

## ORIGIN OF THE FOUR FACTORS

The four factors reflect early judicial efforts to balance the application of copyright law in ways that simultaneously allow uses of copyrighted works to serve the greater society while safeguarding the exclusive rights of copyright holders. Congress incorporated those "common law" efforts and policy concerns into the Copyright Act of 1976. Like the users of copyrighted works, however, courts do not read section 107 and apply the four factors in a vacuum. Courts apply them to determine the lawfulness of a specific use of a specific copyrighted work in a specific time surrounded by specific circumstances. This is how librarians should make fair use decisions. *No rules or guidelines can simplify this decision-making process.* The U.S. Supreme Court has made clear that no "bright-line rules" determine whether a use is fair use.<sup>1</sup> That determination rests in the four factors and how you apply them to your facts and circumstances.

## Applying the Four Factors

One useful way to begin any fair-use analysis is to take a look at the model prepared by Professors Kenneth D. Crews and Dwayne K. Buttler.<sup>2</sup> (See next page)

The model gathers together a multiplicity of facts and circumstances that have occurred in fair use cases and that courts have found significant in weighing how those facts and circumstances fit within the four-factor analysis.

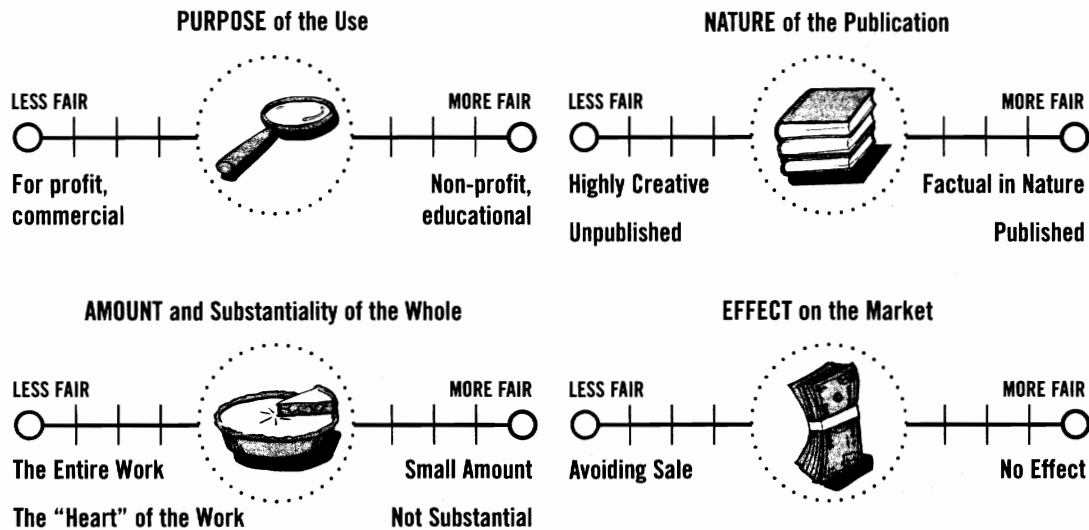
Appendix C includes analyses of several landmark court decisions that demonstrate how courts have applied fair use. Since there is no case law that specifically addresses fair use and its application in libraries, we asked Professor Buttler to apply fair use to the scenario that led off this chapter—making digital copies of Professor Kahn's reserve readings.

1. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

2. Indiana University-Purdue University in Indianapolis. *Checklist for Fair Use*. <http://extended.unl.edu/pdf/fairusechecklist.pdf> (accessed November 21, 2003).

## FAIR USE CONTINUA

The following four continua shed light on the Four Factors of Fair Use



### Buttler's Analysis

#### 1 Purpose

E-reserve service furthers the teaching, learning, and scholarship of students. Libraries typically limit the use of resources solely to particular students enrolled in specific classes, not allowing access to all who might happen upon a Web page. That limit further reinforces and demonstrates the purpose of using the materials: teaching and

learning. E-reserves also can serve as something of a "multiple-copies-for-classroom-use" opportunity, yet in practice actually might lessen the number of copies. The library typically would make only one copy of the work and would make that lone copy available electronically to multiple students. These facts and circumstances might generally favor a finding of fair use, but they certainly don't end the fair use inquiry. All four factors must be analyzed and weighed in applying fair use, not just the purpose.

