

## Why Do I Need to Understand *Fair Use*?

Re-editing commercials and other types of video or media is a great way to talk back to advertisers and those who create and control the messages we hear and see every day. Though a fun and useful tool for educating and empowering audiences, it is important to understand the laws and limitations associated with using a work that is rightfully owned by another, simply referred to as copyrighted material. Violating copyright laws can result in heavy fines or even jail time, but there are measures in place that ensure people's rights to free speech. One of these is called fair use.

Fair use is a notoriously gray area of law, and it's often hard to create a set of easy rules that will apply to all cases. However, the following principles can be generally applied to projects relating to media literacy education, like criticism and video remix.

### WHAT DO COPYRIGHT AND FAIR USE MEAN?

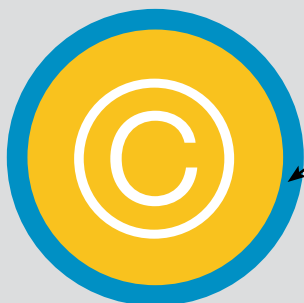
#### Copyright

When an item is protected by a copyright, only the author or creator can use it for as long as the copyright is active. Copyright law literally states that the only person with the "Right to Copy" is the owner. You can tell if something is copyrighted by the © symbol at the end of the title or name.

#### Fair Use

Fair use is the part of U.S. copyright law which says that parts of movies, commercials, music, and books can be used without breaking any copyright laws, and you don't need permission of the owner. Some of these special circumstances include criticism, commentary, news reporting, teaching, scholarship, and research. For example, if a teacher decided to show an episode from a television show in the 1970s to show changing attitudes towards conservation and the environment, that teacher is protected by fair use. But even when someone uses copyrighted work to teach, critique, review, or even report the news there

unregulated content



fair use

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### OUR VISION

A world of critical and active media participants.

### OUR MISSION

Educate and equip people to shape the media landscape through hands-on training. For a critical mass.

### CORE VALUES

- Critical curiosity
- Process over product
- Media literacy as a basic need
- Freedom from censorship
- Access for all

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### WEBSITE

[thelampnyc.org](http://thelampnyc.org)



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are general guidelines that they must follow for the use to be considered “fair.”

## THE RULES

### Determine the Purpose

The first step in deciding whether the use of a copyrighted material is fair is to determine the purpose. If you’re making money off of the material it more than likely will not fall under fair use. Another thing you should examine is whether you’re using the copyrighted work in a “transformative” way. When you add something new to or otherwise manipulate the original work, you can change and transform it into a new work with a completely different purpose or meaning. For example, the toy company Mattel accused a photographer of copyright infringement when he used pictures of a Barbie doll in his original work. The case was lost because the court considered the photographer’s pictures to be a parody of Barbie, making it transformative. Likewise, when you take a commercial and re-edit it or add your own comments, video or voiceover, you’ve transformed it. Adding something new creates a new and different work that has a different meaning and purpose.



Photographs from Tom Forsythe’s Barbie Food Chain series that got him in trouble with Mattel for fair use of the toy.

### Be Critical, Not Just Observational

When you’re making a critique of a work it’s also very important to only make *critical* statements about the message as opposed to observational statements of opinions about the product or the commercial itself. Critical statements about a copyrighted work put it in a larger context or compare it with other works. To help you make the distinction between critical commentary and non-critical/observational commentary, take a look at these examples of statements you can make about a commercial:

**NOT FAIR:** “All the toys shown for girls are pink and all the toys shown for boys are blue.”

**FAIR:** “The advertiser is promoting a gender stereotype by assuming that all girls like the color pink and all boys like the color blue.”

**NOT FAIR:** “Of course the toys are sold separately.”

**FAIR:** “Advertisers use manipulative imagery and show multiple toys together even though each one is sold separately.”

