



Fair Use: 12 Myths and Realities

Fair use is a critical right and the most important limitation on the rights of the copyright holder. It permits the use of copyrighted material without permission from the rightholder under certain circumstances and has been called the “safety valve” of U.S. copyright law. Fair use is a broad and flexible doctrine that is responsive to change and can accommodate new technologies and developments. Fair use is relied upon by everyone, including both users of copyrighted content as well as rights holders.

For libraries and higher education, fair use is integral to achieving the mission of preservation; providing access to cultural, historical, local and scientific heritage; supporting and encouraging research, education, literacy and lifelong learning; and providing a venue for community engagement.

While fair use is of critical importance, there are many myths about what fair use is and how it can be used.¹ Below are twelve myths and realities of the doctrine.

Myth 1: Fair use is only a defense or minor exception.

Reality: Fair use is a right that accommodates the First Amendment.

Fair use is a right and is explicitly recognized as such in the Copyright Act. Section 108(f)(4) specifically references “the right of fair use as provided by section 107.” Because copyright law might constrict free speech, the Supreme Court has explicitly recognized this right as a “First Amendment safeguard.”²

Myth 2: Fair use is too uncertain and too risky to be used.

Reality: Fair use is a fairly predictable doctrine

Fair use is actually fairly predictable. Professor Pamela Samuelson wrote an article in 2009 entitled, [Unbundling Fair Uses](#) which concluded that “Fair use is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases fall into common patterns.” In fact, the Australian Law Reform Commission (ALRC) pointed to this very article when [proposing that Australia adopt a fair use provision](#). The ALRC went on to note that fair use factors can represent

¹ Many of these myths in this document were expressed by rights holder participants at the Orphan Works roundtable held in March 2014. See Krista Cox, *Orphan Works/ Mass Digitization Roundtables: Fair Use Myths and Realities*, ARL POLICY NOTES (March 18, 2104), <http://policynotes.arl.org/?p=50>

² See also Kevin Smith, *Free Speech, Fair Use and Affirmative Defenses*, SCHOLARLY COMMUNICATIONS AT DUKE (Nov. 3, 2014), <http://blogs.library.duke.edu/scholcomm/2014/11/03/fair-use-affirmative-defense/>



“a clear principled standard [that] is more certain than an unclear complex rule.” In recent testimony before the House Judiciary Committee Subcommittee on Courts, Intellectual Property and the Internet, Professor Peter Jaszi (American University) [similarly stated that fair use jurisprudence is predictable and coherent.](#)

Myth 3: Where a specific limitation or exception exists, fair use does not apply.

Reality: Fair use is an exception that exists in addition to specific limitations and exceptions.

Fair use supplements specific limitations and exceptions. While some have argued that recent fair use jurisprudence consumes specific limitations and exceptions, such as Section 108, and renders the provision meaningless, fair use still applies. Section 108(f)(4) explicitly provides that “Nothing in this section—in any way affects the rights of fair use as provided by section 107 . . .” The plain language of the statute could not be any more clear: “Nothing . . . in any way affects the rights of fair use.”

Explicit limitations and exceptions can be beneficial in providing certainty for certain activities, particularly for those that are risk adverse, or apply where fair use might not. However, fair use remains an important right because the doctrine is flexible and responsive to new technologies and developments. Libraries rely on a mix of purpose-specific limitations and exceptions as well as fair use in order to achieve their public service mission and respond to evolving technologies.

In *Authors Guild v. HathiTrust*, the Authors Guild unsuccessfully tried to claim that fair use did not apply where specific limitations and exceptions existed. The Second Circuit rejected the claim that Section 108 renders fair use inapplicable in its decision upholding the fair use activities of *HathiTrust* in creating a full-text search database and providing access to the print disabled. Similarly, because the Second Circuit ruled that the creation of accessible format works for the print disabled was fair use and, as a result, “we need not consider” whether the activity was permissible under Section 121.

Myth 4: Fair use is used as an “excuse” by libraries to perform activities not covered by specific limitations or exceptions

Reality: Libraries are a conscientious and risk adverse community. Fair use is being used after careful thought and based on solid legal footing

Although there are numerous purpose specific limitations and exceptions that libraries rely upon, they do not cover every situation and fair use has long been relied upon where specific exceptions do not exist. Libraries are not pirates, but rather, are trusted institutions serving a public mission to provide access to knowledge and culture within the boundaries of the law.



