# THE FAIR USE DOCTRINE

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The fair use doctrine is a central part of modern copyright law: academics, critics, journalists, teachers, film makers, fan fiction writers, and technology companies all rely on the fair use doctrine to give them a certain amount of freedom in dealing with other people‘s copyrights. The fair use doctrine recognizes that very few works are created without some recognizable borrowing from antecedent works. Fair use allows the use of copyrighted material without permission. As part of copyright law‘s overall balance between authorial incentives and public freedom, the fair use doctrine “permits and requires courts to avoid rigid application of the copyright statute, when, on occasion, it would stifle the very creativity which that law is designed to foster.”[[1]](#footnote-2) In evaluating the history of the fair use doctrine, it is a mistake to start with Folsom v. Marsh[[2]](#footnote-3)—the complete history of the fair use doctrine begins with over a century of copyright litigation in the English courts.

This is the pre-history of the American fair use doctrine. This pre-history of fair use consists largely of fair abridgment cases litigated in English courts of law and equity between 1710, the year the first Copyright Act was enacted, that provide for copyright regulation by the government and before that, the courts had no provisions for authorized reproduction of copyright content and 1841. Abridgment—the process of making a shortened version or abstract of a longer text—was common in this era, but its lawful scope was contested.

The fair use doctrine does not in fact begin with early American cases such as Folsom v. Marsh in 1841, as most accounts assume—the complete history of the fair use doctrine begins with over a century of copyright litigation in the English courts because there were numerous English authorities where similar abridgments had been allowed. In the 1741 case of Gyles v. Wilcox[[3]](#footnote-4), Lord Chancellor Hardwicke explained that a real fair abridgment should be regarded as a new book and not as a trespass on the original from which it was derived. In the 1775 case of Strahan v. Newber[[4]](#footnote-5), Lord Chancellor Apsley found that an abridgment of Dr. Hawkesworth‘s Voyages did not infringe the original because by employing his won understanding “in retrenching unnecessary and uninteresting circumstances, which rather deaden the narration” the defendant had created ―an allowable and meritorious work.

Likewise, in the 1761 case of ***Dodsley v. Kinnersley***[[5]](#footnote-6), an abridgment of a popular novel in the modestly titled Grand Magazine of Magazines was also found to be non-infringing, principally because the copyright owners had already published their own abstract of the book in their own periodical. English copyright law in the pre-modern era offers significant insights into the transition of American copyright law in the 19th century.

Thus, the notion that Folsom v. Marsh constituted a radical departure from precedent can only be properly evaluated by considering the state of the law prior to that case. In fact, prior to Folsom v. Marsh there were only 11 reported copyright decisions in the United States. A review of those decisions and the American copyright treatises confirms that the far more developed body of English case law was treated as persuasive in American courts in the mid-19th century.

For example, in the Supreme Court‘s first copyright in 1834, Wheaton v. Peters[[6]](#footnote-7), the majority cites to eight English cases and no local authorities; the dissent cites to three additional English cases and two American cases. Likewise, in Folsom v. Marsh[[7]](#footnote-8) Justice Story cites 16 English authorities and not a single U.S. case. The use of English authority clearly outweighs the nascent American case law in almost all of the reported U.S. cases up to 1841.

Thus, to evaluate the significance of Folsom v. Marsh in the development of American copyright law requires a proper understanding of the development of English copyright law in the pre-modern era. In Folsom v. Marsh,[[8]](#footnote-9) in 1841, Justice Story articulated a very often cited summary of how to approach a question of fair use and stated the following and as per J. story: “a fair and bona fide abridgment of an original work” did not amount to copyright piracy, he also relied on those same authorities for a series of limiting principles.

Justice Story argued that it is clear, that a mere selection, or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment.” On the contrary, he contended that to qualify as a fair and bona fide abridgment “there must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.” And by saying this he concluded: “We must often…look to the nature and object the selections made, the quantity and value of the material used, and the degree in which the use may prejudice the sale, or diminish the profit, or supersede the objects, of the originate work.”[[9]](#footnote-10)

The Copyright Act, 1976 largely adopted the core and summary and incorporated the same as a four factors under Section 107 of U.S Copyright Act,1976 and they are stated as below:

• Purpose of the work • Nature of the copyrighted work • Amount and substantiality of the work • Effect on market value of the original work.

