



PennState

# COPYRIGHT INFORMATION

For university teaching and research

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## Fair Use

“ [T]he fair use of a copyrighted work . . . is not an infringement of copyright.

Fair use gives users the right to use copyrighted material without permission under certain circumstances. If a use is fair, the user need not notify or seek permission from the copyright holder.

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## Illustrative Purposes

[Section 107 of the Copyright Act](#) gives examples of purposes that are favored by fair use: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, [and] research.” Use for one of these “illustrative purposes” is not automatically fair, and uses for other purposes can be fair. The statute lays out four factors to consider in deciding whether a particular use is fair.

## Four Factors of Fair Use

“ In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Each of the four factors has subfactors that influence how the factor weighs in favor of or against fair use. On its own, no individual subfactor guarantees that a use is fair or is not fair. The subfactors must all be weighed together.

## First Factor: Purpose and Character of the Use

The first factor is one of the most important of the four factors.

### Less Likely to Be Fair

- **Commercial purpose:** If a use is for commercial purposes, that weighs against fair use. Because Penn State is a non-profit, uses in university work are generally not commercial. If you will be using a work in more than one context (e.g., including an image in your dissertation and later in a published book), keep in mind that this subfactor's impact can change.
- **Bad faith:** Lying, cheating, or otherwise acting in bad faith in order to gain access to the work you use makes your use of that work less likely to be fair.

### More Likely to Be Fair

- **Transformative purpose:** Use of a work is transformative when it is used for a purpose different than the purpose for which it was originally created. For example, using advertisement images from the 1960s to discuss use of race in advertising is a transformative use, because the advertisements were originally created to sell products. Using a work transformatively weighs in favor of fair use. It can also impact other subfactors below.
- **Educational purpose:** Using a work for educational purposes weighs in favor of fair use. For example, using a diagram of a biological process to teach about that process is an educational use. Similarly, using a cartoon as an example of an artistic technique you are teaching is an educational use. In contrast, using a cartoon for entertainment in a biology class is less likely to be an educational use.
- **Illustrative purposes:** Using a work for any of the illustrative purposes, "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, [and] research," weighs in favor of fair use.

## Second Factor: Nature of the Copyrighted Work

The second factor typically is the least important of the four fair use factors.

### Less Likely to Be Fair

- **Work is unpublished:** Using a work that is unpublished weighs against fair use. This comes from [Harper & Row v. Nation Enterprises](#), a case involving a news magazine publishing a small excerpt from a soon-to-be-published presidential memoir without permission. The fact that a work is unpublished is likely less important if the work was not created for publication or is not about to be published (such as a letter in an archive). After *Harper & Row*, Congress amended the fair use statute to clarify that fair use can apply to unpublished materials, “if such finding is made upon consideration of all the [fair use] factors.”
- **Work is creative:** Using a creative work weighs against fair use, because the strength of copyright is greater for creative works at the core of copyright protection, such as novels, paintings, and songs.

### More Likely to Be Fair

- **Work is factual:** In contrast to use of a creative work, use of a factual work is more likely to be fair. Facts themselves are not copyrightable. Factual works that are on the fringe of copyright, such as meeting minutes, have thinner protection.

## Third Factor: Amount and Substantiality

### Less Likely to Be Fair

- **Using the heart of the work:** Using the “heart of the work” weighs against fair use. This doctrine also comes from the Harper & Row case mentioned above. The news magazine in that case used a very small but very important part of President Ford’s memoir. It was the part of the memoir where he discusses his decision to pardon President Nixon, one of the most important decisions of his presidency. Using that part of the book weighed strongly against fair use because it was such an important part of the book.
- **Using more of the work:** In general, the more you use, the less likely your use is to be fair. (For an exception related to transformative uses, see below.) Contrary to popular belief, fair use doctrine is not based on numerical amounts. Although using more of a

work weighs against fair use, all the fair use factors must be weighed together — other factors and subfactors can outweigh this one.

## Neutral

- **Necessary for a transformative purpose:** If the amount used is necessary to the transformative purpose of the use, this factor is neutralized.

## Fourth Factor: Effect on the Market

The fourth factor is one of the most important of the four factors.

### Less Likely to Be Fair

- **Use decreases demand for the original work by acting as a substitute:** If your use provides a substitute for the original and therefore decreases demand for licensed copies, that weighs against fair use. For example, this subfactor would weigh against fair use if you scanned a current bestseller and hosted it on a public website. In contrast, scanning the same bestseller to create a linguistic corpus for your own research would not provide a substitute. Another example relates to books that are out of print and are not available from the rightsholder as ebooks or via print on demand — sharing copies of those books is less of a problem under this subfactor because it does not impact an established market.
- **Use is the sort that the rightsholder currently licenses:** If your use is one that the rightsholder currently licenses, that weighs against fair use. For example, if you use a stock photo on your website without a license and the stock photo agency licenses that photo for use on a website, this subfactor would weigh against fair use.

### More Likely to Be Fair

- **Use is the sort the rightsholder is unwilling to license:** Fair use is designed in part to enable criticism. If you cannot get a license, either because the rightsholder disapproves of your use or because the rightsholder does not license that type of use, that weighs in favor of fair use.

## Examples

- **Art criticism** that requires reproducing the art is often fair use. An example of art criticism that requires reproducing the art is Arthur Lubow, "[A Portrait of America That](#)

[Still Haunts, Decades Later](#),” *The New York Times*, June 12, 2020, sec. Arts.

## Fair Use in Seven Words

Fair Use in Seven Words



## Fair Use Checklist

*We are considering retiring the Fair Use Checklist and recommending the list of factors and subfactors above instead. Please contact us at [copyright@psu.edu](mailto:copyright@psu.edu) if your unit at Penn State still uses the checklist.*

You can use the PSU Fair Use Analysis Checklist to help analyze whether a use of a copyrighted work could be a fair use. No single item or factor is determinative of fair use. Download the [Fair Use Analysis Checklist PDF](#) or the [Fair Use Analysis Checklist Word Document](#).

## What if My Use isn't a Fair Use?

If a planned use isn't a fair use and doesn't fall within another exception, you have options:

- Review your analysis/checklist. How can you change your planned use to turn it into a fair use? Can you reduce the amount of material or replace the material with material that's more likely to be a fair use?

- Use openly licensed (e.g., [Creative Commons](#)) or [public domain](#) material instead.
- [Obtain permission](#) from the copyright holder.

## Fair Use at Penn State

Review the [PSU IP Policy regarding Fair Use](#).

## Other Fair Use Resources

- [US Copyright Office Fair Use Index](#)
- [Codes of Best Practices in Fair Use](#)
- [Summaries of Fair Use Cases](#)
- [Fair Use for Teaching and Research from the University of California](#)
- [Measuring Fair Use: The Four Factors, from NOLO, hosted at Stanford](#)



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SCHEDULE APPOINTMENT

SUBMIT A REQUEST

Submit copyright and scholarly communications questions and requests for consultations & trainings using the [Request Form](#)

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