

Fair Use – An Introduction

David H. Bundy

Artists and authors must often decide if they can copy or otherwise use someone else's copyrighted art in a paper, a presentation, or embedded into their personal art making, such as a collage, without first obtaining permission and usually paying a fee. The decision is based on whether they can claim that the doctrine of fair use applies. While some situations are relatively clear, in others the answer is not obvious and may be reasonably disputed.¹

The holder of a copyright to an original work of art or literature, generally the creator or the creator's representative, such as a foundation, has several exclusive rights, usually described as reproduction, distribution, adaptation, performance or display. Any of these rights can be infringed by an unauthorized use of the work. These rights are separate from and in addition to the physical ownership or possession of the art work itself. Picasso's *Les Femmes d'Alger (O.J.)* is in the permanent collection of New York's Museum of Modern Art, but permission to reproduce it must be sought from the Picasso Administration in Paris. To make an infringement claim, the copyright holder must establish ownership of the infringed rights and unauthorized copying. Copying can be established by substantial similarity between two works. But holding a copyright to a work does not grant absolute control over all uses of the protected work; if the "fair use" exception applies the copyrighted work may be used without having to obtain permission or pay a fee.

The concept of copyright was recognized in the United States Constitution of 1789; Article 1, Section 8, authorized Congress to enact appropriate legislation on the subject.² That power has resulted in a series of statutes, the most recent of which, the 1976 Copyright Act, became effective January 1, 1978. With subsequent amendments the basic term of a copyright now lasts for the lifetime of the artist plus 70 years. Works created prior to the effective date may still be covered by the current law, but if the work passed into the public domain prior to 1978 copyright protection was not restored. And there are a number of details and exceptions which extend the copyright term for certain works, so further research could be needed for specific cases before concluding that no permission to copy or use a particular work is needed.

¹ This article is a discussion of the principle of fair use as applied in the United States, and is not a substitute for professional advice that may be needed to make a decision on whether permission to use a copyrighted work should be obtained in a specific case.

² "The Congress shall have power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; . . . and to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"

Most countries have joined the Universal Copyright Convention and the Berne Convention which grant international protection such that a work published in any nation which is a party will obtain copyright protection in all other nations which are parties to the extent that a party nation grants protection to its own nationals. In addition, the Buenos Aires Convention covers many countries in the Western Hemisphere. By attaching the appropriate notices, a work may be protected under all three, although the Berne Convention does not require copyright formalities (such as inserting the © symbol). The United States joined the Berne Convention in 1989, so a United States work does not need to be published outside the United States to be internationally protected.

The concept of copyright is intended to protect rights of authorship in order to encourage creativity and protecting a common culture by allowing distribution to advance knowledge and civic engagement. But protecting one person's creation may inhibit free expression by another; a potential conflict with the First Amendment of the U. S. Constitution which provides that Congress shall make no law "abridging the freedom of speech."

"Fair use" allows limited use of copyrighted material without permission or payment, although the concept is not always straightforward, and many applications are debatable; the copyright owner preferring a narrower interpretation than the potential user. Fair use in the United States and, perhaps with a different label, in other countries which recognize the concept,³ is intended to balance the need to protect the rights of an artist to her creation, whether a book, essay, drawing, painting, sculpture, film or other original work, with society's need to encourage freedom of expression including further use of the artistic work. The conflict and balancing test arises in such situations as the use in a collage of a painting, or part of a painting, or for example in Andy Warhol's familiar "Brillo Boxes." When will the secondary use infringe on the rights of the original creator such that permission for the use is required, or, in the absence of permission, when will the unauthorized use invite a claim for damages?

Analysis of whether fair use applies to a specific situation begins with the so-called "four factor test" developed in the common law through court decisions, and as codified in the U. S. Copyright Act of 1976, at 17 United States Code Section 107:

1. The purpose and character of the use. Is the use of the challenged work for commercial purposes (such as printing a David Hockney painting on greeting cards or t-shirts) or for a non-profit or educational purpose (such as showing slides of the Hockney painting to a class of art students). The fundamental inquiry here is: has the original work been transformed into a new medium or form?

