

PBS Standards

Copyright Fair Use

Please note: This material is for informational purposes and does not constitute legal advice. Consult with counsel for any specific guidance on candidate appearances.

Overview

Copyright law protects original works of expression—including literary, musical, and pictorial works as well as movies and other audiovisual works.

Fair use is a legal doctrine that permits the unlicensed use of such works in limited circumstances. The doctrine is based on the principle that the public is free to use portions of copyrighted works without permission or payment for purposes such as criticism, comment, news reporting, teaching, and research.

Section 107 of the Copyright Act lists four factors for courts to evaluate in determining whether the unlicensed use of a copyrighted work qualifies as a fair use. These factors, detailed below with illustrative examples, are evaluated by courts on a case-by-case basis. It is very difficult to predict how a court will apply these factors to a specific set of facts.

For this reason, asserting fair use should be done only as a last resort. PBS practice is that, whenever possible, producers should obtain permission before using a copyrighted work. In many cases, it is advisable to pay a license fee in exchange for using material rather than risk expensive litigation.

Fair Use Factors

The purpose and character of the use

Courts examine whether the new work transformed the material taken from the original copyrighted work. In other words, was value added to the original work through the creation of new expression, meaning, or message? For example, a parody is transformative because it holds the original work up to ridicule. A review or commentary of the copyrighted work also might qualify. Courts also evaluate whether the use is commercial in nature or for nonprofit educational purposes. While courts are more likely to find that nonprofit educational uses are fair, this does not mean that all such uses are fair.

Illustrative examples:

- In [*SOFA Entertainment v. Dodger Productions*](#), a federal appellate court found that this factor weighed in favor of fair use when the musical *Jersey Boys* incorporated a seven-second television clip from *The Ed Sullivan Show*. 709 F.3d 1273 (9th Cir. 2003). The clip shows Sullivan introducing the band the Four Seasons. The court explained

that the clip was transformed to serve as an important historical reference to reflect the band’s prominence in American music. (The musical was based on the Four Seasons’ career.)

- In contrast, the same court in [Elvis Presley Enterprises v. Passport Video](#) upheld a lower court’s determination that this factor weighed against fair use when a documentary film used various television clips featuring Elvis Presley. The court explained that many of the clips were used not only as historic references but also for the very same entertainment purposes as protected by the plaintiffs’ copyrights. 349 F.3d 622 (9th Cir. 2003). The court noted that the clips ranged from only a few seconds to over one minute, were sometimes repeated, and collectively accounted for at least 5 percent of the 16-hour film.

The nature of the copyrighted work

Courts evaluate whether the original copyrighted work is primarily factual or creative. For example, a creative work, such as a film, song, or book, may have stronger protection than a technical article or news item. Courts also consider whether the original copyrighted work is published or unpublished. (The author’s ability to be the first to publish is regarded as a valuable right.)

Illustrative examples:

- The court in [SOFA Entertainment](#), referenced above, explained that the television clip from *The Ed Sullivan Show* had already been published (i.e., broadcast) and contained mainly factual information—that the Four Seasons were about to perform. As such, this factor weighed in favor of fair use.
- The court in [Elvis Presley Enterprises](#) found that this factor was a close call, noting that while the television clips had already been broadcast and were newsworthy (weighing in favor of fair use), the television clips of Elvis’ appearances and concerts were also creative in nature and therefore entitled to strong protection.

The amount used and its importance to the whole

Courts look at both the *quantity* and *quality* of what was taken from the original copyrighted work. In general, the less of the original work that is used, the better. But even taking a small portion of the original work can be infringing if it is the “heart” (or most important part) of the work. For example, even using very little of the work from a quantitative perspective (e.g., a minute of an hours-long hockey game) could be problematic if the qualitative taking is significant (the copied portion was the only goal of the game). Importantly, there is no set number of seconds of a song or film that automatically qualifies as fair use; each case is different.

Illustrative examples:

- In [SOFA Entertainment](#), referenced above, the court found this factor weighed in favor of fair use because the television clip featured in *Jersey Boys* only included the host’s introduction of the Four Seasons’ performance and was a single seven-

second reference point in the two-hour musical.

- However, in [Elvis Presley Enterprises](#), the court found that this factor weighed against fair use because some of the clips were not short in length, were repeated numerous times, and constituted the “heart” of the work by showing Elvis “singing the most familiar passages of his most popular songs.”

The effect of the use on the market for the copyrighted work

Courts look at the economic impact of the unlicensed work on the original copyrighted work. If the unlicensed work reduces demand (e.g., leads to lower sales) for the original copyrighted work by acting as a substitute, then this factor could weigh heavily in favor of the copyright owner. Market harm caused by criticism that suppresses demand for the original work is not cognizable. For example, a bad review of a movie that results in lower ticket sales is not the kind of market harm recognized by the courts. However, using a clip from a film without paying a licensing fee might not be fair because such conduct, if widespread, could deprive the copyright owner of significant revenue.

Illustrative examples:

- In [SOFA Entertainment](#), referenced above, the court found that this factor weighed in favor of fair use because “*Jersey Boys* is not a substitute for *The Ed Sullivan Show*. The clip is seven seconds long and only appears once” in the musical. Moreover, the court explained, since the musical was not reproduced on videotape or DVD, the clip could not be viewed repeatedly.
- The court in [Elvis Presley Enterprises](#) found that this factor weighed against fair use because the filmmaker’s use of the clips for entertainment purposes could undermine the plaintiffs’ ability to charge a licensing fee, thereby causing market harm.

More Resources

[To learn more about Copyright, click here for the U.S. Copyright Office's 'Copyright Basics' Circular](#)

[Click here for the report 'Set of Principles in Fair Use for Journalism'](#)

[Click here for the 'Documentary Filmmakers' Statement of Best Practices in Fair Use'](#)

If you have any questions, please contact PBS Standards & Practices at: standards@pbs.org