#### 2 Nature

This factor asks about the nature of the original work. Fair use generally favors the use of published works over unpublished works.<sup>3</sup> Unpublished works enjoy a bit thicker protection under the theory that the author should have the right to decide not only when to publish but also whether to publish at all. However, the statute itself now indicates: "the fact that a work is unpublished shall not itself bar a finding of fair use."<sup>4</sup> Thus, fair use could support the use of unpublished works in some circumstances. The other three factors, for instance, might weigh heavily in favor of fair use. Making use of more factually based works also can support a fair use finding. On the other hand, using fictional or highly creative works such as art, music, novels, plays, and the like might make a fair use outcome less likely. Professor Kahn assigns a range of diverse readings and materials; some may fall easily within fair use, others outside its ambit. Nature is but one of four factors.

3. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

4. 17 U.S.C. §107 (2003). Congress added this language to the statute in 1992.

### 3 Amount

In general, less is better, but there may be instances when using a greater amount of the work, maybe even the whole thing, is legitimate. Remember the purpose factor? Purpose can relate closely to amount, or more precisely, ought to relate closely to amount. The more you use of a given work, the more you will need to articulate not only well but also clearly how that amount might be critical to serving your purpose, for instance, directly supporting teaching goals and pedagogy.

A difficulty in understanding and applying an incremental approach, that is, an amount standard, to fair use determinations is the seeming bias toward print materials. It is usually less difficult for faculty, librarians, and others to appreciate how one might limit the use of written

works to particular teaching and learning designs rather than a photograph or musical work. If students don't need to read a whole article to understand a particular nuance, for instance, why copy and assign the whole work? Just copy and assign directly relevant portions of it. The more difficult conundrum is communicating visually or aurally in their broadest sense. Think about teaching photography and photographic principles. Can one teach photography by using only increments or percentages of photographs or other visual works? Is the lower left-hand corner, somewhere near the middle, just above the border, enough to meet learner needs? Probably not. What about teaching music composition? Is listening to 10 percent or ten seconds of a particular work sufficient to convey the flavor of the work or something of more substance? Can you use a whole work and still fit

within fair use? Such a quandary can raise difficult challenges in applying fair use. Whole works have successfully constituted fair use in some fairly narrow instances.<sup>5</sup> Using whole works also has weighed against fair use in other instances.

### 4 Effect

Effect is in some ways the most mysterious, and perhaps most irreconcilable, factor of fair use. Some courts have suggested that it might "weigh" more than the other factors, but the Supreme Court has sought to refine and arguably to extinguish this narrow interpretation.<sup>6</sup> Copyright owners might claim that effect ought to determine the outcome of a fair use analysis.

Copyright users might agree that effect is an important factor but not sufficiently crucial to simply supersede purpose. One useful way to think about

## tip

Do not confuse fair use with fair use guidelines. Guidelines are not included in the copyright law and therefore do not have the force or effect of law. Guidelines will be discussed further elsewhere in this chapter and are reproduced in Appendix B.

5. *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002) (reproduction of whole photographs as thumbnail images held fair use, with amount a fairly neutral factor).

6. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 590, n.21 (1994).

and frame effect might be to explore its extremes. Weighing each of the four factors is after all a continuum in both theory and practice. At one end of each factor would lie the potentially perfect fair use, at the other end the possibly big-time infringement. For example, making one copy of a copyrighted work is likely to have little if any effect at all on the market for the original work. This outcome would include the sometimes overlooked, but equally important, potential market for the work—the licensing or permissions opportunities. On the other hand, using your bank of 150 CD burners to rip off the latest musical hit so that you might sell it for \$.50 from your Web site might destroy the market for that original \$15.99 version at the nationwide record stores.