³ In Britain, the term is "fair dealing." The European Union does not have a general fair use doctrine but has adopted a number of specific exceptions to copyright, as listed in Article 5 of the Copyright and Information Society Directive 2001; among these are quotations for purposes of criticism or review.

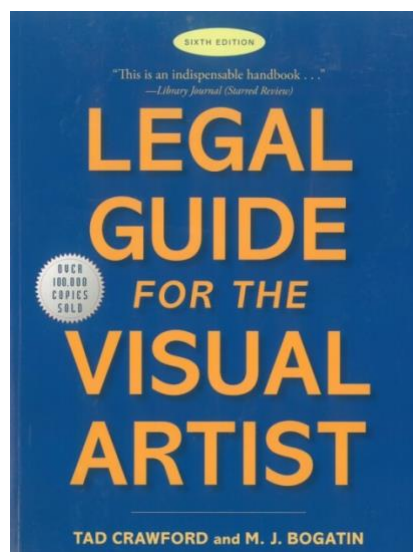
2. The nature of the copyrighted work. Is it original, like a poem or painting, or a factual presentation, like a telephone directory? An original work is entitled to significantly greater protection.

3. The amount and substantiality of the portion used in relation to the copyrighted work as whole. The use of an individual film frame may be permissible, while copying entire motion picture or a scene from the film would not be allowed.

4. The effect of the challenged work on the market for or marketability of the original copyrighted work. Does the challenged work diminish the market value of the original work, either by inducing potential buyers to purchase the new work instead, or by competing with a use to which the original work might be put? Thus, printing a Hockney painting on a t-shirt might be considered non-competitive with a market for actual Hockney paintings due to their high value and limited number of potential buyers, but producing a line of Hockney t-shirts would diminish the marketability of genuine Hockney t-shirts should the artist himself decide to go into the apparel business or license another line of clothing featuring his paintings.

Applying these factors to a specific case is not always easy and may not lead to an obvious answer. The factors may work against each other. Courts and juries interpret these guidelines differently, bringing their own attitudes and judgments into play. The skill of the advocates on either side may also influence the outcome. Lawyers and judges rely on published court decisions for guidance and precedent. Precedent is usually helpful and sometimes is binding, but precedents themselves can be in conflict and may or may not clearly apply.

This work is a very useful reference:



Common sense is a starting point. “Remember that the basic test for infringement asks whether an ordinary observer, looking at the two works, would believe one had been copied from the other. But fair use muddies the waters by creating a number of situations where such copying would not be considered unlawful. For example, if an author penned a review or scholarly article discussing another work in great depth, substantial portions of that work could be copied exactly and it still wouldn’t be an infringement. As a result, the guidelines for fair use must be carefully considered in every case to determine whether an artist can safely use someone else’s copyrighted work.” (Crawford and Bogatin 39-40).

An often discussed case is *Rogers v. Koons*, 960 F.2d 301 (2nd Circuit, 1991). Photographer Art Rogers exhibited at the San Francisco Museum of Modern Art his photograph of a group of German Shephard puppies sitting in a line. The photo was published in a book about dogs. He also produced a greeting card with the photograph. Koons saw the card and created four wood “String of Puppies” sculptures with puppies copied from the photograph in detail. Rogers sued for infringement and Koons defended on the grounds of fair use as a parody of the photograph and because the photographer had no intention of making the sculptures himself. However, the court ruled in Rogers’ favor, ruling the photographer did not have to make sculpture from his puppy image; he could, instead license someone else to use his photograph for that purpose, an opportunity made less likely by Koons unauthorized use of the image. The court rejected the parody claim as the duplication of the images in wood did not suggest to an ordinary viewer that an actual parody of the photograph was intended.

All four of the listed factors come into play in this situation. Koons made his *String of Puppy* sculptures for sale to collectors; Rogers’ photo was an original creative work; Koons duplicated the entire image in wood; and his work infringed on the potential use of the photograph. The first three factors do seem to apply; the use of the fourth is more debatable.