### Quantity vs. Importance

The amount of the original work being used is another important factor in the argument of fair use. When using a work for criticism you should avoid using the original work in its entirety and without pause. This is one reason why we “break” commercials instead of just commenting at the end of a full advertisement. On the other hand, even when taking a small sample of a larger work, it can fall out of the lines of fair use in court if it is decided that the small portion used was the most important part of the entire work. Importance is generally quantified by the “sell-point” of the work. For example, showing a 5-minute scene from the three-hour movie *The Dark Knight* can be fine. But if you show the scene where Batman defeats the villains and saves Gotham, that use wouldn’t be considered fair because it is assumed people buy the movie tickets and later DVDs to see that particular scene in the film. If you’ve given away the ending for free, it could mean that people wouldn’t pay to see the movie, thereby damaging commercial value for the film and negatively impacting the copyright holders.

## Replacement

As mentioned before, you should always attempt to use portions of an original work as opposed to the entire piece without any additions or pauses. It is not considered fair to replace or affect the market of the original work. For example, if a popular song is uploaded on YouTube, then the public is able to hear the song without having to purchase it, which could be seen as “stealing” the sales the owner of the song may have made if the song wasn’t uploaded and people instead had to buy the song to listen to it in full.

## FAIR USE IN TRADEMARK LAW

### Trademarks

A lot of copyrighted materials and products often have a trademark. If a product has a trademark it will usually be followed by the ™ symbol, the © symbol, or the ® symbol. A trademark is a recognizable sign, design, or phrase that makes one product or service stand out from another product or service. Trademark law is meant to protect an owner from a competitor using its trademark or a similar trademark on his or her own product that may confuse customers. As an example, the “Nike swoosh” is placed on shoes, in commercials, and on packaging so that everyone knows they’re buying Nikes and not another brand of shoe. If another shoemaker were to reverse the swoosh or reposition it on their sneaker in a way that could confuse consumers about the product, it would be a violation of trademark law.

Federal trademark law also protects against dilution of a trademark. Dilution occurs when a consumer understands and knows the source, or creator, of a well-known mark but becomes less able to match it with the associated product or service due to its use on other unrelated products. Going back to the Nike example, if the swoosh was used on a package of coffee rather than solely on sneakers and athletic wear, then in your mind, as a buyer, the association between Nike and athletic wear may grow weaker, even if you don’t believe the two products came from the same source.



*In 2009, this well-known artist, Shepard Fairey, filed a federal lawsuit against the Associated Press to acquire a declaratory judgment that his use of their photograph, used to create his famous Obama HOPE poster, was protected by the fair use doctrine.*

There is however, a version of fair use used in trademark law. This is called nominative fair use.

### Nominative Fair Use

Nominative fair use is just a fancy term for fair use for trademarks. In nominative fair use, it is understood that it is practically impossible to avoid using a trademark for a product when referring to or criticizing that product. When you use a trademark in a commercial critique or re-mix of other media, you are within your fair use rights if you follow these three rules:

1. The product can not be easily recognized without the use of the trademark. For example, a bottle of water with no label could be any brand. How would anyone know you were critiquing Deer Park instead of another brand like Poland Spring?
2. You only use the minimal portion of the trademark reasonably necessary to

recognize the product. Unlike the water bottles, the red and white bull's-eye of Target is pretty easy to recognize without even showing the name of the store. It wouldn't really be necessary to use any further trademarks of the company to identify it as Target.

3. You do NOT do anything that would imply sponsorship or endorsement by the trademark holder when you use the owner's mark. (This is why we include the LAMP disclaimer at the beginning and end of every video edit).

Under nominative fair use, trademarks can also be used for identifying, parodying, criticizing or commenting on the trademark's owner, or its goods and services. Trademark use is also considered fair when used in advertising or promotion that allows consumers to compare goods or services. For example, Pepsi shows the Coca-Cola logo in its Pepsi Challenge advertisements, where real consumers are asked to taste, rate and guess which product is Pepsi or Coke. This is considered fair and not a violation of trademark law. In addition, all forms of news reporting and news commentary as well as any noncommercial use of a mark would be covered by nominative fair use in trademark dilution.