Though the word ‘fair use’ is not defined under the Copyright Act, the spirit has been enriched by the legislature under Sec 107 of the Act and it is a duty of the court to consider that whether use at issue falls into one of the specific favored uses and court takes into account the broad four factors to decide whether use of a copyrighted work by a person without due permission amount to fair use or not. Weighing the factors, the court then decides whether fair use applies or not. Each factor directs attention to a different facet of the problem.

The factors do not represent a score card that promises victory to the winner of the majority. Rather, they direct court to examine the issue from very pertinent corner and to ask in each case whether and how powerfully a finding of fair use serve or disserve the objectives of the copyright. Fair use was first made part of the copyright statute as a Copyright Act, 1976.

The earliest among these cases was that of Lawrence v. Dana. As a part of long process leading up the enactment of the statue, in 1976 the Copyright office providing several examples held to be fair use. The Report of the Register of the Copyrights on the General Revision of the US Copyright Law in 1961 cites 26 Id. 26 examples of activities that court have regarded as fair use.[[10]](#footnote-11)

All of the examples below are direct quotes from the report. Quotation of experts in review or criticism for purpose of illustration or comment; quotation of short passage in a scholarly or technical work, for illustration and clarification of author‘ observation; use in a parody of some of the content of the work parodied; summary of an article or address, with brief quotation; in a news report; reproduction by a library of a portion of a work to illustrate a lesson; reproduction of work in legislative or judicial proceeding or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in a scene of an event being reported.[[11]](#footnote-12)

Copyright is always a fact based determination. The statute specifies several factors to consider, but the question ultimately comes down to case laws and policy consideration. It is pertinent to note that these factors are only guidelines that are court are free to adapt to particular situations on a case-by-case basis. In such situation a judge has a great deal of freedom when making fair use determination, so outcome in any case is so hard to predict.

Unlike the typical fair dealing provision, which features an exhaustive list of purpose, US provision point to criticism, comment, news, reporting, teaching, scholarship, research and illustrative fair use purpose, leaving open the possibility of the identification of additional purpose through the case laws. The US fair use doctrine has been applied to wide range of activities that fall outside the boundaries of specifically enumerated purpose. The codification of fair use doctrine in Sec 107 was intended to retain the doctrine as it has been developed by the courts.

These four factors are held to illustrative rather than definitive and the factors should not be treated in isolation. All are to be explored and result weighed together in light of the purpose of copyright. Also the factors have been perceived as non-exhaustive.[[12]](#footnote-13)

1. Campbell v. Acuff-Rose Music Inc, 510 U.S. 569 (1994) [↑](#footnote-ref-2)
2. 9. F.Cas. 342 (C.C.D. Mass. 1841) [↑](#footnote-ref-3)
3. 1740, 3 Atk 143. 21 (1774) 98 Eng. Rep. 913 (K.B.) 913-14 [↑](#footnote-ref-4)
4. (1774) 98 Eng. Rep. 913 (K.B.) 913-14. [↑](#footnote-ref-5)
5. Dodsley v. Kinnersley, (1761) 27 Eng. Rep. 270 (Ch.). [↑](#footnote-ref-6)
6. Wheaton v. Peters, 33 U.S. 591 (1834) [↑](#footnote-ref-7)
7. 9. F.Cas. 342 (C.C.D. Mass. 1841) [↑](#footnote-ref-8)
8. Id [↑](#footnote-ref-9)
9. Id [↑](#footnote-ref-10)
10. HOUSE COMMITTEE PRINT 87 CONGRESS Ist SESSION, COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF THE COPYRIGHT ON THE GENERAL REVISION OF THE US. COPYRIGHT LAW, (1961) [↑](#footnote-ref-11)
11. KENNETH D. CREWS, ―The Law of Fair Use and the Illusion of Fair-Use Guidelines‖ OHIO STATE LAW JOURNAL, [Vol. 62 (2001)] [↑](#footnote-ref-12)
12. AYUSH SHARMA, “ Indian perspective of fair dealing under Copyright Law; Lex Lata Or lex fernanda?.”14 JIPR23, 28(2009) [↑](#footnote-ref-13)