

Copyright and Fair Use

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**University of Nebraska
Medical Center™**

Legal Disclaimer

Copyright advice is provided by lawyers.

We are not lawyers.

This presentation is for educational purposes only.





Objectives

- Determine if a work is copyrighted
- Evaluate permissible use of a copyrighted work utilizing the four factors of fair use



Agenda

1. Why copyright matters
2. Decision framework
 - Includes fair use
3. Bonus: Image resources



Why does copyright matter?



Why copyright?

“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”



Copyright is a protection of a work and gives the creator exclusive rights.



Exclusive rights in copyrighted works

1. to **reproduce** the copyrighted work in copies or phonorecords;
2. to **prepare derivative works** based upon the copyrighted work;
3. to **distribute copies** or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
4. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to **perform** the copyrighted work publicly;
5. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to **display** the copyrighted work publicly; and
6. in the case of sound recordings, to **perform** the copyrighted work publicly by means of a digital audio transmission.



Ask Yourself

1. Is it protected by copyright?
2. Is there a license?
3. Is your use a fair use?
4. How do I get permission?



1. Is it protected by copyright?



“If you can see it, read it, watch it, or hear it – with or without the use of computer, projector, or other machine, the work is likely eligible for copyright protection.”

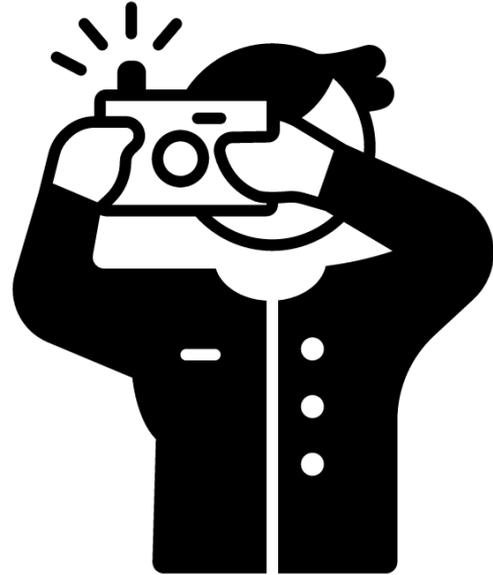
Kenneth D. Crews. Copyright essentials for librarians and educators. Chicago, American Library Association, 2000.



Copyright is Automatic

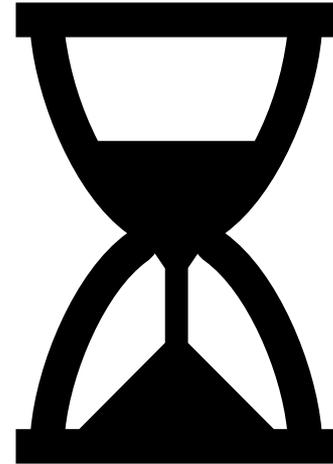
Once a work is fixed in a medium, it is copyrighted.

Formal copyright can be acquired but it is not necessary.

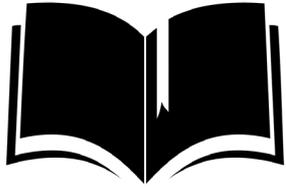


How long does it last?

- Life of the author +70 years
- Corporate author: 95 years from publication or 120 from creation (whichever comes first)

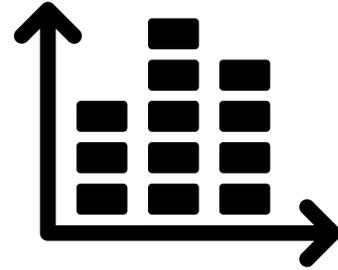
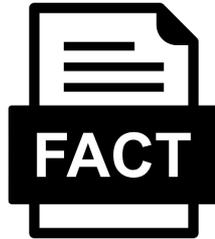


What is Copyrightable?





What is NOT Copyrightable?



