Fair Use for Academics

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Disclaimer

This presentation and Q&A contain general information about legal doctrine.

This information is not legal advice and should not be treated as such.
ABOUT THE CLINIC

The UCI Intellectual Property, Arts, and Technology Clinic is a core clinic in the UC Irvine School of Law's clinical program.

Law students in the IPAT Clinic work to protect civil liberties and support innovation in the digital age by advising and representing clients on a range of matters dealing with copyright, patent, privacy, First Amendment, and media law, among other areas. Clients...
Fair Use

The right to:

• Use copyrighted material
• Without permission
• Without payment
• For socially valuable purposes
The Four Factors of Fair Use

1. The **purpose and character** of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

2. The **nature** of the copyrighted work;

3. The **amount** and substantiality of the portion used in relation to the copyrighted work as a whole; and

4. The effect of the use upon the potential **market** for or value of the copyrighted work.

17 USC § 107
When you DON’T need fair use

• You already have a license
• You are using a Creative Commons licensed work
• The work is in the public domain
“Some rights reserved”

Attribution 4.0 International (CC BY 4.0)

This is a human-readable summary of (and not a substitute for) the license. Disclaimer.

You are free to:

Share — copy and redistribute the material in any medium or format

Adapt — remix, transform, and build upon the material for any purpose, even commercially.

The licensor cannot revoke these freedoms as long as you follow the license terms.

Under the following terms:
Transformative Use

(Campbell v. Acuff-Rose, Supreme Court 1994)
Transformative Use (Campbell v. Acuff-Rose)

“The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely supersedes the objects of the original creation (or supplants the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.
Transformative Use (Campbell v. Acuff-Rose)

35.5% Nontransformative, commercial use of a creative, published work

94.9% Transformative use

• Did the unlicensed use “transform” the material taken from the copyrighted work by using it for a different purpose or giving it a different meaning than that of the original, or did it just repeat the work for the same intended purpose and value as the original?

• Considering the nature of the copyrighted work and the challenged use, was the material taken appropriate in kind and amount?
Documentary Filmmakers’ Statement of Best Practices in Fair Use

• For social, political, or cultural critique;

• To illustrate an argument or a point;

• Incidental to the process of filming something else;

• In a historical sequence.
Fair Use for the Visual Arts

One: Analytic Writing
Two: Teaching about Art
Three: Making Art
Four: Museum Uses
Five: Online Access to Archival and Special Collections
Analytic Writing
“to quote, excerpt, or reproduce”

- Justified by a clear analytic objective
- Analytic objective should predominate
- Appropriate amount
- Give credit as is customary in the field
Academic and Research Libraries

- Supporting teaching & learning
- To publicize or create exhibitions (incl. digital)
- Preservation (at-risk items)
- Digital collections of at-risk materials
- For use by disabled
- Maintaining institutional repositories (dissertations)
- Databases for non-consumptive uses
- WWW
“It is fair use to make appropriately tailored course-related content available to enrolled students via digital networks.”

Limitations:
- But not material created for that type of course (like a textbook)
- Connection to pedagogical purpose
- Only during course, only eligible students
- Attribution
Code of Best Practices in Fair Use for Scholarly Research in Communication

• Deals with **research methods** used in social sciences and humanities

• Uses **commercial media content** data (newspaper articles, radio commercials, television programs, etc.)
  • Uses the data for critiques and commentary
• Analysis, criticism, and commentary
• Quoting for illustration
• To stimulate response, discussion, and other reactions during research
• Personal research archive

Limitations:
- Extent of use should be based on analytic objective
- Do not employ more than is needed for the objective
- Citations in form & manner typically used in that field
- Not decorative or entertaining uses
Stills in a book?
HELD: FAIR USE

1. purpose and character
   a “retrospective and an illustrated biography of an artist”
2. nature
   out of print works are accorded less protection
3. amount
   covers used to “catch the eye” so not the “heart of the work”
4. market
   Warren Publishing’s “complete failure” to exploit copyrights for
   ~22 years “substantially detracts” from this factor
Putting translations of ancient texts on a website?

The Ascetical Homilies of Saint Isaac the Syrian

www.trueorthodoxy.info
HELD: NOT FAIR USE

1. **purpose and character**
   same purpose and benefit as the original works—to further religious practice and education

2. **nature**
   unpublished translation of creative work

3. **amount**
   “essentially verbatim or near-verbatim copies”

4. **market**
   “effectively commandeered the Monastery’s control over if, when, and how any such release of these Works to the public would take place.”
Promotional poster?
HELD: FAIR USE

1. **purpose and character**
   - use “as historical artifacts” was “transformatively different

2. **nature**
   - was at the “core of intended copyright protection.”

3. **amount**
   - didn’t capture the “essence” or “heart” of the original

4. **market**
   - “reduced reproductions” could not “supplant the market”

*Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006)*
4-6% of unpublished novel in a scholarly paper?
HELD: FAIR USE

1. **purpose and character**
   “a scholarly appraisal” which “has productive uses as criticism, comment, scholarship, and literary research.”

2. **nature**
   creative unpublished work weighted against fair use

3. **amount**
   “While it does quote from and paraphrase substantially *Blood of My Blood*, its purpose is to criticize and comment on Ms. Rawlings’ earliest work.”

4. **market**
   would improve marketability and “there is no protectable market for criticism.”
1) Does the work support a point?

2) Is the amount reasonably appropriate to support the point?

3) Is the connection clear?
Common questions

• Film vs books vs music?
• Is there a set minimum I can automatically use?
• What if I ask for permission and it’s refused?
• Published vs unpublished?
• Charts & tables?
• Orphan works?
• Contract with archive, rightsholder?
• Outside United States?
• What if my publisher says no to fair use?
The DMCA

- Blocks access to copyrighted materials behind digital locks (like encryption)
- Threatens our ability to make fair use

17 U.S.C. § 1201
**DMCA** blocks access to...

- Content with Technological Protection Measures (encryption, DRM)
- DVDs
- Blu-Ray
- Encrypted video streams
DMCA block access to...

- Printed books OK
- Printed photographs OK
- Printed newspapers OK
- Camcorder Footage OK
- Unencrypted Streams OK
DMCA for professors! OK to circumvent:

• By college and university faculty and students or (K–12) educators and students (under educators’ supervision), for the purpose of criticism, comment, teaching, or scholarship*
• MOOCs offering close film analysis*
• By nonprofit digital and media literacy programs offered by libraries, museums, and other nonprofit entities with an educational mission*
• Accessibility for students

*LIMITATION: Must consider screen capture software first
Questions?

https://ipat.law.uci.edu
Resources

• The UCI Intellectual Property, Arts, and Technology Clinic!  
  [https://ipat.law.uci.edu](https://ipat.law.uci.edu)
• Center for Social Media & Impact  
  [https://cmsimpact.org/fairuse](https://cmsimpact.org/fairuse)
• Authors Alliance  
• Stanford Copyright and Fair Use Center  
  [https://fairuse.stanford.edu/](https://fairuse.stanford.edu/)
• United States Copyright Office Fair Use Index  
  [https://www.copyright.gov/fair-use/](https://www.copyright.gov/fair-use/)
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