Disclaimer: I’m Not a Lawyer

VCU Libraries provides the VCU community with information and resources that can help guide them in the responsible and confident use of copyrighted works. However, we do not provide legal advice.

For legal advice, please consult the Office of University Counsel.
Other Legal Resources

Virginia Lawyers for the Arts
http://www.arts.virginia.gov/resources_lawyers.html

Washington Area Lawyers for the Arts (WALA)
https://waladc.org/

Graphic Artists Guild
https://graphicartistsguild.org
What this workshop will cover

- Brief introduction to copyright
- What is fair use?
- Who decides what is a fair use?
- How do you decide what is a fair use?
- What happens if the creator/copyright holder disagrees?
What is Copyright?

Copyright is a form of legal protection granted to authors that gives them exclusive rights to their original works of authorship.
Copyright protects...

- Literary works
- Choreography
- Musical works, including score and lyrics
- Sound recordings
- Pictorial, graphic, and sculptural works
- Films and other audiovisual works
- Architectural works
But doesn’t protect...

Ideas, procedures, methods, systems, and processes

Facts and data

Titles, names, short phrases, and slogans

“Useful articles” (that’s patent)

However, it can sometimes protect the particular way that these things are expressed.
Original and Fixed Expressions

**Original**: The work must have originated from the creator’s mind. Only a minimal amount of creativity is required.

**Fixed**: The work must be fixed in some tangible medium so that it can be perceived, copied, or communicated.

**Expression**: Copyright does not protect underlying ideas or facts, but the particular way they are expressed.
Copyright gives authors exclusive rights

- To reproduce the work
- To distribute the work
- To create derivative works
- To perform or display the work in public
- To authorize others to exercise any of these rights
Copyright is more like copyrights

Copyright is a bundle of rights. You can give away (or get) any of the exclusive rights:

- Individually
- On an exclusive or nonexclusive basis (transfers of rights on an exclusive basis must be done in writing)
- For a certain amount of time
- With other kinds of restrictions (noncommercial, educational use only, etc.)
Copyright is more like copyrights

If you want to exercise one of these rights, you have multiple options:

- Find a work that is in the public domain (not protected by copyright)
- Find a work that is openly licensed or available under terms and conditions that are compatible with what you want to do
- Get permission
- Make use of fair use
Copyright Myths

Myth: A work is not copyrighted unless it’s officially registered.

Fact: Registration is not not required.
Copyright Myths

Myth: A work is not copyrighted unless it has a copyright symbol.

Fact: Works are not required to be marked with a copyright symbol.
Copyright Myths

Myth: The work is already online, so the creator is okay with it being used and shared.

Fact: It may be online without their consent. Even with their consent, copyright still limits how you can use a work.
Copyright Myths

Myth: I’m not “publishing” something when I put it up online.

Fact: Under copyright law, putting a work online does count as “publishing” or “distribution,” which is an exclusive right of the copyright holder.
Copyright Myths

Myth: If I made it for class, I can put it online.

Fact: In the classroom versus on the open web are two different environments, and copyright has to be considered differently for each.
Copyright Myths

Myth: If I attribute the work to the creator, I’m not infringing on their copyright.

Fact: Attribution and copyright infringement are two different things. You can properly attribute a work and still infringe on the author’s copyright.
Fair Use

Fair use is a right granted to everyone under copyright law that allows certain uses of works to be made without permission or payment.

“Fair use is indefinite, vague, deliberately flexible, deliberately subjective, and intended to apply in different situations.”*

*Kevin Smith & Susan Davis (2013). Copyright in a Digital Age: Conflict, Risk, and Reward. The Serials Librarian: From the Printed Page to the Digital Age, 64:1-4, 57-66, DOI: 10.1080/0361526X.2013.759875
Fair Use

- Fair use is fact specific, and it must be determined on a case-by-case basis.
- Fair use in an academic setting versus outside of it: these are two different contexts, which means fair use will work differently in each.
- Publishers, websites, distributors, etc. don’t have to uphold your right to fair use
Fair Use - Section 107

“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—”
Fair Use

There are four factors that must be considered:

- The purpose and character of the intended use, including whether the use is for commercial or for non-profit educational purposes
- The nature of the copyrighted work
- The amount and substantiality of the work that is used in relation to the work as a whole
- The effect of the use on the potential market for or value of the copyrighted work
Fair Use

No single factor is the deciding factor.