Note: An expression of these can be copyrightable.



Public Domain

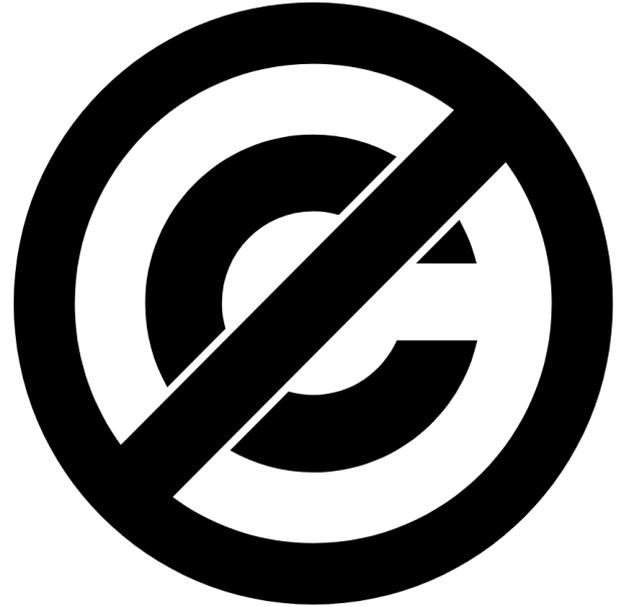
Copyright has expired.

Pre 1929

Copyright holder failed to comply with formalities.

Not eligible for copyright, like government publications.

Gifted by creators before copyright period ended.





Is it Protected by Copyright? For works published in the U.S.A.*

Directions:

- Set arrow at correct date
- Read information in windows
- Click on any asterisks [*] for clarifying information

Permission Needed?

No*

Copyright Status/Term

In Public Domain

Unpublished Works
(date of creation)

Date of First Publication

Before 1928

After 1927 & Before 1978

If published without © notice

After 1927 & Before 1964

If published with © notice, but not renewed after 28 years

After 1927 & Before 1964

If published with © notice, renewed after 28 years

After 1963 & Before 1978

If published with © notice

After 1977 & Before 2003

Created (unpublished) before 1978 & first published before January 1, 2003

After 1977 & Before March 1, 1989

If published without © notice & without subsequent registration

After 1977 & Before March 1, 1989

If published without © notice but registered within 5 years; or published with © notice

On or after March 1, 1989

Published with or without © notice

Published after 2002

Created before 1978 and author died more than 70 years ago

Created by Individual or Joint Authors

Created under Corporate Authorship



Copyright Symbol

Not required after
1989.

No symbol or notice
does not mean it is
free to use.





2. Is there a license?



License > Copyright



What is Licensed?

- Online library resources
- Computer software
- Mobile apps
- Creative Commons





FIGURE 20-8.

Osteoarthritis with joint space narrowing of both the distal interphalangeal joints and the proximal interphalangeal joints of the left hand. (Used, with permission, from Richman, MD.)



Source: Revere A, Fazzolari, DiGiacco J, Hoffman, Michael W, Rubin, Kenneth S, McQuinn. Current Medical Diagnosis & Treatment 2022
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Four components:

- BY
- NC
- ND
- SA



<https://creativecommons.org/>



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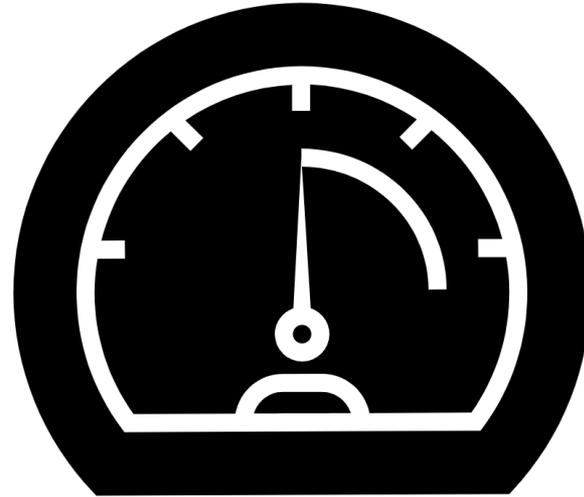
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Copyright Has Limits

- Libraries
- Classrooms
- Public Domain
- Expiration
- **Fair Use**





3. Is your use a fair use?



What is Fair Use?