The Supreme Court has framed the larger policy issue by saying that “to negate fair use one need only show that if the challenged use should

become widespread, it would adversely affect the potential market for the copyrighted work.”<sup>7</sup> Usually one will need to investigate a few facts to assess the “market” and “effect” on it for a particular use. Important questions—What is the market and “potential” market? Has a market developed at all? What is its rough size—a handful of possible buyers for some precisely focused newsletter, or a wealth of takers for a Hollywood film? Making a copyrighted work available to a small group of enrolled students for the purpose of teaching, learning, and scholarship is likely an easier fair use case than sharing that work with six billion people worldwide on a publicly accessible Web site. Ease and cost of acquiring permission also is a question to ponder and address in assessing the potential market.

The variation and twists in applying fair use can be as diverse as the facts and circumstances

that might lead to applying it—making use of copyrighted materials. Understanding fair use is not always easy. Applying it, however, is almost always possible in making use of copyrighted works, particularly the kinds of uses that underscore the essential work of the library and education communities. Fair use is not always logical or simple, but it is the most flexible and immediate means to address a wide range of uses that might take place in a library and educational setting.

## tip

A useful practice for addressing amount dilemmas:      ahead,      the unique needs and opportunities of diverse disciplines, and      how much of a copyrighted work is needed to achieve your pedagogical goals.

7. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) at 451; *id.* at 484 and n.36 (collecting cases) (dissenting opinion)).

## CHECKLIST FOR FAIR USE

Please complete and retain a copy of this form in connection with each possible "fair use" of a copyrighted work for your project.

NAME	DATE	PROJECT
INSTITUTION		PREPARED BY

*Favoring Fair Use*

*Opposing Fair Use*

### PURPOSE

- |   |   |
|---|---|
| <input type="radio"/> Teaching (including multiple copies for classroom use)              | <input type="radio"/> Commercial activity               |
| <input type="radio"/> Research  | <input type="radio"/> Profiting from the use            |
| <input type="radio"/> Scholarship   | <input type="radio"/> Entertainment                     |
| <input type="radio"/> Nonprofit Educational Institution                                   | <input type="radio"/> Bad-faith behavior                |
| <input type="radio"/> Criticism   | <input type="radio"/> Denying credit to original author |
| <input type="radio"/> Comment   |   |
| <input type="radio"/> News reporting  |   |
| <input type="radio"/> Transformative or Productive use (changes the work for new utility) |   |
| <input type="radio"/> Restricted access (to students or other appropriate group)          |   |
| <input type="radio"/> Parody  |   |

### NATURE

- |   |   |
|---|---|
| <input type="radio"/> Published work                              | <input type="radio"/> Unpublished work  |
| <input type="radio"/> Factual or nonfiction based                 | <input type="radio"/> Highly creative work (art, music, novels, films, plays) |
| <input type="radio"/> Important to favored educational objectives | <input type="radio"/> Fiction   |

### AMOUNT

- |   |  |
|---|--|
| <input type="radio"/> Small quantity  | <input type="radio"/> Large portion or whole work used                       |
| <input type="radio"/> Portion used is not central or significant to entire work | <input type="radio"/> Portion used is central to work or "heart of the work" |
| <input type="radio"/> Amount is appropriate for favored educational purpose     |  |

### EFFECT

- |  |   |
|--|---|
| <input type="radio"/> User owns lawfully acquired or purchased copy of original work               | <input type="radio"/> Could replace sale of copyrighted work  |
| <input type="radio"/> One or few copies made   | <input type="radio"/> Significantly impairs market or potential market for copyrighted work or derivative |
| <input type="radio"/> No significant effect on the market or potential market for copyrighted work | <input type="radio"/> Reasonably available licensing mechanism for use of the copyrighted work            |
| <input type="radio"/> No similar product marketed by the copyright holder                          | <input type="radio"/> Affordable permission available for using work                                      |
| <input type="radio"/> Lack of licensing mechanism  | <input type="radio"/> Numerous copies made  |
|  | <input type="radio"/> You made it accessible on Web or in other public forum                              |
|  | <input type="radio"/> Repeated or long term use   |