### **Product Disparagement**

The last point to remember when using or referencing a copyrighted or trademark-protected work is the potential for product disparagement. Product disparagement is when false or misleading statements are made about a product.

You should not, for example, claim that an automobile manufacturer produces and sells "steel death traps" in your broken commercial. However, it would be appropriate to comment on the message the advertiser uses to sell a potentially unsafe car model, or even to provide factual safety or recall information that illustrates how unsafe that particular car is (just remember to provide citation for those facts at the end of your video). The false accusation that the car manufacturer creates cars that cause drivers and passengers to die may be considered a de-

famatory statement, which is a negative statement that harms the image and character of the product or company. Two common types of defamation are slander, stating negative or harmful statements about a product person or service and libel, the act of writing down negative or harmful statements about a product, person or service. To avoid violating this rule against slander and libel, you should first be able to tell the difference between a statement that is valid criticism of the ad or product, and one that is false and/or misleading. You should focus the criticism on the **message** of the advertisement, rather than the product itself.

Now that you're aware of the definitions and reasons behind fair use, let's look at one final checklist for creating a broken commercial for commentary or criticism.

### **MEDIA BREAKER AND FAIR USE CHECKLIST**

Now that you're aware of the definitions and reasons behind fair use, let's look at one final checklist for creating a media break with commentary or criticism, using The LAMP's Media Breaker video editing tool available at [mediabreaker.org](http://mediabreaker.org).

**What is the original media message you are breaking?**

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**Why did you choose that particular media message?**

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Have you transformed the original media message into something significantly different? (For example, is it now unrecognizable as the original message?)

Yes     No

Did you use any of the following transformative tools from the Media Breaker library?

Text                       Yes                       No

Visual Transitions     Yes                       No

Video Effects             Yes                       No

Sound Effects             Yes                       No

Music Samples             Yes                       No

Does your media break contain commentary and not just observational statements?

Example:

**COMMENTARY:** “The commercial is promoting a gender stereotype by assuming all girls like the color pink and all boys like the color blue.”

**OBSERVATIONAL STATEMENT:** “All the girl toys are pink and all the boy toys are blue.”

Yes     No

Did you use comments and critiques throughout the entire media text, and not just at the beginning or the end?

Yes     No

Did you make your critiques obvious and specific instead of vague and general?

Example:

**SPECIFIC:** “Showing people being bullied is not funny.”

**GENERAL:** “This is not funny.”

Yes     No

Is your break constructive, not disparaging or insulting commentary?

Example:

**CONSTRUCTIVE:** “This product could be dangerous for children because it contains small parts that may cause choking.” Or “The news reporter is projecting a message that may be considered offensive to minorities.”

**INSULTING/DISPARAGING:** “This product will kill you!” Or “This person is a racist!”

Yes     No

If you checked mainly YES, then your break probably falls under Fair Use. If you checked mainly NO, you should go back and add more *critical comments* and use more of the *transformative tools* that the Media Breaker offers.

## FOR MORE INFORMATION

Aufderheide, Patricia, and Peter Jaszi. 2011. “Reclaiming fair use: How to put balance back in copyright.” Chicago: The University of Chicago Press.

American University Center for Social Media, Fair Use Codes & Best Practices: <http://www.centerforsocial-media.org/fair-use>

Hobbs, Renee. 2010. “Copyright clarity: How fair use supports digital learning.” Thousand Oaks, CA: Sage.



### AUTHOR BIO

## ELISE STERLING-SMITH

As a pre-law student at CUNY Brooklyn, Elise Sterling-Smith majored in both Television and Radio and Business Administration with a concentration in Marketing. Elise interned for The LAMP in her senior year at Brooklyn College. It is Elise’s sincere wish to earn her J.D. and practice in the field of Entertainment Law or Intellectual Property. Elise to this day habitually hoards magazines and barely channel surfs, preferring to watch the commercials or, as she likes to defend them, “30 second syndicated mini-series.”