Fair Use For Nonfiction Authors

Audience FAQs & Answers for Presenters

# What does it mean to say a use is “transformative”?

A use may be considered “transformative” if it:

1. Actually transforms expression in the work, as a parody of a song might do;
2. Is included in a new work of authorship, such as quoting from the writings of a person in a biography;
3. Is used for a different purpose than the original, causing it to have a different meaning, as when a newspaper publishes a photograph that has become controversial.

Transformative uses will not always be fair. A new arrangement of a song, for instance, may well infringe the derivative work right. But especially when done for purposes of criticism or commentary, the transformativeness of a use will tend to tip in favor of fair use.

Courts have recently been receptive to the idea that copyright owners do not have the right to control all transformative uses of their works. Transformative uses are less likely than non-transformative uses to pose a risk of supplanting market demand for a work.

# What does it mean to say a use is “non-transformative”?

A use will be considered “non-transformative” if it is, for example, an exact copy of a work or part of a work. Making a time-shift copy of a television program is an example of a non-transformative use that courts have deemed fair. Posting a chapter of a book on an electronic course reserve system is another example of a non-transformative use. (The *Cambridge University Press v. Becker* case, which is presently pending before an appellate court, is testing whether this kind of use is fair.) Scanning a photograph you like and posting it online is a third example of a non-transformative use.

Non-transformative uses may be fair uses, but they are less likely to be fair uses insofar as they pose a stronger risk of harming the market for the work. If someone makes a copy of a movie or computer program, for instance, instead of buying a copy of his own, that non-transformative use is more likely to have a negative effect on the copyright owner’s market. Even though one person’s peer-to-peer file-sharing of music or a movie would seem to be relatively trivial, courts take into account that if they say this use is fair, then many others will do the same thing and the aggregation of these uses are likely to cause market harm.

# Are charts, graphs, and tables protected by copyright and, if so, can I rely on fair use to incorporate them into my nonfiction work?

Charts, graphs, and tables may be protected by copyright, but the underlying facts are not copyrightable. Creative choices in the way that facts are presented in a chart, graph, or table may be sufficiently original to warrant copyright protection. That said, where applicable, you may still be able to rely on fair use to use a chart, graph, or table that includes expressive elements.

# How does a work’s copyright status affect fair use?

Copying of works that are not protected by copyright is not copyright infringement, regardless of fair use. But sometimes it can be difficult to determine whether a work is protected by copyright. For example, you may not be able to determine whether a work’s copyright has expired, or you may not be sure whether a scientific chart has the requisite level of creativity to warrant copyright protection. Even where you cannot determine a work’s copyright status, you may still want to understand whether the use of the material would be permitted by fair use should the material be protected by copyright. In fact, in some cases determining whether the use would be permitted by fair use may be easier than resolving the work’s copyright status.

# How does a work’s orphan work status affect fair use?

Orphan works are works for which it is difficult or impossible to identify or locate the work’s copyright owner, even after a diligent search. The use of an orphan work may be permitted by fair use, just like any other work. In fact, orphan works often have characteristics that make fair use more likely. For example, orphan works are by definition not active in the market, limiting any resulting economic harm to rightsholders. In some cases, determining whether the use of an orphan work would be permitted by fair use may be significantly easier than securing permission from a rights holder that, by definition, is difficult or even impossible to track down.

# Does the fair use analysis change when the copyrighted material I want to use is owned by a litigious estate?

No. Some estates are notoriously aggressive in trying to prevent the use of materials to which they own the copyrights. However, just because a copyright owner is forceful in asserting copyright claims doesn’t make fair use any more or less likely. It may, however, change your assessment of the practical risk that a copyright owner might complain or sue. Authors in this situation may be especially interested in obtaining errors and omissions coverage prior to publicizing their work.

# What can I do if my publisher asks me to obtain permission instead of allowing me to rely on fair use?

Some publishers may require that authors get permission to use copyrighted materials in their works instead of allowing them to rely on fair use. If you find yourself in this situation, you may find it helpful to ask your publisher to reconsider its position and to explain why you think your intended use is protected by fair use. You may also want to share with them related codes of best practices, if relevant. If fair use is important to you or essential to your project, you may want to search for a publisher that recognizes fair use before signing a publishing contract.

# Where can I find guidance on other applications of fair use?

The Center for Media and Social Impact at American University has published some [“best practices” guidelines](http://www.cmsimpact.org/fair-use/best-practices) for a variety of authors, including one for poets, journalists documentary filmmakers, and makers of online videos.

# Does fair use still apply if my work will be published outside of the United States?

Fair use as described in this presentation is based on U.S. copyright law. That said, a growing number of countries have similar “fair use” or “fair dealing” limitations and exceptions, and criticism and commentary are often protected by these regimes. If your work is being published in a country other than the United States (including web-based uses specifically targeted toward other countries, to which those countries’ laws may apply), you may want to consult an attorney about similar limitations and exceptions that may apply.

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