Copyright Crossroads: Balancing Creativity with Fair Use

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Copyright & Fair Use Definitions

Copyright:

The right of an author, artist, composer, or other creator to control other's use of their original work.

What can be copyrighted:

Original work of authorship that can be fixed in any tangible medium of expression, such as written on paper, or encoded on disk or tape, or recorded on film.

What does copyright protect:

Only the form in which ideas or facts are expressed; it does not protect the ideas or facts themselves. Unless fair use or another exception to copyright protection applies, you may not reproduce the actual text of the paper without permission.

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What Can Be Copyrighted

- Fiction/nonfiction writings
- Poetry
- Musical compositions (words and music)
- Sound recordings
- Photographs
- Paintings/drawings
- Sculptures
- Architectural works
- Databases
- Choreographic works
- Dramatic works
- Movies and multimedia works
- Software code

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Copyright & Fair Use Definitions *(cont.)*

Fair use: A defense to copyright infringement. The right to use a copyrighted work under certain conditions without permission of the copyright owner.

- If the use of a work is a fair use, no permission is required from the copyright owner to use the work because a fair use of a copyrighted work is not an infringement of copyright.

Fair use test: Burden is on alleged infringer to prove they used the work for purposes such as criticism, comment, news reporting, or teaching.

Factors:

- The purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes
- The nature of the copyrighted work
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole
- The effect of the use upon the potential market for or value of the copyrighted work

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Fair Examples

Criticism

Comment

News reporting

Teaching

Scholarship

Research

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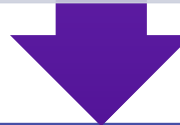
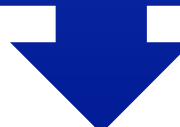
History of Fair Use

Folsom v. Marsh (1841): Opinion by Justice Story, later codified as the 4 "fair use" factors in Copyright Act, 17 U.S.C. § 107 (1976).

"[A] fair and bona fide abridgment of an original work, is not a piracy of the copyright of the author."	There is no copyright infringement if there "is a justifiable use of the original materials."	"[L]ook to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."



Eaton Drone, A Treatise on the Law of Property (1879): Described "fair use" as a privilege for certain forms of copying, such as quotation in reviews, or copying facts from informational works.



Arthur Weil, American Copyright Law (1917): Defined "fair use" as "a use which is legally permissive, either because of the scope of a copyright, the nature of a work, or by reason of the application of known commercial, social or professional usages, having the effect of custom, insofar as these do not expressly run contrary to the plain language of copyright legislation."

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Fair Use Cases

More recent Supreme Court “fair use” cases treat it as a discrete carve-out from infringement liability to serve some countervailing interest.

Category	Cases
Individual uses of new copying technologies.	• Williams & Wilkins Co. v. United States (1975) • Sony Corp. of America v. Universal City Studios, Inc. (1984)
Reuse of software commands known by programmers.	• Lotus Development Corp. v. Borland Int’l, Inc. (1996) • Google LLC v. Oracle America, Inc. (2021)
Particular forms of criticism, parodies.	• CBS, Inc. v. Loew’s Inc. (1958) • Campbell v. Acuff-Rose Music, Inc. (1994)
The limits of quotation for news reporting.	• Harper & Row v. Nation Enterprises (1985)

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Recent Developments | *Hachette v. Internet Archive* (2d Cir. 2024)

- Publishers sued the Internet Archive over its Controlled Digital Lending (CDL) practice. CDL allows libraries to digitize and lend physical books they own on a one-to-one basis. The case examined whether CDL is fair use, given its educational and non-commercial nature, and whether **digital** libraries should have the same rights as physical ones.
- In September, the Second Circuit held it is **not "fair use"** for a nonprofit organization to scan copyright-protected print books in their entirety, and distribute those digital copies online, in full, for free, subject to a one-to-one owned-to-loaned ratio between its print copies and the digital copies it makes available at any given time, all without authorization from the copyright-holding publishers or authors?

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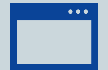
Recent Developments | *Hachette v. Internet Archive* (2d Cir. 2024) *(cont.)*

"Fair use" factors:

Purpose and Character of the Use: Internet Archive's use of the works was **not transformative**. The Free Digital Library essentially functioned as a direct replacement for the original works, competing with the publishers' editions. This lack of transformation weighed against fair use.