The *Rogers v Koons* case was decided in the federal courts governing New York State where many of these cases arise due the dominance of New York art market. However, the United States Supreme Court has also issued a number of important fair use decisions.

Rogers v Koons might have been decided differently had it arisen after the Supreme Court’s decision in *Campbell v Acuff-Rose Music Inc.* 510 U. S. 569 (1994), where the Court emphasized the importance of the concept of transformation. The litigation involved a rock ballad “Oh Pretty Woman” and the defendant rap music group released a song “Pretty Woman” intended as a parody. The court held that the rap version was protected as a parody, as its comical lyrics were intended as a satire of the original. The concept of transformation was critical in the Court’s view. Does the new work simply copy or supersede the original, or does it contribute something new or fulfill a new purpose and have a different character from the original?

Considering the four factors from the Copyright Act, the Supreme Court said none is determinative and all must be considered together in determining whether a proposed use is fair. Further, a commercial purpose on the part of a challenged work is not determinative either way. The commercial purpose of an appropriating work is not fatal to its claim of fair use, as the Court pointed out in the current economy almost any use of an artwork may be conducted at least partially for profit. Art professors receive salaries; students pay tuition and fees; art criticism is published in journals which subscribers pay to read. Non-profit institutions are, in short, businesses in every sense except providing dividends to owners, but this does not mean that they cannot take advantage of the fair use doctrine.

Since the *Campbell* case, courts have concentrated on the question of whether the challenged use is transformative; if the purposes and objectives of the two uses are different fair use is more likely to apply. Koons was more successful in *Blanch v Koons* 467 F.3d 244 (2nd Cir 2006). Blanch photographed a model's feet and legs and his photo was published in the magazine Allure. Koons then created paintings using many photos including Blanch's. The paintings were duplicated on postcards. Blanch sued for infringement of his copyrighted photograph. The courts determined that Koons' use was transformative and this factor outweighed the fact that Koons profited from the sale of his painting. Koons' copying was not substantial and did not diminish the value of Blanch's photo which he had not used commercially since its original sale to the magazine.

A common situation confronting art writers and critics is the use of art images in a magazine or art journal. The author may wish to analyze one painting, or an artist's entire oeuvre; or discuss an art movement or period involving many artists. In any of these situations the article is enhanced by including the relevant images themselves so that a reader will better understand the author's discussion or argument.

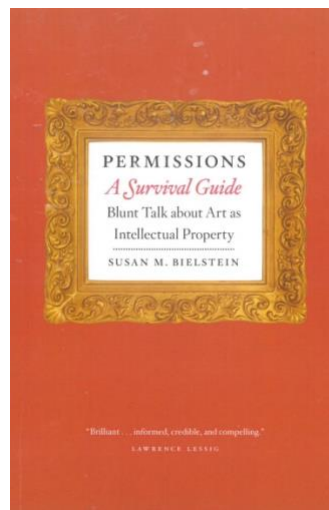
A doctoral student's dissertation about an artist or art movement will necessarily mention many art works, and for clarity the author must include the images of the art works themselves. Does the student need permission to include the art works in her paper? What about the book she hopes to publish after her degree is awarded?

The first step in deciding if permission to use a work is needed at all is to determine whether the work is subject to copyright or has passed into the public domain. As copyright protection expires, generally but not always 70 years after the artist's death, the user will need to determine the relevant dates. Winston Churchill, for example, died in 1965, so until 2036 permission to publish an image of one of his paintings will be needed, unless, of course, the fair use exception applies.⁴ If the work is in the public domain, no permission is needed to copy or

⁴ Other countries have different copyright expiration dates, so determining the artist's nationality, and for an artist who worked in multiple countries, the location where the work was created, is necessary.

reproduce an image as long as the copy can be obtained legally, often from the internet. Museums may allow photographs of public domain work on their walls, although they often state that such photographs are only for private individual use. The restriction on commercial use of the photo is not on copyright grounds, which don't apply; just because a museum owns the art it may try, not always successfully, to control visitors' photography.