Fair Use is an exemption, built into copyright law, that allows you to use portions of copyrighted material without permission for the purpose of teaching, research, news reporting, criticism, and commentary.

All factors (4) must be met to be considered a fair use.

Each application of fair use must be examined on a case-by-case basis

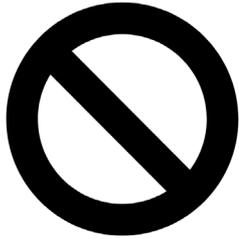


Factors of Fair Use

1. The **purpose** and **character** of the use
2. The **nature** of the copyrighted work
3. The **amount** and **substantiality** of the copyrighted work used
4. The **effect** of the use upon the **potential market**



1. Purpose and Character



Less likely to be fair

- Commercial purpose
- Decorative use



More likely to be fair

- Educational purpose
- Scholarly purpose
- Transformative purpose

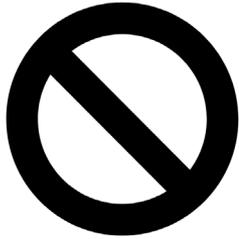


Transformative Use

"A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test If, on the other hand, the secondary use adds value to the original--if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings-- this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society."

Pierre N. Leval, *Toward a Fair Use Standard* 103 Harv. L. Rev. 1105 (1990) <http://docs.law.gwu.edu/facweb/claw/levalfrustd.htm>

2. Nature of the Work



Less likely to be fair

- Work is unpublished
- Work is creative

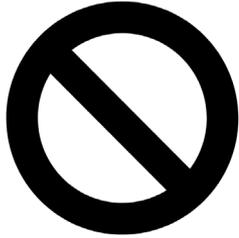


More likely to be fair

- Work is published
- Work is factual



3. Amount Used



Less likely to be fair

- Uses heart of the work
- Uses entire work or large part



More likely to be fair

- Uses portions
- If transformative, this factor is neutralized



Putting it into Practice

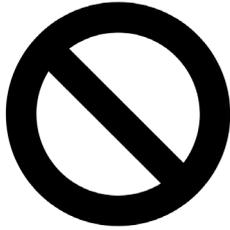
“There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use.”

Maxtone-Graham v. Burchael

- **Consider the amount needed to serve the purpose of the use in relation to the work being used.**
- This is a judgment call, and one you must be prepared to justify should your use of the work ever come into question!
- If straight copying or quoting, less is better.
- If transformative, can usually justify more!



4. Effect on the Market



Less likely to be fair

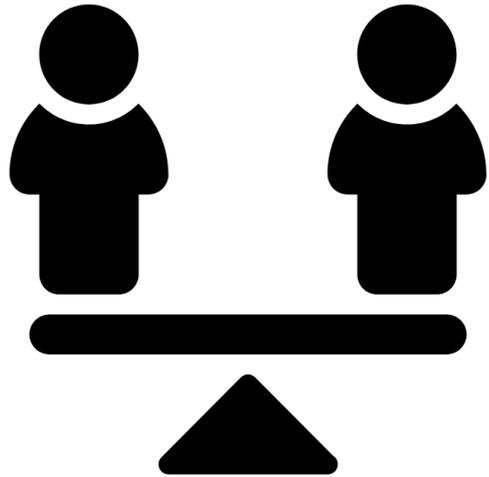
- Undermines or competes with existing market
- Permission can be obtained for your purpose at reasonable cost



