

## Fair Use of Copyright-Protected Works 7-19-2023

Fair use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances. [Section 107 of the Copyright Act](#) provides the statutory framework for determining whether something is a fair use and identifies certain types of uses—such as criticism, comment, news reporting, teaching, scholarship, and research—as examples of activities that may qualify as fair use. Section 107 calls for consideration of the following four factors in evaluating a question of fair use:

**Purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes:** Courts look at how the party claiming fair use is using the copyrighted work, and are more likely to find that nonprofit educational and noncommercial uses are fair. This does not mean, however, that all nonprofit education and noncommercial uses are fair and all commercial uses are not fair; instead, courts will balance the purpose and character of the use against the other factors below. Additionally, “transformative” uses are more likely to be considered fair. Transformative uses are those that add something new, with a further purpose or different character, and do not substitute for the original use of the work.

*The Docent Council is a volunteer organization of the Santa Barbara Museum of Art, a non-profit. Its members give educational tours of the museum to adult visitors and to schoolchildren who are on field trips for scheduled class activities. The Council maintains a private website (password protected and not visible to browsers) for the purpose of gathering talking points that can be utilized in touring. Materials going into each post are transformed into a 24-element form that can be searched and displayed in a variety of ways.*

**Nature of the copyrighted work:** This factor analyzes the degree to which the work that was used relates to copyright’s purpose of encouraging creative expression. Thus, using a more creative or imaginative work (such as a novel, movie, or song) is less likely to support a claim of a fair use than using a factual work (such as a technical article or news item). In addition, use of an unpublished work is less likely to be considered fair.

*Our form begins with a mid-sized image of the work, which is either owned by the museum or borrowed for a special exhibition, with permission, from a lending institution or individual. There may be up to two additional low-resolution thumbnails such as a portrait of the artist or a related work. The remainder of the material is either descriptive and historical prose about the work or critical reviews of the work.*

**Amount and substantiality of the portion used in relation to the copyrighted work as a whole:** Under this factor, courts look at both the quantity and quality of the copyrighted material that was used. If the use includes a large portion of the copyrighted work, fair use is less likely to be found; if the use employs only a small amount of copyrighted material, fair use is more likely. That said, some courts have found use of an entire work to be fair under certain circumstances. And in other contexts, using even a small amount of a copyrighted work was determined not to be fair because the selection was an important part—or the “heart”—of the work.

*The written components of the post include short snippets of copyrighted material, looking a lot like an undergraduate term paper, only much briefer. Sources are properly attributed and copyright notices, when found, are acknowledged.*

**Effect of the use upon the potential market for or value of the copyrighted work:** Here, courts review whether, and to what extent, the unlicensed use harms the existing or future market for the copyright owner’s original work. In assessing this factor, courts consider whether the use is hurting the current market for the original work (for example, by displacing sales of the original) and/or whether the use could cause substantial harm if it were to become widespread.

*Our use cannot hurt the current market for the original work because we are quoting only a tiny portion of the work and are not making our database public. Our use cannot become widespread because it is not visible to the internet and we are not disseminating it in any other way. Our website is read-only and contents are encrypted to the user’s desktop. Our website contains the following banner on the home page: “The contents of this website are being made available for teaching, study, and research only.” We are strictly a volunteer organization and have no means of producing income from this project.*

SOURCE: <https://www.copyright.gov/fair-use/> (downloaded July, 2023)