

# What Is Copyright?

*From the U.S. Copyright Office: "Copyright is a form of protection provided by the laws of the United States (title 17, U. S. Code) to the authors of 'original works of authorship,' including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works... It is illegal for anyone to violate any of the rights provided by the copyright law to the owner of copyright. These rights, however, are not unlimited in scope. Sections 107 through 122 of the 1976 Copyright Act establish limitations on these rights. In some cases, these limitations are specified exemptions from copyright liability. One major limitation is the doctrine of "fair use," which is given a statutory basis in section 107 of the 1976 Copyright Act. In other instances, the limitation takes the form of a "compulsory license" under which certain limited uses of copyrighted works are permitted upon payment of specified royalties and compliance with statutory conditions."*

## What rights does copyright provide?

Copyright provides copyright holders with a set of exclusive rights, including the ability to:

- reproduce (copy) the work
- make derivative works (turn your book into a movie)
- distribute, sell, rent and/or lease copies of the work
- perform or display the work publicly

Copyright holders may be someone other than the original author or creator. Some authors/creators transfer some or all of their copyright to other entities in exchange for having their work published, produced or distributed. Employers may also assert that a work is made under "work for hire" circumstances and thus claim some or all copyrights.

## What is and is not protected?

- Copyright protects creative works that have been fixed in some tangible form of expression.
- Creative works may include literary works, musical works, dramatic works, choreographic works, motion pictures, sound recordings, architectural works, visual art, and computer programs.
- In order to be protected, works must have some element of creativity. Blank forms or "common property" information sources such as calendars or phonebooks are not protected.
- Symbols, slogans, and names are covered by other areas of intellectual property law such as patents and trademarks.
- Works that are not protected by copyright or other laws are said to be in the public domain.

## Additional Information

- Copyright Law of the United States – Available online from the U.S. Copyright Office: <http://copyright.gov/title17>
- Copyright Matters – List of resources provided by UNM's Office of University Counsel: <http://counsel.unm.edu/resources/copyright-matters.html>
- [copyrighthelp@unm.edu](mailto:copyrighthelp@unm.edu) - Email your copyright questions to UNM Libraries staff (information and collegial consultation, not legal advice)

# Fair Use Checklist

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Fair Use is identified in Section 107 of the U.S. Copyright Act. Fair use is determined by a balanced application of four factors set forth in the statute:

1. the purpose of the use
2. the nature of the work used
3. the amount and substantiality of the work used, and
4. the effect of the use upon the potential market for or value of the work used.

Use this checklist to guide and document your decision-making. You may find that you check more than one box in each column and even check boxes across columns. Consider each factor and evaluate whether the cumulative weight of your analysis favors or turns you away from fair use and towards seeking permission to use a copyrighted work.

## 1 Purpose of the use

*The fair use statute lists several purposes 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. 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 pieces of work mixed into a multimedia product for your own teaching needs or included in commentary or criticism of the original.*

### Favoring Fair Use:

- Teaching (including multiple copies for classroom use)
- Research
- Scholarship
- Nonprofit educational institution
- Criticism
- Comment
- News reporting
- Parody
- Transformative (creation of a new work, new purpose)
- Restricted access (to students or other group)

### Opposing Fair Use:

- Commercial activity
- Profiting from use
- Entertainment or non-critical use
- Bad-faith behavior
- Denying credit to original author

## 2 Nature of the work used

*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 of the work. For example, the unpublished “nature” of a work, such as private correspondence or a manuscripts, can weigh against a finding of a fair use. The courts reason that copyright owners should have the right to determine the circumstances of “first publication.” Use of a work that is commercially available specifically for the education 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.*

### Favoring Fair Use:

- Published work
- Factual or nonfiction based
- Important to favored educational objectives

### Opposing Fair Use:

- Unpublished work
- Highly creative source (art, music, fiction)

### ③ Amount and substantiality of the work used

Although the law does not set exact quantity limits, 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. Sometimes the exact “original” is not always obvious. A book chapter might be a 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 “substantiality” of the work used is another key factor. 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. 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” which may be a way to serve educational purposes.

#### Favoring Fair Use:

- Small quantity proportionate to the work
- Portion used is not central or significant to entire work
- Amount is appropriate for educational or other purpose

#### Opposing Fair Use:

- Large portion or whole work used
- Portion used is central to or “heart of the work”

### ④ Effect of the use on the potential market for or value of work used

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.” 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 affect the potential markets for those works.

#### Favoring Fair Use:

- Lawfully purchased/acquired copy of original work
- One or few copies made
  
- No significant effect on market
  
- No similar product marketed by copyright holder
- Lack of licensing mechanism

#### Opposing Fair Use:

- Could replace sale of copyrighted work
- Significantly impairs market or potential market for copyrighted work or derivative
- Reasonably available licensing mechanism for use of copyrighted work
- Affordable permission available for using work
- Numerous copies made
- Made accessible on the Web or in other public forum
- Repeated or long-term use

### Fair Use is a Balancing Test

- Always keep in mind that you need to apply all four factors. Do not jump to a conclusion based simply on whether your use is educational or commercial. You still need to evaluate, apply, and weigh in the balance the nature of the copyrighted work.
- This flexible approach to fair use is critical in order for the law to adapt to changing technologies and to meet innovative needs of higher education.
- Not all factors need to weigh either for or against fair use, but overall the factors usually lean one direction or the other. Your analysis should guide you to a conclusion.