An explanation of the Four Factor Fair Use Test

The sections below explain the Four Fair Use Factors.

**Factor 1: Character**

**Question:** What is the character of the use?

<table>
<thead>
<tr>
<th>Nonprofit</th>
<th>Educational</th>
<th>Personal</th>
<th>Criticism</th>
<th>Commentary</th>
<th>News reporting</th>
<th>Parody</th>
<th>Otherwise &quot;transformative&quot; use</th>
<th>Commercial</th>
</tr>
</thead>
</table>

**Discussion:**

The use on the right tends to tip the balance in favor of the copyright owner - in favor of seeking permission. The uses in the middle, if they apply add weight to the tipping force of uses on the left; they subtract weight from the tipping force of a use on the right.

Imagine that you could assign a numerical weight to each use. A nonprofit educational use other than the middle uses, for example, making a copy of a journal article for a university class, might weigh 5 in favor of fair use. But a nonprofit educational use that is also criticism, for example, the inclusion by a faculty member of a quote from another's work in a scholarly critique, would weigh even more in favor of fair use: about 6 or 7. That's because the uses in the middle are "core" fair uses; the ones most dearly protected.

Even if they are for-profit, the core fair uses weigh in favor of fair use: that's why they subtract from the weight against fair use of a commercial use. A commercial duplication of an article from a journal might weigh 5 against fair use. But a commercial commentary or quotation would barely tip the scale, if at all.

This is not to suggest that fair use can be precisely quantitatively analyzed. Numbers are just a tool to illustrate how the facts interact and affect each other. Actually, numbers wouldn't make the analysis any easier: copyright owners and users would have just as much trouble agreeing on weights as we have agreeing on any other judgment about fair use.

**Application:**

Think about the uses you would need for teaching and research. Do they tend to weigh in favor of, or against fair use?

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*This policy was reviewed and approved by the President and Provost and endorsed by the Information Technology Committee in December 2008.

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Factor 2: Nature

Question: What is the nature of the work to be used?

- Fact
- Published
- Unpublished

- A mixture of fact and imaginative

- Imaginative

Discussion:

Again, uses on the left tip the balance in favor of fair use. But here, uses in the middle tend to have little effect on the balance. Uses on the right tip the balance in favor of seeking permission.

Application:

Think about the nature of copyrighted materials you need for teaching and research. Do they tend to tip the balance in favor of, or against fair use?

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**Factor 3: Amount**

**Question: How much of the work will you use?**

- Small amount
- More than a small amount

**Discussion:**

This factor has its own peculiarities. The general rule holds true (uses on the left tip the balance in favor of fair use; uses on the right tip the balance in favor of asking for permission), but if the first factor weighed in favor of fair use, you can use more of a work than if it weighed in favor of seeking permission. A nonprofit use of a whole work will weigh somewhat against fair use. A commercial use of a whole work would weigh significantly against fair use.

For example, a nonprofit educational institution may copy an entire article from a journal for students in a class as a fair use; but a commercial copy shop would need permission for the same copying. Similarly, commercial publishers have stringent limitations on the length of quotations, while a student writing a paper for a class assignment could reasonably expect to include lengthier quotes.

**Application:**

Think about the amount of copyrighted materials you need for teaching and research. Will the balance tip in favor of, or against fair use?

Which way does your balance tip after assessing the first three factors? The answer to this question will be important in the analysis of the fourth factor!
**Factor 4: Effect**

**Question:** If this kind of use were widespread, what effect would it have on the market for the original or for permissions?

| • After evaluation of the first three factors, the proposed use is tipping towards fair use | • Original is out of print or otherwise unavailable | • Competes with (takes away sales from) the original |
| • No ready market for permission | • Copyright owner is unidentifiable | • Avoids payment for permission (royalties) in an established permissions market |

**Discussion:**

This factor is a chameleon. Under some circumstances, it weighs more than all the others put together. Under other circumstances, it weighs nothing! It depends on what happened with the first three factors.

This factor asks, "If the use were widespread, would the copyright owner be losing money?" Well, actually, it asks, "If the use were widespread, and the use were not fair, would the copyright owner be losing money?" After all, if the use were fair, the copyright owner would not be entitled to any money at all, so he couldn't "lose" what he never would have had to begin with.

Courts deal with this propensity of the fourth factor to encourage circular reasoning by looking at the first three factors before evaluating the fourth. If the first three factors indicate that the use is likely fair, courts have not generally permitted the fourth factor to convert an otherwise fair use to an infringing one. On the other hand, if the first three factors indicate that the use is likely not fair, courts are willing to consider lost revenues under the fourth factor. In this case they do not have to assume the conclusion in order to reach it. They reach the conclusion based on good evidence that the use is not fair. This means that if a use is tipping the balance in favor of fair use after the first three factors, the fourth factor should not affect the results, even if there is a market for permissions, even if the owner would lose money because of the use.

On the other hand, if a use is tipping the balance in favor of asking for permission one need not "assume" it's not fair, the first 3 factors show that it's not. Add to that an active permissions market and the fourth factor will decisively tip the balance. Forget fair use. Get permission.

The facts in the middle illustrate circumstances that also supports fair use, as they indicate a lack of harm to the owner's economic incentive.

**Application:**

Does the balance for your use tip in favor of fair use or in favor of getting permission after consideration of all four factors?

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