

Fair Use vs Fair Dealing: An Overview

About The British Copyright Council

The British Copyright Council (BCC) represents those who create, perform, hold interests, or manage rights in literary, dramatic, musical, and artistic works. The following response has been developed with our membership which includes professional associations, industry bodies and trade unions which collectively represent the voices of over 500,000 creators and performers, spanning the creative industries.

These rightsholders include many individual freelancers, sole traders and SMEs, as well as larger corporations within the creative and cultural industries. Our members also include trade associations and collecting societies which represent rightsholders, and which provide licensed access to works of creativity.

This note outlines how Fair Use operates in the United States and explains why importing such a model into UK law would weaken the UK's gold standard copyright framework. Far from offering greater legal certainty, a Fair Use-style approach would introduce ambiguity and fail to provide any clearer justification for the copying acts involved in machine learning.

Overview

Globally, the extent to which copyright exceptions may excuse acts of machine learning is highly contested (79 suits worldwide/54 in the US as of Oct 17th 2025). While it is broadly accepted that no copyright exception will excuse all copying done for 'AI', the extent to which the US concept of Fair Use applies to AI development is a key legal battleground.

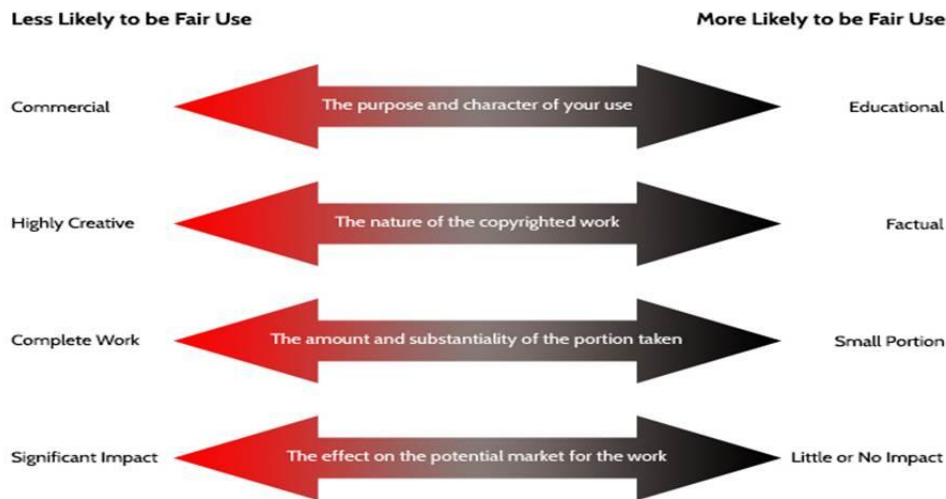
No copyright exception, including those for Text and Data Mining (TDM), covers the full breadth of copying that occurs across an AI system's lifecycle.

From scraping and crawling, creating and tokenising content sets, storing content for further training, publishing and distributing data sets, fine tuning models. and potentially in AI outputs, each stage of machine learning may involve multiple acts of temporary or permanent reproduction or communication to the public.

Copyright law aims to balance the rights of creators with the public interest in accessing and using creative works. Fair Use and Fair Dealing are two fundamentally different mechanisms for achieving that balance.

Fair Use is a flexible four-factor test, unique to the US. Generally, Fair Use allows for the same type of activities the UK explicitly permits, such as criticism, comment, news reporting, and certain educational reuses. However, Fair Use may also be raised as a defence for novel or transformative uses. Whether or not Fair Use applies depends on analysing the specific facts and context of the copying, making judicial decisions on Fair Use inherently narrow in scope. As the Supreme Court has noted, "The same copying may be fair when used for one purpose but not another."

Four Factors of Fair Use



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As is evident, Fair Use has many grey areas. The US Copyright Office explains, “There are no legal rules permitting the use of a specific number of words, a certain number of musical notes, or percentage of a work. Whether a particular use qualifies as Fair Use depends on all the circumstances.”

This ambiguity has resulted in extensive litigation on the limits of Fair Use to AI development. Currently, we only have 3 first instance decisions out of the 53 cases being tried. It will likely take a decade before we understand how Fair Use applies to any one step in AI training, let alone all.

In the three lower court decisions so far, one held Fair Use did not apply (Thomson v Ross), one held Fair Use could apply (Kadrey v Meta) with the court suggesting more evidence was needed on the fourth factor ‘harm to the market’, and the third case held Fair Use may apply to some AI. As Fair Use is dependent on the specific facts at issue, none of these cases help educate the market or the public as to the limits of Fair Use in AI contexts.

Why Fair Use is not a model for the UK

UK’s ‘Fair Dealing’ and the US concept of ‘Fair Use’ are not the same. The UK’s Fair Dealing approach is more specific and predictable, establishing the limits of certain listed copyright exceptions (Fair Dealing exceptions). Fair Dealing exceptions allow for activities such as criticism, comment, news reporting, teaching and research in a manner understandable by both rights holders and the public.

The UK’s doctrine of ‘Fair Dealing’ is not a general exception to copyright and only applies to specific exceptions and limitations and in specific circumstances. Fair Dealing is defined through common law and provides a predictable structure to ensure that any reuse of content is fair to the copyright owner. This includes acting as a fair-minded and honest person would and not engaging in activities that rights holders could reasonably expect to license or otherwise

¹ Georgetown University Library, What is Fair Use?, available at <https://library.georgetown.edu/copyright/fair-use> (CCBY NC)

exploit commercially, including only using a reasonable amount of a protected work. Using a whole work is unlikely to be considered fair.

Unlike Fair Use, Fair Dealing is not an independent defence, but the framework through which we understand whether the use of a copyright protected work is lawful. Fair Dealing for Non-commercial Text and Data Mining is how the UK ensures that TDM exceptions are used in such a way that does not unreasonably conflict with the rights holder's legitimate interests and provides surety to UK businesses.

Looking at jurisdictions such as Australia which have exhausted extensive legislative resources in research and assessment of all copyright options including an EU style 'opt out' for commercial TDM and a Fair Use type exception, the government has conclusively decided that no change will be made to the Australian copyright system.

Legal certainty is a key strength of the UK's copyright system. It supports its world leading creative industries and enables them to thrive. Attempting to adopt a US style Fair Use defence into the UK's copyright system would severely undermine legal certainty, weaken the UK's copyright framework, and fail to solve AI related challenges.

Key Takeaways

- Fair Use is not a general excuse for all copyright done during AI development. Its application depends on case-specific facts and remains legally uncertain.
- No existing copyright exception or defence covers all copying carried out during an AI system's lifetime in all territories where such copying may occur and any Fair Use decision is limited to actions that take place in the United States.
- Any copyright exception is specific to copyright infringement: privacy, data protection, personality, trademark and other infringements will remain.
- Licensing presents the only approach to allow for global development of AI systems. The sooner a dynamic licensing market develops, the sooner the AI sector can thrive safe in the knowledge they are not carrying out illegal copyright acts.
- We predict an increase in licensing in a competitive fair market.