More likely to be fair

- Use that has no effect on the market for the work
- It is not possible to obtain permission

Balance ... Transformativeness





Examples

Fair Use Index

<https://www.copyright.gov/fair-use/fair-index.html>



Chapman v. Maraj
No. 2:18-cv-09088-VAP-SS (C.D. Cal. Sept. 16, 2020)

Year	2020
Court	United States District Court for the Central District of California
Key Facts	<p>Plaintiff Tracy Chapman owns the copyright for the song <i>Baby Can I Hold You</i> (the “Composition”). Defendant Onika Tanya Maraj, professionally known as Nicki Minaj, experimented on a remake of the song <i>Sorry</i>, which she believed was an original work by Shelly Thunder but which her representatives later learned was a cover of the Composition. Minaj knew she needed to obtain a license to publish a remake of the Composition because her remake incorporated a large number of lyrics and vocal melodies from the Composition. Minaj made multiple requests to Chapman for a license, but Chapman denied each request. Minaj did not include her remake of <i>Sorry</i> on her album. Minaj contacted DJ Aston George Taylor, professionally known as DJ Flex, and asked if he would premiere a record that was not on her album. Minaj denies sending DJ Flex a copy of her remake of <i>Sorry</i> and she posted a message instructing him not to play any songs not on her album. Somehow DJ Flex obtained a copy of Minaj’s remake of <i>Sorry</i> and played it on the radio. Chapman sued Minaj, asserting copyright infringement. On cross-motions for summary judgment, Chapman asserted Minaj violated her copyright by creating and distributing a derivative work based on the Composition, while Minaj contended that her creation of the remake qualifies as fair use.</p>

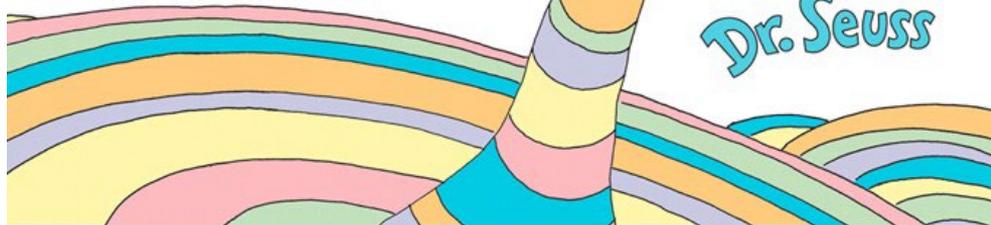


Holding	<p>The court found that the first factor, the purpose and character of the use, favored fair use. The court concluded that the initial purpose of Minaj's new work was experimentation. Given that Minaj "never intended to exploit the work without a license" and excluded the new work from her album, Minaj's use was not purely commercial. In addition, the court observed that "artists usually experiment with works before seeking licenses and rights holders typically ask to see a proposed work before approving a license." The court expressed concern that "uprooting . . . [these] common practices would limit creativity and stifle innovation within the music industry." The second factor, the nature of the copyrighted work, disfavored fair use because the Composition is a musical work, which is "the type of work that is at the core of Copyright's protective purpose." The third factor, the amount and substantiality of the portion used in relation to the work as a whole, favored fair use. Although Minaj's new work incorporated many lyrics and vocal melodies from the Composition, the material Minaj used "was no more than necessary to show Chapman how [Minaj] intended to use the Composition in the new work." The fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, favored fair use because "there is no evidence that the new work usurps any potential market for Chapman." Considering the factors together, the court found that Minaj's use was fair and granted partial summary judgment in Minaj's favor that her use did not infringe Chapman's right to create derivative works.</p>
Tags	Music
Outcome	Fair use found

Source: U.S. Copyright Office Fair Use Index. For more information, see <https://www.copyright.gov/fair-use/fair-index.html>.

Oh, the Places
You'll
Go!

By
Dr. Seuss



Oh, the Places
You'll
Boldly
Go!





