



University System of Georgia
Creating A More Educated Georgia

The Fair Use Exception

One may make fair use of a copyrighted work without the copyright holder's permission. The determination of whether a use of a copyrighted work is within fair use depends upon making a reasoned and balanced application of the four fair use factors set forth in Section 107 of the U.S. Copyright Act. Those factors are

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

All four factors should be evaluated in each case, and no one factor will determine the outcome. While fair use is intended to apply to teaching, research, and other such activities, an educational purpose alone does not make a use fair. The "purpose and character of the use" is only one of four factors that users must analyze in order to conclude whether or not the use is fair, and therefore lawful.

Moreover, each of the factors is subject to interpretation as courts work to apply the law. Working through the four factors is important. Simple rules and solutions may be compelling, but by understanding and applying the factors, users receive the benefits of the law's application to the many new needs and technologies that continue to arise at member institutions within the University System of Georgia.

Understanding the Four Factors

The following is a brief explanation of the four factors from the fair use statute. Keep in mind that fair use requires weighing and balancing all four factors before reaching a conclusion. Additionally, the four factors are nonexclusive, so other factors may be considered in determining whether a use is fair.

Purpose and Character of the Use

The law explicitly favors nonprofit educational uses over commercial uses. Activities that are truly confined to the university in support of nonprofit education are likely to receive favorable treatment. Courts also favor uses that are "transformative," or that are not mere reproductions. A transformative use has been defined as a use that adds to or changes the original work in such a way as to give it new expression, meaning, or message. Fair use is more likely when the copyrighted work is "transformed" into something new or of new utility, such as quotations incorporated into a paper, and pieces of a work mixed into a multimedia product for teaching. The use of works in the context of criticism or critical analysis may also be given favorable treatment. The statute also notes that "multiple copies for classroom use" are permitted.

Nature of the Copyrighted Work

This factor examines characteristics of the work being used. Quite simply, courts have tended to apply fair use differently to different types of works. For example, courts have concluded that the unpublished nature of a work is a fact weighing against fair use. Courts more readily favor the fair use of nonfiction, as opposed to fiction and other highly creative works, including novels, short stories, poetry, and modern art images. Only those portions of the work which are relevant to a purpose favoring fair use should be used. Instructors should carefully review uses of "consumable" materials, such as test forms and workbook pages that are meant to be used and repurchased, as their use is less likely to qualify as fair use.

Amount of the Work Used

Amount is measured both **quantitatively** and **qualitatively**. No exact measures of allowable quantity exist in the law. Quantity must be evaluated relative to the length of the entire work and in light of the amount needed to serve a proper objective. The amount taken from the work should be narrowly tailored to serve these purposes. Any copying of an entire work usually weighs heavily against fair use. Images generate serious controversies because a user nearly always wants the full image, or the full "amount." A "thumbnail," or low-resolution version of the image, might be an acceptable "amount." Motion pictures are also problematic because even short clips

may borrow the most extraordinary or creative elements of the work. One may also reproduce only a small portion of any work, but still take "the heart of the work." This concept is a qualitative measure that may weigh against fair use.

Effect on the Value of or Market for the Work

This factor assesses the extent to which a given use serves as a substitute for the markets or potential markets for the work. The "effect on the market" factor is closely linked to the "purpose of the use" factor. For example, if the purpose of the use is commercial, any adverse market effect resulting from that commercial use weighs against fair use. If the purpose of the use is non-commercial, however, an adverse market effect is less likely, weighing in favor of fair use. Occasional quotations or photocopies may have no adverse market effect, but reproductions of software and videotapes can make direct inroads on the potential markets for such works.

All four factors must be considered in determining whether a use of a work is a fair use.

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