**The Guiding Factors of Fair Use according to the American Library Association**

1. The purpose and *character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes*
   1. The courts have found that the use of a copyrighted work for educational purposes is the most likely application of the fair use statute. Outside educational purposes, any *noncommercial* use is likely to be looked upon as fair use if that use is “transformative.” A work is transformative if it is based on the copyrighted work but adds some new element or has a different character or serves a different purpose. An example of this would be a parody or a satire of an existing work. So, a *noncommercial* parody of a song would be fair use. An example of fair use for educational purposes is a situation in which a professor makes a few copies of an article to be held on reserve in the library. The library already owns the material and is simply making allowances for time constraints of the students. The professor could copy an article on a given topic for each member of a class if securing authorization would require an unreasonable length of time, and if the article was used one time only and was returned by each student after use. The professor could not use the article as part of the curriculum from semester to semester unless permission from the author was secured. In this example, one can see how the fair use statute seems to say that a given act is permitted, but then limits how permitted it is.
2. *The nature of the copyrighted work*
   1. The gist of this guideline concerns how the work is to be used. For example, a how-to book on woodworking contains plans that are to be copied and used by the reader. It is assumed that the reader is not going to take the book into the workshop and prop it open on the workbench. The physical nature of the work is significant in this guideline. Nonfiction works have received more leeway in fair use than fiction in court cases involving fair use. The issue seems to be that nonfiction simply relates facts whereas fiction reflects true creative inspiration. A health workbook with tear-out pages for doing assignments would not be a good candidate for fair use if a teacher made copies of the consumable pages. An article from a textbook would be a good candidate for fair use. Audiovisual works or software are not good candidates for fair use.
3. *The amount and substantiality of the portion used in relation to the copyrighted work as a whole*
   1. One hundred words taken from an encyclopedia for educational purposes may be fair use, but one hundred words taken from a children’s book may not be. The guideline concerns not the volume of material alone, but what portion of the entire work the excerpt constitutes. Even though the amount of material used may be small, if it is deemed to constitute a significant part of the whole or is substantial in terms of importance, it is not permitted. So, how much is significant? The answer is not clear and, in many cases, the courts have had to decide how much is too much in a given situation. That is, even if a small amount of a short story is used, if it is considered the heart of the story, it is not permitted. Some universities have tried to give rules of thumb concerning the amount of material that may be used under fair use guidelines. For example, Penn State University is very specific in its guidelines for fair use of prose. Penn State’s Copyright Clearance Center states that a complete article up to 2,500 words may be used, or an excerpt from any prose work of not more than 1,000 words or 10 percent of the work, whichever is less, but in any event a minimum of 500 words. If the material to be copied is poetry, only 250 words may be used for educational fair use; if it is a children’s book, no more than 10 percent of the text may be used; and if it is an illustration, a diagram, a drawing, a cartoon, or a picture, only one per work is considered fair use.
4. *The effect of the use upon the potential market for or value of the copyrighted work*
   1. This is perhaps the better-understood concept of fair use. If the use of a copyrighted article impacts significantly on the potential of that work to provide a monetary profit to its author, the use is infringement and not fair use. In educational settings, a professor would be permitted to make copies of a work for nonprofit use if *all four* fair use guidelines are followed. A professor could not make photocopies of a worksheet from a single purchased workbook for all the students in the class. This would be detrimental to the market potential of the original work.

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| **Fair Use Would Be Permitted If the Purpose Is:**  Educational  Nonprofit  News  Criticism  Parody or Satire  “Transformative”  **Fair Use Would Not Be Permitted If the Purpose Is:**  Commercial  For Profit  For Entertainment  **Fair Use Would Be Permitted If the Nature of the Work Is:**  Published  Nonfiction  **Fair Use Would Not Be Permitted If the Nature of the Work Is:**  Unpublished  Creative (e.g., music or film)  Fiction | **Fair Use Would Be Permitted If the Amount Used Is:**  Small  Central to the work  **Fair Use Would Not Be Permitted If the Amount Used Is:**  Large  Not central to the work  **Fair Use Would Be Permitted If:**  The work is lawfully acquired (i.e., purchased)  There is no way to obtain permission  Few copies are available  There is no impact on profit  No similar product is available  **Fair Use Would Not Be Permitted If:**  Numerous copies are made  There is repeated use  The profit of the copyrighted work is affected  The work is easily licensed  The work is available on the Internet |

**FIGURE 3.1**

Fair Use Factors:

**Figure 3.2**

Copyright Protection Periods

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| **If the work was created:**  Before 1923  **The term of protection is:**  In the public domain  **If the work was created:**  1923–1963  **The term of protection is:**  28 years plus renewal for 47 years (plus another 20 years provided by the Sonny  Bono Act of 1998) making total protection time 95 years. If not renewed, protection expires after 28 years. | **If the work was created:**  1964–1977  **The term of protection is:**  28 years plus renewal for 67 years  **If the work was created:**  1978 and after  **The term of protection is:**  The life of the author plus 70 years. If a work has multiple authors, the protection under the most recent law (1976) is the life of the longest-living author plus  70 years. If the author is anonymous, or if the work is made for hire, the 1976  law protects the work for 95 years from the year of first publication or 120 years from the year of creation, whichever expires first. |