Dr. Seuss Enters., L.P. v. ComicMix LLC
983 F.3d 443 (9th Cir. 2020)

Year	2020
Court	United States Court of Appeals for the Ninth Circuit
Key Facts	Plaintiff owns the copyrights of works authored and illustrated by the late Theodor S. Geisel (a/k/a Dr. Seuss), including the book <i>Oh, the Places You'll Go!</i> and two other works at issue in this case (collectively, " <i>Go!</i> "). Plaintiff publishes the works and licenses the works for use in other entertainment products. Defendants combined elements of <i>Go!</i> and the sci-fi franchise <i>Star Trek</i> to create the mash-up book <i>Oh, the Places You'll Boldly Go!</i> (" <i>Boldly</i> "). Defendants copied liberally from <i>Go!</i> to parallel its visual style and textual structure. In a public Kickstarter funding campaign, Defendants contended that <i>Boldly</i> was a fair use of <i>Go!</i> . Plaintiff brought suit alleging copyright infringement of <i>Go!</i> After twice denying motions to dismiss Plaintiff's copyright claim, the district court granted Defendants' summary judgment motion, concluding that <i>Boldly</i> was a fair use of <i>Go!</i> Plaintiff appealed.
Issue	Whether the use of graphic, literary, and other elements from copyrighted works, where combined with elements from other works to create a "mash-up," is fair use.



Holding	<p>The panel found the first factor, the purpose and character of the use, weighed against fair use because <i>Boldly's</i> commercial use of Seussian elements was not a parody or otherwise transformative. The court concluded that <i>Boldly</i> did not critique or comments on <i>Go!</i> as a parody would; rather, <i>Boldly</i> mimicked <i>Go!</i> and “paralleled <i>Go!'s</i> purpose.” On the second factor, the nature of the copyrighted work, the creative nature of <i>Go!</i> weighed against fair use. The third factor, the amount and substantiality of the work used, weighed “decisively” against fair use because <i>Boldly</i> closely replicated “the exact composition, the particular arrangements of visual components, and the swatches of well-known illustrations.” The court also observed that Defendants used the “heart” of the works and rejected an argument to evaluate the amount taken relative to the “entire corpus of the author.” The fourth factor, the effect of the use on the potential market for or value of the work, also weighed against fair use. The court held that, because fair use is an affirmative defense, Defendants had the burden of presenting favorable evidence about relevant markets and failed to do so. The court further observed that <i>Boldly</i> “intentionally targeted and aimed to capitalize on the same graduation market as <i>Go!</i>” and would likely curtail <i>Go!'s</i> existing and potential market for derivative works. Considering the four factors together, the court concluded that all factors weigh against fair use as <i>Boldly</i> was “a non-transformative commercial work that targeted and usurped <i>Go!'s</i> potential market.” Accordingly, the panel reversed the district court’s grant of summary judgment on fair use and remanded the case.</p>
Tags	Painting/Drawing/Graphic; Parody/Satire; Textual work
Outcome	Fair use not found

Source: U.S. Copyright Office Fair Use Index. For more information, see <https://www.copyright.gov/fair-use>.



Sometimes it's confusing!

Congress deliberately created fair use to be flexible so that it could apply to many different situations.

Unfortunately, though, this can lead to uncertainty regarding its application.





Fair Use Tools

- These decisions are very subjective and need to be made by the person utilizing the protected work
- Only works if you are completely honest!
- Keep a copy
 - Can be used as a legal document





University of Nebraska's Memorandum on Copyright Law and Compliance

Appendix A

FAIR USE CHECKLIST

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: _____
Department: _____ Prepared by: _____
Title/Description of Work Used: _____