- Educational and not-for-profit uses are not automatically fair
- Commercial uses are not automatically infringing
First Factor

The purpose and character of the intended use, including whether the use is for commercial or for non-profit educational purposes

- “Purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”
- Commercial versus non-profit
- Transformative use: using the work in a new way, with a new purpose or different character, adding new expression or meaning. Classic example is parody.
Second Factor

The nature of the copyrighted work

- Creative versus factual
- Published versus unpublished
- From Section 107: “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”
Third Factor

The amount and substantiality of the work that is used in relation to the work as a whole

- Smaller amount of the original work is more likely to favor fair use
- Larger amount of the original work is more likely to weigh against fair use
- Amount is proportional
- Substantiality: using something from the “heart” of the work is more likely to weigh against fair use
Fourth Factor

The effect of the use on the potential market for or value of the copyrighted work

- Is the new work a surrogate for the original?
- Is your use a depriving the copyright holder of income?
- Is your work having an effect on a current or a potential market for the work (meaning some way that the copyright holder would sell or license the work)?
Fair Use and Free Speech

Criticism that relies on fair use to illustrate or quote parts of a work can potentially impact the market for the work by changing the opinions of potential customers/consumers of the work.

This isn’t the same kind of market harm that weighs against fair use.

From Caner v. Autry: “it has long been established that fair use protects the transformative use of a work to criticize, even when the parody or criticism is so forceful that it may eliminate the market for the object of the criticism.”
Codes of Best Practices

**Code of Best Practices in Fair Use in the Visual Arts** from the College Art Association

“Assessing fair use in light of shared professional understandings is a respected practice. Invoking professional practices provides members of a community with a clear framework in which to apply fair use with confidence, knowing the shared norms of their field.”

[See more codes of best practices - Center for Media & Social Impact](https://www.centerforsocialimpact.org/)
Three: Making Art

DESCRIPTION: For centuries, artists have incorporated the work of others as part of their creative practice. Today, many artists occasionally or routinely reference and incorporate artworks and other cultural productions in their own creations. Such quotation is part of the construction of new culture, which necessarily builds on existing culture. It often provides a new interpretation of existing works, and may (or may not) be deliberately confrontational.
Increasingly, artists employ digital tools to incorporate existing (including digital) works into their own, making uses that range from pastiche and collage (remix), to the creation of new soundscapes and lightscapes. Sometimes this copying is of a kind that might infringe copyright, and sometimes not. But whatever the technique, and whatever may be used (from motifs or themes to specific images, text, or sounds), new art can be generated.
Three: Making Art

PRINCIPLE: Artists may invoke fair use to incorporate copyrighted material into new artworks in any medium, subject to certain limitations:
CAA Code

Three: Making Art

LIMITATIONS

- Artists should avoid uses of existing copyrighted material that do not generate new artistic meaning, being aware that a change of medium, without more, may not meet this standard.
CAA Code

Three: Making Art

LIMITATIONS

- The use of a preexisting work, whether in part or in whole, should be justified by the artistic objective, and artists who deliberately repurpose copyrighted works should be prepared to explain their rationales both for doing so and for the extent of their uses.
CAA Code

Three: Making Art

LIMITATIONS

- Artists should avoid suggesting that incorporated elements are original to them, unless that suggestion is integral to the meaning of the new work.
CAA Code

Three: Making Art

LIMITATIONS

● When copying another’s work, an artist should cite the source, whether in the new work or elsewhere (by means such as labeling or embedding), unless there is an articulable aesthetic basis for not doing so.
Fair Use Court Cases

Copyright Office: Fair Use Index

Stanford Copyright & Fair Use: summaries of fair use cases
Campbell v Acuff-Rose Music, Inc.

Facts: 2 Live Crew’s “Pretty Woman” was a parody of Roy Orbison’s “Oh Pretty Woman.”

It used the opening bass riff and the original song’s first line of lyrics (“pretty woman walking down the street”).