Myth 5: Fair use prohibits any uses that have an effect on the market.

Reality: Fair use is a flexible standard and all four factors are considered together

Fair use is not designed to require satisfaction of all four statutory factors, but instead the factors are considered together. The four factors include: 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 for the copyrighted work.

The Supreme Court has explicitly stated that the factors are not to “be treated in isolation from one another. All are to be explored and weighed together, in light of copyright’s purpose.”³ Following this line of reasoning, circuit courts have confirmed that a defendant does not need to prevail on each of the four factors in order to successfully rely on fair use.

Furthermore, it is important to keep in mind that the market to be considered is the traditional market for the work. In other words, market harm is limited to market substitution.⁴

Myth 6: Fair use is only permitted where the use is non-commercial.

Reality: Courts have upheld fair use for commercial entities and commercial uses.

In a wide range of cases, courts have found that commercial entities and uses are entitled to findings of fair use. The commercial nature of the use is only one factor for the court to consider. Google, West Publishing, the NFL, and Sony are just some examples of commercial entities that have prevailed in court cases, successfully arguing that their activities were fair use.

Myth 7: Copyright’s primary purpose is free expression and not to promote the public benefit.

Reality: The Constitution clearly states that the purpose of the intellectual property system is to “promote the progress of science of the useful arts”

³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁴ *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d. Cir. 2014).



and the Supreme Court has repeatedly pointed to the importance of the public interest.

The Constitution sets forth the constitutional rationale for the intellectual property system: “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.”⁵ The Supreme Court has repeatedly noted that this clause is both a grant of power and a limitation for Congress in enacting its intellectual property laws.

In *Sony Corp. of America v. Universal City Studios*, the Court cited past precedent dating back to 1932 that “The copyright law, like the patent statutes makes reward to the owner a secondary consideration” and that “[t]he sole interest of the United States and the *primary object* in conferring the monopoly *lie in the general benefits derived by the public* from the labors of authors” (emphasis added). Additionally, the Court noted, “The immediate effect of our copyright law is to secure a fair return for an ‘author’s creative labor. *But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good*” (emphasis added).⁶

Fair use promotes this rationale by ensuring that works can be used for a variety of purposes including education and the creation of new works. Additionally, as noted above, fair use is crucial in protecting the First Amendment right to freedom of speech and expression.

Myth 8: There is no guidance on fair use.

Reality: Section 107, numerous court decisions, and best practices provide ample guidance.

Section 107 sets out four factors, noted above, for courts to consider in making fair use determinations. Section 107 provides further guidance by including a non-exhaustive list of purposes that may be fair use, including “criticism, comment, news reporting, teaching (including multiple copies for fair use), scholarship or research.” However, there are many fair uses that may fall outside this list.

Courts also provide direction on fair use decisions and the most important factor is the purpose. Courts look to see whether a particular use is transformative and are more likely to uphold activities that are transformative as fair use, provided that the amount of the work copied or used is appropriate for the purpose. However, all four factors are weighed together and a finding that a use is not transformative is not dispositive. Court opinions can help guide fair use decision-making. It is simply not true that each use must be litigated. While the doctrine is applied on a case-by-case basis, case law and

⁵ Article 1, Sec. 8, Cl. 8.

⁶ 464 U.S. 417 (1984).



precedent are very important; fair use, for example, allows individuals to record a television program for later viewing or for a journalist to quote a portion of a speech without litigating each case.

Best practices can provide helpful guidance by summarizing the best practices of a particular community. As the [Code of Best Practices in Fair Use for Academic and Research Libraries](#) notes, “how judges have interpreted fair use affects the community’s ability to employ fair use.” These practices are grounded in court decisions and judicial interpretations of the fair use doctrine. This Code of Best Practices provides principles, limitations and enhancements to guide individuals in making fair use determination in the following situations: supporting teaching and learning with access to library materials via digital technologies; using selections from collection materials to publicize a library’s activities, or to create physical and virtual exhibitions; digitizing to preserve at-risk items; creating digital collections of archival and special collections materials; reproducing material for use by disabled students, faculty, staff, and other appropriate users; maintaining the integrity of works deposited in institutional repositories; creating databases to facilitate non-consumptive research users (including search); and collecting material posted on the world wide web and making it available.

