institutions, weighing against fair use.
- **Amount:** The defendant was copying the entire work and retaining copies for as long as ten years, weighing against fair use.
- **Effect:** The copying directly competed with the plaintiff's market for selling or licensing copies to the schools, weighing against fair use.

Conclusion:

- The court had little trouble concluding that the activities were not fair use.

American Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994).

- The court ruled that photocopying of individual journal articles by a Texaco scientist for his professional research needs was not fair use.

THE ANALYTICS

- **Purpose:** While a research purpose generally favors fair use, Texaco's research was conducted for commercial gain, and the use essentially served to replace additional subscriptions. This factor therefore weighed against fair use.
- **Nature:** The articles were factual, which weighed in favor of fair use.
- **Amount:** An article is an independent work, so copying the article was a reproduction of an entire copyrighted work, weighing against fair use.
- **Effect:** The court found it unlikely that Texaco reasonably would have purchased more subscriptions to the relevant journals. However, because the photocopying directly competed with the ability of publishers to collect license fees, this factor weighed against fair use.

Conclusion

- ☞ According to the court, the Copyright Clearance Center provided a practical method for paying fees and securing permissions, so the copying directly undercut the ability to pursue the market for licensing through the CCC.
- ☞ Despite an impassioned dissent from one judge who argued for the realistic needs of researchers, the court found three of the four factors weighing against fair use in the corporate context.
- ☞ After issuing its conclusions, the Second Circuit amended its decision to clarify that it applies only to “institutional, systematic” copying, and that the ruling does not reach isolated copying by independent researchers.
- ☞ While this case is likely to have significant practical effects on private companies, its application to strictly nonprofit teaching and research is far from clear.

Sundeman v. The Seajay Society, Inc., 142 F.3d 194 (4th Cir. 1998).

- This case is remarkable for having gone to court at all; isolated scholarly uses of materials are seldom the subject of litigation.
- It is also a reminder that reasonable, limited, scholarly uses of materials are most likely to be fair use.
- In this case, a researcher at a nonprofit foundation selected quotations from an unpublished literary manuscript of historical and cultural interest, and included the quotations in an analytical presentation that she delivered to a scholarly society.

THE ANALYTICS

- **Purpose:** The use was scholarly and transformative, providing criticism and comment on the original manuscript, thus favoring fair use.
- **Nature:** The unpublished nature of the work weighed against fair use, though this factor was not determinative.
- **Amount:** The amount used was consistent with the purpose of scholarly criticism and commentary, and there was no evidence of taking “the heart of the work,” thus weighing in favor of fair use.
- **Effect:** The court found no evidence that the presentation displaced any market for publishing the original work, and a presentation at a scholarly conference may in fact have increased demand for the full work. This factor therefore favored fair use.

Conclusion

- ☐ The court ruled that the researcher was acting within fair use.
- ☐ This case is important for many reasons. It affirms that customary quoting of materials, consistent with scholarly aims, is often within fair use.
- ☐ Many courts have construed fair use narrowly when applied to unpublished materials, but this case demonstrates that under proper circumstances, copying and quoting from unpublished works can be fair use.

**Nuñez v. Caribbean International News, Corp.,
235 F.3d 18 (1st Cir. 2000).**

- A newspaper published three suggestive and controversial photographs from the portfolio of a beauty pageant winner.

THE ANALYTICS

- **Purpose:** The newspaper is a commercial enterprise and the use of the photos certainly boosted sales of the paper. However, the paper's use of the photos was transformative; the original purpose of the photos may have been promotional, but the newspaper used them to inform the public about news events. The court ruled that this factor slightly favored fair use because of the informative use, the good faith of the newspaper in obtaining the photos, and the difficulty in reporting the news without the photos.
- **Nature:** The court did not characterize the photos as either factual or creative, leaning toward a neutral conclusion on this factor. In addition, the court emphasized that the reproduction did not threaten the right of first publication, and that the photos already had been shown on the television news.
- **Amount:** The entirety of each picture was copied, yet copying less than the whole would have rendered the photo useless to the purpose of news reporting. Ultimately, the court found this factor to be "of little consequence."
- **Effect:** The court found little or no effect (and if anything, a positive effect) on the market for these pictures, because a newspaper reproduction is not a market substitute for an 8" x 10" glossy. Because there was also little likelihood that a market for sale directly to newspapers would have been developed, the court found that this factor favored fair use.

Conclusion

- The court emphasized that generally reproduction by newspapers of professional photographs is infringement. However, if the photo itself is newsworthy, the photo is acquired in good faith, and the photo has already been disseminated, publication may well be fair use.

NXIVM Corp. v. The Ross Institute, 364 F.3d 471 (2d Cir. 2004).

- NXIVM produced executive business training seminars that generated considerable controversy. NXIVM brought a copyright infringement action against website operators for posting excerpts from NXIVM's training manuals. The training manuals were unpublished in the sense that they were not available to the general public.

THE ANALYTICS

- **Purpose:** The purpose of the use was deemed “transformative,” because it was to criticize NXIVM’s seminars and manual. Because the use was transformative, the first factor favored fair use, even in light of the bad faith in which the manuals were obtained.
- **Nature:** Because both sides conceded that the work was unpublished, the second factor weighed against fair use.
- **Amount:** The amount used was only as necessary to further the transformative purpose. Also, Ross did not take the “heart of the work,” because there was no specific portion that constituted the heart of NXIVM’s manual. Thus, the third factor weighed in favor of fair use.
- **Effect:** The court found that criticism of a seminar or organization did not substitute for the seminar itself or its market, and any harm to the market as a result of such criticism was merely a byproduct of free expression and public discussion. Thus, the fourth factor leaned in favor of fair use.

Conclusion

- This case demonstrates that even posting materials on publicly accessible websites can be within fair use, particularly if the use is in the context of critical discussion, and only portions are copied.

Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc., 55 F.Supp.2d 1113 (D. Nev. 1999).

- Tiffany Design created a digitally altered photographic image of the Las Vegas strip. Reno-Tahoe Specialty produced a composite image of Las Vegas and included images of at least six buildings scanned and inserted from Tiffany's work.

THE ANALYTICS

- **Purpose:** The use of the images and the developments of the composite picture were to create a commercial product, weighing against fair use.
- **Nature:** The image copied was a computer-enhanced photograph, with numerous original elements of lighting, perspective, shading, and subject orientation. The creative nature of the original work tipped this factor against fair use.
- **Amount:** The entire image was scanned, although only portions were used.
- **Effect:** The court found that incorporation of components of the scanned image could harm the commercial demand for Tiffany's depictions of the Las Vegas Strip, causing this factor to weigh against fair use.

Conclusion

- The court ruled that the defendants' use of images did not constitute fair use. Thus, scanning and manipulating a highly creative work may be beyond the limits of fair use, especially if the ultimate purpose is to include elements of the original work in a commercial product that might compete with the existing market for the original.