Nature of the Copyrighted Work: Both the fiction and nonfiction materials reprinted on Internet Archive include the **authors' individualized expressions of facts and ideas**. Therefore, because these materials embody the type of original expression that copyright laws aim to protect.

Amount and Substantiality of the Portion Used: Internet Archive **copies entire works** and makes them **fully available** to the public. The use is not transformative because Internet Archive substitutes its digital books for the original print and eBooks.

Effect on the Market: Internet Archive's practices could significantly harm the book publishers' market for the works. By providing free access to digital books, the internet library competed directly with the publishers' editions, potentially decimating their market if such practices became widespread.

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Recent Developments | *Andy Warhol Foundation v. Goldsmith* (U.S. Supreme Court 2023)

- The Andy Warhol Foundation licensed for $10,000 an image of "Orange Prince"—a silkscreen portrait of the musician Prince by Andy Warhol—to use on a magazine cover. Warhol derived this image from a 1981 photograph by Lynn Goldsmith taken for another magazine. Unaware of Warhol's "Prince Series" until 2016, Goldsmith claimed copyright infringement. The foundation argued there was no infringement on "fair use" grounds.
- The Supreme Court held this was not fair use because the purpose and character of the use was for commercial nature. The Court focused almost exclusively on the 1st "fair use" factor.
- While "Orange Prince" added new expression to Goldsmith's photograph, it emphasized that **merely adding something new does not automatically make a use fair**. The Andy Warhol Foundation's use of "Orange Prince" for a magazine cover shared a **similar purpose** to Goldsmith's original photograph, which was to depict Prince in magazine stories. Therefore, the first fair use factor did not support Andy Warhol Foundation.
- The decision highlighted the importance of the use's purpose and character in fair use analysis. The Court noted that different uses, such as educational purposes, might lead to a different fair use outcome. Changes to a work's aesthetic or message do not automatically qualify as transformative under the first fair use factor because an artist's secondary uses may serve the same purpose from the original.

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Recent Developments | *Generative AI*

- The emergence of generative AI has sparked significant developments in copyright law. These AI tools produce outputs such as text and images based on training models, raising several copyright issues.
- Key questions include:
  - Who holds copyright ownership for AI-generated works?
  - Are AI companies liable for copyright infringement due to their use of training data?
  - Does such use constitutes fair use?
  - Is a generator liable for outputs generated by AI models, and are those outputs considered fair use?
- A recent lawsuit, *The New York Times v. OpenAI*, addresses these complex issues of copyright infringement and fair use in the context of generative AI.
  - In December 2023, The New York Times sued OpenAI and Microsoft for copyright infringement, alleging OpenAI's language models were trained on millions of NYT articles without permission, and that the AI's outputs compete with and harm NYT's journalism business. OpenAI argues that their use of these datasets are "fair use," similar to how search engines index content. NYT insists that OpenAI's actions are for commercial gain and do not qualify as "fair use."

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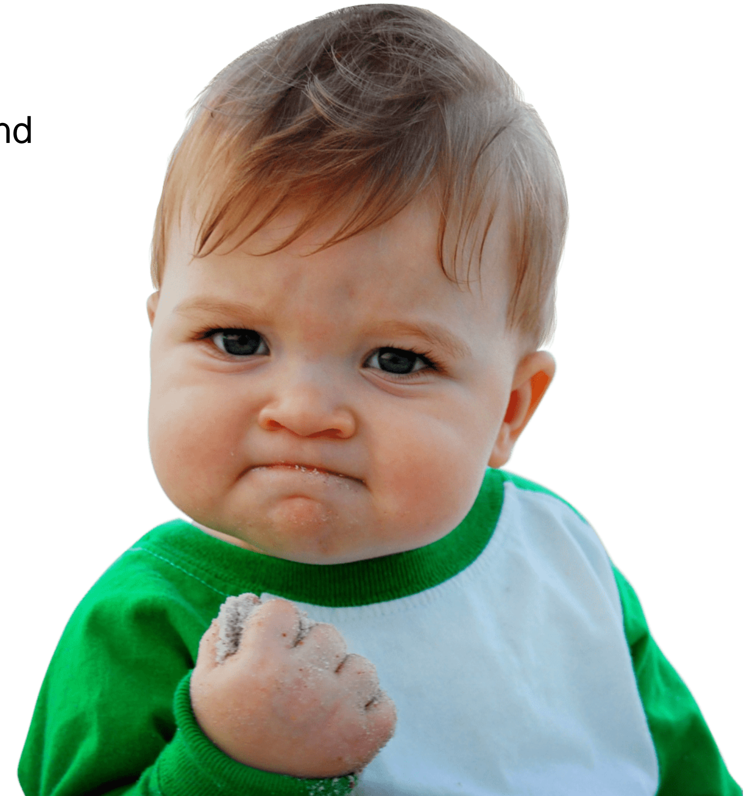
Fair Use and Social Media