Codes of best practices have been created for a variety of other communities and purposes including for: dance related materials, scholarly research in communication, teaching for film and media educators, media studies publishing, use of images for teaching, research and study, journalism, documentary filmmakers, online video, media literacy education, OpenCourseWare, poetry, orphan works for libraries and archives, and visual arts.⁷

Myth 9: Best practices in fair use are a contemporary/recent standard and not known by creators.

Reality: While many codes of best practices are recent, these practices contained within these documents have been used prior to being collected in a code.

[Codes of best practices](#) do not appear out of thin air. ARL’s [Code of Best Practices in Fair Use for Academic and Research Libraries](#), for example, was created in consultation with 150 research and academic librarians across the country. The Code of Best Practices draws upon the experiences of academic and research librarians and is a compilation of their best practices. ARL’s Code of Best Practices reflects a consensus of best practices in the research library community. While the aggregation of these best practices into a

⁷ Center for Media & Social Impact, Best Practices, <http://www.cmsimpact.org/fair-use/best-practices>



single document may have occurred recently, the practices themselves are not new to many libraries, but instead simply provide guidance regarding community practices.

Myth 10: Digitization without authorization is not fair use. Fair use does not permit full-text copying.

Reality: Numerous circuits have upheld mirror image copies as transformative and applied fair use.

Several circuit courts have addressed the issue of whether mirror image or exact copying is fair use, finding that transformative copies are protected by fair use. In the recent Second Circuit decision of *Authors Guild v. HathiTrust*, the Second Circuit found that digitizing works and ingesting the works into a full-text search database is “quintessentially transformative” as it is “different in purpose, character, expression, meaning and message from the page (and the book) from which it is drawn.” Numerous courts have likewise held—both in terms of digitization as well as reprinting—that full copying is permissible under certain circumstances, including in the Second Circuit (*Bill Graham Archives v. Dorling Kindersley*⁸), the Fourth Circuit (*A.V. v. iParadigms, LLC*), the Ninth Circuit (*Perfect 10 v. Amazon*,⁹ and *Kelly v. Arriba Soft*¹⁰), the Southern District of New York (*White v. West*,¹¹ *Fox v. TVEyes*,¹² and *Authors Guild v. Google*¹³) and the District Court of Nevada (*Field v. Google*¹⁴).

Myth 11: Fair use is a new idea that did not appear in U.S. copyright law until 1976.

Reality: Fair use has a long history and the 1976 Act simply codified a common law practice.

While fair use was not specifically referenced prior to the 1976 Copyright Act, the doctrine, including the four factors, was well known and practiced. The 1976 Act simply codified the four fair use factors that derive from Justice Joseph Story’s opinion in the 1843 case, *Folsom v. March*. While the four factors may date back to 1843, this doctrine’s origins date back much farther and can be traced back to the English caselaw from the 1740s.

Myth 12: Fair use is a U.S. doctrine that breaks from international law and practice.

⁸ 448 F.3d 605 (2d Cir. 2006).

⁹ 508 F.3d 1146 (9th Cir. 2007).

¹⁰ 336 F.3d 811 (9th Cir. 2003).

¹¹ (S.D.N.Y. 2014).

¹² (S.D.N.Y. 2014).

¹³ 770 F.Supp.2d 666 (S.D.N.Y. 2011).

¹⁴ 412 F.Supp. 2d 1106 (D. Nv. 2006).



Reality: Over one-third of the world's population have fair use or fair dealing provisions in their copyright laws.

The concept of fair use or fair dealing is not unusual or an outlier; fair use or fair dealing is used in over 40 countries.¹⁵ Both fair use and fair dealing allow the use of copyrighted materials without permission from the copyright holder under certain circumstances. While several countries, such as the United States, Israel and Japan have fair use provisions (and, as noted above, it has been considered in other countries, such as Australia), many other countries have fair dealing provisions. Canada, for example, relies on its fair dealing provision to facilitate balance in copyright law and accommodate freedom of expression.

Resources:

- [Fair Use Fundamentals Infographic](#)
- [ARL Code of Best Practices](#)
- [The Good News About Library Fair Use Infographic](#)
- For more resources on fair use, visit <http://fairuseweek.org/resources>

¹⁵ Jonathan Band and Jonathan Gerafi, *The Fair Use/Fair Dealing Handbook* (2013), <http://infojustice.org/wp-content/uploads/2013/03/band-and-gerafi-2013.pdf>.