From there, its lyrics diverged into a parody of the original.
Roy Orbison

Pretty woman, walkin' down the street
Pretty woman the kind I like to meet
Pretty woman I don't believe you, you're not the truth

No one could look as good as you, mercy
Pretty woman won't you pardon me
Pretty woman I couldn't help but see
Pretty woman that you look lovely as can be
Are you lonely just like me

2 Live Crew

Pretty Woman, walking down the street,
Pretty Woman, girl, girl you look so sweet,
Pretty Woman, you, you bring me down to that knee,
Pretty Woman, you make me wanna beg please,
Oh, Pretty Woman.

Big hairy woman, you need to shave that stuff,
Big hairy woman, you know I bet it's tough.
Big hairy woman, all that hair ain't legit,
'Cause you look like Cousin It.
Big hairy woman
Campbell v Acuff-Rose Music, Inc.

First Factor: Purpose

"The later words can be taken as a comment on the naivety of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies."
Second factor: nature of the original work

The original song is highly creative. However, this “is not much help in this case, or ever likely to help much, in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.”
“It is significant that 2 Live Crew not only copied the first line of the original, but thereafter departed markedly from the Orbison lyrics for its own ends. 2 Live Crew not only copied the bass riff and repeated it, but also produced otherwise distinctive sounds, interposing ‘scraper’ noise, overlaying the music with solos in different keys, and altering the drum beat. This is not a case, then, where ‘a substantial portion’ of the parody itself is composed of a ‘verbatim’ copying of the original.”
Campbell v Acuff-Rose Music, Inc.

Fourth factor: impact on market

“We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because ‘parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically,’ [B. Kaplan, An Unhurried View of Copyright 69 (1967)], the role of the courts is to distinguish between ‘[b]iting criticism [that merely] suppresses demand [and] copyright infringement, [which] usurps it.’ [Fisher v. Dees, 794 F. 2d, at 438.]”
Campbell v Acuff-Rose Music, Inc.

Transformative use

“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.”
Campbell v. Acuff Rose Music, Inc.

Luther Campbell of 2 Live Crew's Historic Supreme Court Parody Case (VH1 Hip Hop Honors)
Bill Graham Archives v. Dorling Kindersley Ltd

- Even if you ask for permission, you can still change your mind and proceed with fair use.
- Just because there is a licensing market for a certain use, doesn’t mean that you have to license instead of relying on fair use:
- From the court: “A copyright holder cannot prevent others from entering fair use markets merely by developing or licensing a market for parody, news reporting, educational or other transformative uses of its creative work.”
Not fair use

Although the creation of a Harry Potter encyclopedia was determined to be “slightly transformative” (because it made the Harry Potter terms and lexicons available in one volume), this transformative quality was not enough to justify a fair use defense.

Important factors: An important factor in the court’s decision was the extensive verbatim use of text from the Harry Potter books.
Monster Communications, Inc. v. Turner Broadcasting Sys. Inc.

Fair Use

The makers of a movie biography of Muhammad Ali used 41 seconds from a boxing match film in their biography.

Important factors: A small portion of film was taken and the purpose was informational.

This summary comes from Stanford Copyright & Fair Use
Los Angeles News Service v. KCAL-TV Channel 9

Not fair use

A television station’s news broadcast used 30 seconds from a four-minute copyrighted videotape of the 1992 Los Angeles beating of Reginald Denny.

Important factors: The use was commercial, took the heart of the work, and affected the copyright owner’s ability to market the video.

This summary comes from Stanford Copyright & Fair Use
Fair Use Analysis

Fair use is fact-specific.

Write down all of the specific facts of your situation.

- What are you using?
- How are you using it?
- What new work are you creating?

Now analyze your use in light of each of the four factors, and write down your analysis. You can also use tools like the Fair Use Checklist to guide your thinking.
Other Key Questions

- Why are you using this particular work?
- What is the purpose of your work, and how does that purpose compare to that of the original work? (How transformative is your purpose/work?)
- Are you using only enough of the original work to achieve your purpose?
- How widely will your new work be distributed (or be able to be distributed)?
Future Events

Rights and Relationships: Key Legal Issues for Artists, 10 a.m.-12 p.m.
Culture in the Face of Publics, 2-3:30 p.m.
Friday, March 16, 2018, Cabell Library, Room 303

Navigate the Permissions Process
Friday, March 23, 2018, 1-2 p.m., Cabell Library, Room 205

bit.ly/CopyrightForCreators
Questions?

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guides.library.vcu.edu/copyright-for-creators