

Secret #1: The key word is *use*.

Section 107 says, “the fair use of a copyrighted work . . . is not an infringement.” Restated: “A *use* is not an infringement if it is fair.” Or: “*Using* a copyrighted work in a fair way does not infringe the copyright in the work.”

The key here is *use*. It may be possible to use any copyrighted work in a way that is considered to be fair in the context of copyright law and thus would not be held to be infringing. The law does not say that the work itself, or the context in which you use it, or the technology you employ, or any of a range of other facts about your situation, is fair or not fair. The question is simply: What kind of *use* is fair?

In searching for an answer to this question, we too often become distracted by the context in which we are using the work, or by the technology involved, or some other particular about the situation, and we forget to look at the specifics of the *use* itself.

For example, I often get questions from people who are knowledgeable about fair use along the lines of: “Can we use videos we find on YouTube?”

Think about that for a minute. How can we analyze that question for fair use? We cannot, because we know nothing about the *use*. A video is simply a copyrighted work, and YouTube is simply its residence, or perhaps the tool used to locate and access the work.

So my answer is to the question, “Can we use videos we find on YouTube?” is: How are you *using* it? What are you *doing* with it, and *why*?

Sometimes we forget to focus on use because we succumb to that strong desire to have black-and-white rules instead of the uncertainty of fair use. For example, even after a full day of training in fair use and applying the entire, four-factor analysis to specific scenarios, I often see participants in my workshops fall into the habit – most often without realizing it – of relying on only one factor or another. Usually that takes the form of immediately rejecting a fair use argument in the case of either a use for commercial purposes or use of a large portion of a work.

The importance of focusing on use is made apparent by the fact that three of the four fair use factors ask specific questions about the use itself. However, even then we can veer off track from focusing on use itself. For example, we may ask whether the *user* is a non-profit educational *entity*, rather than asking whether the *use* is for non-profit educational *purposes*.

Perhaps the word “use” has become so over-used (no pun intended), that we forget it is there, or forget to give it meaning. The term “fair use” almost ceases to become two words, each with its own significance, and morphs into a single thing: fairuse.

To help focus on how you are using the work as you analyze factors one, three, and four, try re-framing your questions to eliminate the word “use.” It sounds contradictory, but it’s an old trick to get around old habits, and it can be effective.

For example:

Factor 1

Instead of: Is this a commercial or non-profit educational use?

Ask: To what extent do my actions contribute to someone's education? To what extent do they contribute to producing income?

Factor 3

Instead of: How much did I use?

Ask: Why am I [copying/distributing/performing/displaying] this particular portion and this particular amount of this particular work?

Factor 4

Instead of: How did my use affect the marketplace of the original?

Ask: How likely would it be that someone who might otherwise have paid to [own/view/perform/etc.] the original will decide, because of my actions, not to do so?

Take Away:

Be specific about what you are doing and why, rather than focusing on the format of the work, where you found the work, who your institution is, the quantity you are using, or whether the work is currently on the marketplace.