Can you get sued for using a meme? Probably not, based on "fair use."

- Fair use guidelines exist online to allow people to create and share their own original works. Some common or typical fair uses include criticism, comment, news reporting and teaching.
- As long as the meme doesn't interfere or compete with the original memer's ability to make money off their original work, you're safe to share a meme.
- You can make or share your own meme by, for example, changing a caption, under the "transformative" principle of copyright law. Giving a meme a new expression and new meaning isn't "competing" with the original meme, and thus is protected as "fair use."

When could you be sued for a meme? If you try to make money.

- Iowa politician used "success kid" meme in a political ad.
- Firework company used "success kid" meme in commercial ad.
- How to avoid: Use websites containing public domain works that can be used commercially (Unsplash, Pexels, pixabay, and Wikimedia Commons).



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Fair Use and Social Media *(cont.)*

What if I go viral?

- <u>Your viral meme already has copyright protection.</u>
- Copyright protection arises automatically from fixation and originality.
- Posting a meme online satisfies fixation because it exists somewhere it can be seen by the public.
- Nearly any “modicum of creativity” satisfies the originality requirement, but it must be independently created, not copies from someone else.
- Fair use protection is not the same as copyright protect: You can receive fair use protection for making a meme from someone else’s copyrighted work, but you’ll only receive copyright protection on a meme if it is entirely your own, original work.
- If you’re really worried someone will infringe your intellectual property rights, you can always register your meme with the copyright office.

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Fair Use and Source Code | *Google LLC v. Oracle America, Inc.* (2021)

Oracle owns the copyright for the Java SE, the code for using the Java programming language. Google copied part of this program without permission to enable programmers to access prewritten software for specific tasks. Oracle sued Google, arguing the copied code was copyrightable, not "fair use."

The Supreme Court extended "fair use" doctrine to computer programs.

Analysis:

The nature of the code. The copied code was part of a "user interface" that allows programmers to access prewritten code using simple commands, distinguishing it from other types of code that directly instruct computers to perform tasks. The user interface code was thus intertwined with uncopyrightable ideas, such as structure and organization of tasks. Applying "fair use" did not undermine the general copyright protection intended for computer codes.

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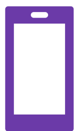
Fair Use and Source Code | *Google LLC v. Oracle America, Inc.* (2021) *(cont.)*

The “**purpose and character**” of Google’s use. The copying was “transformative,” meaning it added something new or had a different purpose, and thus “fair use” applied. The copied code was transformative because it enabled programmers to work in a new computing environment (smartphones) without abandoning a familiar programming language. This transformative use also aligned with the constitutional objective of copyright: to promote creative progress.

The **amount and substantiality** of the portion used. Google copied 11,500 lines of declaring code. Although this represented almost all the declaring code needed for hundreds of tasks, it constituted only 0.4% of the entire Java code, which had 2.86 million lines. Google copied this fraction them not for their creativity but to serve a valid, transformative purpose, enabling programmers to apply their skills in a new smartphone environment.



The **effect** of Google’s use on the **market** for the original work. It concluded that Google’s use did not harm Oracle’s market for Java because it targeted a different market segment (mobile devices) and did not replace the original product.

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Questions?

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