PURPOSE

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

Reasoning: _____

NATURE

<u>Favorable Fair Use</u>	<u>Opposite Fair Use</u>
<input type="checkbox"/> Published work	<input type="checkbox"/> Unpublished work
<input type="checkbox"/> Factual or nonfiction based	<input type="checkbox"/> Highly creative work (art, music, novels, films, plays)
<input type="checkbox"/> Important to favored educational objectives	<input type="checkbox"/> Fiction

Reasoning: _____

AMOUNT

<u>Favorable Fair Use</u>	<u>Opposite Fair Use</u>
<input type="checkbox"/> Small quantity of work used	<input type="checkbox"/> Large portion or whole work used
<input type="checkbox"/> Portion used is not central or significant to entire work	<input type="checkbox"/> Portion used is central to work or "heart of the work"
<input type="checkbox"/> Amount is appropriate for favored educational purpose	

Reasoning: _____

EFFECT

<u>Favorable Fair Use</u>	<u>Opposite Fair Use</u>
<input type="checkbox"/> User owns lawfully acquired or purchased copy of original work	<input type="checkbox"/> Use could replace sale of copyrighted work
<input type="checkbox"/> One or few copies made of copyrighted work	<input type="checkbox"/> Significantly impairs market or potential market for copyrighted work or derivative
<input type="checkbox"/> No significant effect on the market or potential market for the copyrighted work	<input type="checkbox"/> Reasonably available licensing mechanism for use of copyrighted work
<input type="checkbox"/> No similar product marketed by copyright holder	<input type="checkbox"/> Affordable permission available for using work
<input type="checkbox"/> Lack of licensing mechanism	<input type="checkbox"/> Numerous copies made of copyrighted work
	<input type="checkbox"/> Work made available on the Web or other public forum
	<input type="checkbox"/> Repeated or long-term use of copyrighted work

Reasoning: _____



Other Fair Use Tools

Ken Crews' Fair Use Checklist:

<https://copyright.columbia.edu/basics/fair-use/fair-use-checklist.html>

ALA Fair Use Evaluator:

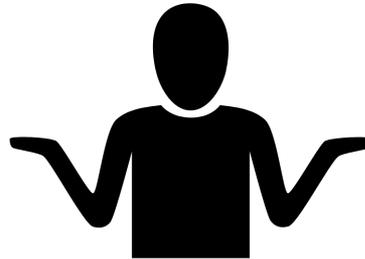
<https://librarycopyright.net/resources/fairuse/index.php>



In the End

Fair use does not give you a definitive yes

... it's a probably.





4. How do I get permission?



Getting Permission

- Contact the copyright holder (not necessarily the author!)
 - Plan ahead
 - Specify the amount of the work and purpose of use
 - Negotiate any payment
 - Get it in writing (and save it!)
- Use the Rights & Permissions links, located on many journal article pages
 - Remember, permission can sometimes mean \$\$



Bonus: Image resources

Creative Commons <https://search.creativecommons.org/>

Google Images > Tools > Usage Rights

Open Access journals (CC License)

United States .gov websites

Sources



Copyright Law of the United States (Title 17) <https://www.copyright.gov/title17/>

Cross, Will and Brown, Elizabeth. "Making & Sharing Scholarship: Copyright Issues in Scholarly Communication," presented on July 12, 2017. (Licensed open access)
<https://digitalcommons.unl.edu/scholcom/50/>

Enriquez, Ana. "The Fair Use Factors: Their History and Application," presented on February 25, 2016. (Licensed under the Creative Commons CC-BY 4.0 International License.)

Myers, Carla. "Copyright Bootcamp," presented on June 1, 2015. (Licensed under a Creative Commons Attribution-NonCommercial 4.0 International License.)

Smith, Kevin and Macklink, Lisa. (2014) "A Framework for Analyzing any U.S. Copyright Problem" <https://kuscholarworks.ku.edu/handle/1808/22723>

University of Nebraska's Memorandum on Copyright Law and Compliance <https://nebraska.edu/offices-policies/general-counsel/practice-areas/intellectual-property>



Questions?

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