Code of Best Practices in Fair Use for the Visual Arts

Funded by the Andrew W. Mellon Foundation
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Available at:
collegeart.org/fair-use
cmsimpact.org/fair-use
Why fair use is important in the visual arts
Fair use: the basics
Why a code of best practices?
What’s in the CAA code
More support
What you can do
WHY IT MATTERS: 2014 CAA ISSUES REPORT

70% of respondents say they use copyrighted material in doing their own work.
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Writing about art

Teaching about art

Museum uses

Making art

Organizing documentation
FOR INSTANCE

“I found a suitable image online to illustrate my article. Do I still need a license?”
Can I use some photos I took of an artist’s work on my online course site?”
“I’m making art from found images. Do I need to get permission to use them.”
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AND

“Can I use pictures from our exhibition in museum publications?”
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AND

“Can we put our archival collection online?”
WHAT IS FAIR USE?
ONE PURPOSE:
TO PROMOTE THE CREATION OF CULTURE
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Rewarding creators with limited monopoly

Encouraging new makers to use existing culture
BIGGEST BALANCING FEATURE

FAIR USE

Non-infringing, unauthorized use of copyrighted material—under some circumstances
<table>
<thead>
<tr>
<th><strong>“FOUR FACTORS”</strong></th>
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<tbody>
<tr>
<td><strong>1.</strong> Purpose of the use</td>
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<td><strong>2.</strong> Kind of work used</td>
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<td><strong>3.</strong> Amount used</td>
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<td><strong>4.</strong> Effect on the market</td>
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GOOD NEWS:

• Judges balance interests in fair use analysis
• Supreme Court: Fair use promotes free speech
• Judicial interpretation has changed a lot since 1990
1. Is the use for a new “transformative purpose”? (in terms of context, audience, added insight, etc.)

1. Does it employ an appropriate amount to fulfill the transformative purpose?
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Custom and practice of individual creative communities...

...especially when well-documented
WHY DON’T WE EMPLOY FAIR USE MORE FULLY?
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PERCEIVED RISK:

Legal trouble

Lost relationships

Bad publicity
WHAT’S THE BIGGEST PROBLEM?

1. Restrictive publishing contracts
2. High licensing fees
3. Difficulty of obtaining clearances
4. None of the above
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SELF-CENSORSHIP
ASSESSING RISK?
CONSIDER BOTH!

Legal risk associated with pursuing mission

Mission risk associated with failing to act
1/3 of the visual-arts community have avoided or abandoned work because of copyright concerns.
WE HAVE A PROBLEM...

Copyright Hypercompliance = SELF-CENSORSHIP
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CODES, IN FOUR STEPS:

1. Research discovers most common problems
2. Creative community discusses terms of fair use
3. Consensus synthesized
4. Lawyers check work
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DOCUMENTARY FILMMAKERS
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POETS
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...AND MORE!
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NOT LIKE FAIR USE “GUIDELINES”!

• A guide to reasoning, not a set of rules
• No arbitrary limits or metrics
• Based on professional consensus
• Not negotiated with copyright holders
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INFORMED RISK ASSESSMENT → BETTER PRACTICE

EXAMPLES

Documentary filmmakers: Fair use now gets insured

Librarians: Collections digitized

Scholars: New work published

Archivists: Digital exhibits online
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University of Colorado, Boulder: YES to digital format shifting
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DEVELOPING CAA’S CODE

- Nationwide fact-finding
- 10 discussion sessions in 5 cities
- Confidential meetings building consensus
- Input from CAA Fair Use Task Force
- Review by Legal Advisory Committee
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SITUATIONS

Writing about art

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Museum uses

Making art

Archives online
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FOR EACH SITUATION IN THE CODE:

Description

Principle

Limitations
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WHAT YOU CAN DO

Use the Code
Tell a colleague
Tell a student
Tell a publisher
Find an endorser
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MORE INFORMATION:

THE CODES AND MUCH MORE
(VIDEOS! PRESENTATIONS! FAQS!)

cmsimpact.org/fair-use
collegeart.org/fair-use
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RECLAIMING FAIR USE

How to Put Balance Back in Copyright

PATRICIA AUFTERHEIDE AND PETER JASZI
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Practice Makes Practice
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THANK YOU!

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