Copyright law is supposed to spur creative authorship, so perhaps it is not surprising that narratives about creative processes abound at different points in copyright disputes. These authorship narratives may take the form of affidavits or deposition testimony about a work’s originality when someone challenges the work’s eligibility for copyright protection. Authorship narratives may also be invoked as a defense when an accused infringer attempts to defend against a charge of infringement by explaining the context of her work’s creation. Such narratives often serve two distinct but related goals of potential legal relevance: to set forth the author’s subjective intent in undertaking a particular activity, and to convince a judge or jury that such a view is objectively reasonable.

This paper explores the role of authorship narratives in the context of fair use. Specifically, it examines whether a claim of fair use—including the purpose and character of a use of a copyrighted work—should be assessed from the subjective perspective of the user, or from some more “objectively reasonable” vantage point. Courts and scholars have recently sided with the latter view, but have failed to fully explain why this should be the case, or what the risks of relying on subjective evidence might be. This paper first develops the concept of “subjective” evidence of fair use and examines what level of conscious compliance with fair use principles a court might consider relevant. It then argues that there may be a limited role for some subjective evidence. The paper concludes by proposing guidelines for when subjective evidence should, and should not, play a role in the fair use calculus.