

Fair Use Myths & Facts



**fair use
week**

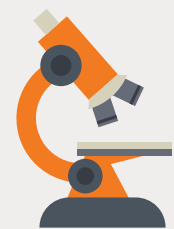
Many myths persist about fair use, an essential right that allows the use of copyrighted material without permission from the copyright holder under certain circumstances. We debunk some of the most common fair use myths here.



Myth: Fair use is a defense, or minor exception, not a right.

Fact: Fair use is a right that accommodates the First Amendment.

Fair use is a right explicitly recognized by the Copyright Act.¹ The Supreme Court has recognized this right as a “First Amendment safeguard” because copyright law might otherwise constrict freedom of speech.



Myth: Copyright’s primary purpose is rewarding authors and not promoting the public benefit.

Fact: The US Constitution clearly states that the purpose of the intellectual property system is to “promote the progress of science and the useful arts.”

The Supreme Court has repeatedly stressed that the intellectual property system must support the Constitutional rationale and, “The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”² Fair use promotes this rationale by ensuring works can be used for a variety of purposes.



Myth: Where a specific limitation or exception exists under copyright law, fair use does not apply.

Fact: Fair use is a right that exists in addition to specific exceptions.

While specific exceptions provide certainty for particular activities or apply where fair use does not, the fair use doctrine remains an important right that is flexible and responsive to new technologies and developments, as confirmed by courts.³



Myth: There is no guidance on fair use.

Fact: The statute, numerous court decisions, and best practices provide ample guidance.

Section 107 of the Copyright Act lays out four factors and also includes a non-exhaustive list of purposes that may be fair use. A multitude of court decisions also provide direction on fair use, particularly with respect to whether a use is transformative and therefore more likely to be considered fair use. Best practices,⁴ often grounded in court decisions, similarly provide helpful guidance by summarizing the best practices of a particular community.

1. Section 108(f)(4) of the Copyright Act specifically references “the right of fair use as provided by section 107.”

2. Feist Publications, Inc. v. Rural Television Services Co., 499 U.S. 340 (1991).

3. See, e.g., Authors Guild v. HathiTrust. The Second Circuit rejected the claim that Section 108 renders fair use inapplicable because of the plain language of the statute. Additionally, it found the creation of accessible format works for the print disabled was fair use and, as a result, “we need not consider” whether the activity was permissible under Section 121.

4. Codes of best practices have been created for a variety of communities and purposes. For numerous examples, see Center for Media & Social Impact, “Best Practices,” accessed January 19, 2017, <http://archive.cmsimpact.org/fair-use/best-practices>.



Myth: Fair use is only permitted where the use is non-commercial.
Fact: Courts have upheld fair use for commercial entities and commercial uses in a wide range of cases.

The commercial nature of the use is only one factor for the court to consider. Google, West Publishing, the NFL, and Sony are just a few examples of commercial entities that have prevailed in court cases by relying on fair use.



Myth: Digitization without authorization is not fair use. Fair use does not permit full-text copying.

Fact: Numerous circuits have upheld mirror-image copies as transformative and applied fair use.

The purpose of the digitization of the work is important in making a fair use determination. Numerous courts have found that digitization of a work and ingestion into a database for purpose of search is a quintessentially transformative use.⁵



Myth: Fair use is a US doctrine that breaks from international law and practice.

Fact: Fair use or fair dealing is a doctrine widely incorporated around the world.

The concept of fair use or fair dealing is not unusual or an outlier; fair use or fair dealing exists in more than 40 countries. Both doctrines allow the use of copyrighted materials without permission from the copyright holder under certain circumstances.



Myth: Fair use prohibits any uses that have an effect on the market.

Fact: Fair use is a flexible standard and all four statutory factors are considered together.

The four factors “are to be explored and weighed together, in light of copyright’s purpose.”⁶ It is not necessary to prevail on each of the four factors for a successful fair use claim. Furthermore, at least one court has determined that the market to be considered is the traditional market for the work and the relevant question is market substitution.⁷



Myth: Fair use is a new idea that did not appear in US copyright law until 1976.

Fact: Fair use has a long history and the 1976 Copyright Act simply codified a common law practice.

The Copyright Act codified the four factors derived from Justice Joseph Story’s opinion in the 1843 case, *Folsom v. March*. However, the doctrine’s origins date back much farther and can be traced back to English caselaw from the 1740s.



Myth: Fair use is too uncertain and risky.

Fact: Fair use is a fairly predictable doctrine.

A 2009 study concluded, “Fair use is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases fall into common patterns.”⁸

5. Many courts have held—both in terms of digitization as well as reprinting—that full copying is permissible under certain circumstances, including in the Second Circuit (*Authors Guild v. Google*, *Authors Guild v. HathiTrust*, *Bill Graham Archives v. Dorling Kindersley*), the Fourth Circuit (*A.V. v. iParadigms, LLC*), and the Ninth Circuit (*Perfect 10 v. Amazon and Kelly v. Arriba Soft*).

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

7. *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

8. Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537 (2009).