If a work is not in the public domain and fair use is not applicable, permission to publish must be obtained from the artist, or the artist's representative such as a gallery or rights organization. This can be a time-consuming and tedious process; most permissions are granted for fees which may be scaled to the scope of permission (large or small printing, sales in one country or worldwide), the importance of the artist and the bargaining power of the rights holder.⁵



An author who wants to reduce the costs and time of obtaining permission to publish, where fair use may arguably apply anyway, may choose to forego the permission route and take the chance that there will not be a challenge or complaint. This approach is more likely to work if the use is not blatantly commercial and is limited to a small audience, and if successful this approach will avoid paying fees to a rights holder who sees a revenue opportunity in every permission request, even if an impartial viewer would determine that permission is not really needed in the first place. It is not surprising that some rights holders will demand a fee where none should be asked, there are bullies in every business and an author may decide to avoid conflict and pay for permission anyway.

The College Art Association, a professional organization for art faculty, art historians and students, published in 2015 its "Code of Best Practices in Fair Use for the Visual Arts." The

⁵ Useful guidance on navigating this process can be found in *Permissions, A Survival Guide*, by Susan M. Bielstein, University of Chicago Press, 2006.

Code does not provide a clear answer to every fair use question; given the unlimited range of issue that arise in daily practice, a cookbook answer would be impossible. Instead the Code provides guideline where fair use should apply in five categories: Analytic writing, teaching about art, making art, museum uses, and online access to related collections in memory institutions. In each category, the Code states a principle and then limitations on the principle.

For example, the Code's principle on analytic writing is "In their analytic writing about art, scholars and other writers (and, by extension, their publishers) may invoke fair use to quote, excerpt, or reproduce copyrighted works, subject to certain limitations:

Limitations

- The writer's use of the work, whether in part or in whole, should be justified by the analytic objective, and the user should be prepared to articulate that justification.
- The writer's analytic objective should predominate over that of merely representing the work or works used.
- The amount and kind of material used and (where images are concerned) the size and resolution of the published reproduction should not exceed that appropriate to the analytic objective.
- Justifications for use and the amount used should be considered especially carefully in connection with digital-format reproductions of born-digital works, where there is a heightened risk that reproductions may function as substitutes for the originals.
- Reproductions of works should represent the original works as accurately as can be achieved under the circumstances.
- The writing should provide attribution of the original work as is customary in the field, to the extent possible."

One might expect that the CAA, whose members are mostly art scholars and critics, will have an expansionist approach to fair use. But, according to the introductory message from the CAA President, "The Code . . . is based on a consensus of professionals in the visual arts who use copyrighted materials in their creative and scholarly work . . . [including] art and architectural historians, artists, designers, curators, museum directors, educators, rights and reproduction officers, and editors at scholarly publishers and journals."

Under this principle and with the listed limitations, the doctoral candidate should be able to format her dissertation to be published with images protected by fair use. She will still have to deal with a risk-averse publisher and its legal department which may advise against taking any chances of a complaint from an artist or representative.

This essay is a summary of fair use concepts. The sources listed below discuss the subject in much greater depth and will be useful to anyone uncertain about the use of copyrighted images in a specific context.

Sources

Lerner, Ralph E. and Judith Bresler. *Art Law, The Guide for Collectors, Investors, Dealers and Artists*, 4th Edition. Practising Law Institute. 2012.

Bielstein, Susan M. *Permissions, a Survival Guide, Blunt Talk about Art as Intellectual Property*. University of Chicago Press, Chicago. 2006

Crawford, Tad and M. J. Bogtin. *Legal Guide for the Visual Artist*. Allworth Press. New York, 2022.

College Art Association. "Code of Best Practices in Fair Use for the Visual Arts." 2015. Print and online at www.collegeart.org/fair-use

BIO:

David H. Bundy is a graduate of Yale College and Harvard Law School. He has practiced business and commercial law (board certified in bankruptcy) throughout Alaska for over fifty years. Bundy is a strong supporter of AICA-International.