

Fair Use Myths - The Truth About Fair Use

by Terrica Carrington February 24, 2017

There are a number of misconceptions floating around about fair use, what it means, and what purpose it serves. In this post, I'll tackle some of the most popular myths about fair use.

Myth: Proponents of copyright hate fair use

One of the most egregious fair use myths is the notion that proponents of copyright are necessarily opposed to fair use and vice versa. That couldn't be further from the truth; some of the strongest supporters of fair use are the very creators who rely on copyright to earn a living. And that such a revelation would come as a surprise underscores just how misunderstood fair use has come to be.

In part, this misconception can be attributed to the fact that much of the conversation surrounding fair use emphasizes the doctrine's role as an "affirmative defense" to copyright infringement. Most of the time when people hear about fair use it's in relation to a copyright infringement suit where one party is arguing fair use and the other is a creator enforcing a copyright. While fair use is an affirmative defense, it also serves an important and vital role, as a *component of copyright*, in shaping and defining the scope of the law. Journalists, filmmakers, writers, and choreographers, just to name a few, routinely rely on fair use to create new copyrighted works.

And when copyright minimalists try unduly stretching the bounds of fair use as a vehicle to chip away at copyright, that doesn't help to mitigate the confusion; if anything, it fuels the fire. But, that certain proponents of fair use actively oppose copyright doesn't mean the sentiment is mutual.

Like with all things, balance is key. So don't think of fair use as the kryptonite to Copyright's Superman; a more accurate metaphor would call it the Robin to Copyright's Batman.

Myth: Cover songs are fair use

I did a quick internet search for definitions of fair use, and Urban Dictionary—a user-generated online dictionary—defines it in the following way:

The use of copyrighted material that can be used without permission of the original copyright owner such as criticism, reviewing, news reporting, parodies, remixes, mashups, cover songs, scholarship, and teaching.

Admittedly, I take issue with a number of the examples provided in this definition, but one certainly stands out among the rest: cover songs. A cover is a performance of a song by someone other than the original performer—and it is *definitely* not fair use. Just ask songwriters and music publishers. Much of this confusion comes from the fact that we commonly see videos of cover songs uploaded on Facebook and YouTube, and the assumption is that, since they aren't being removed like other content, they must be fair use. Many

people are unaware that YouTube pays for a license that allows its users to legally post videos of cover songs. Facebook, on the other hand, has not yet entered into agreements to acquire the necessary licenses, and as a result, cover videos posted on Facebook are now being removed. The good news, though, is that these licenses may be in the cards for Facebook in the near future.

Myths: As long as it's "transformative" it's a fair use; As long as you're not making money, it's fair use

I'm combining these 2 myths because they have a lot in common, and I see them getting a lot of traction on social media. The dialogue usually goes a little something like this:

Person A: *"Is it ok to use clips from a movie in my video?"*

Person B: *"Yeah as long as you do something to transform it, it's fair use"*

Person A: *"What about a song? Can I add music without getting in trouble?"*

Person B: *"That's fair use too as long as it's just for fun and you're not making money off of it"*

As for transforming the work, courts do consider whether a secondary work "transforms" the original, but that's just *one* element in *one* of the four factors. Specifically, courts consider transformativeness as a part of the first factor, which looks at "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," but, again, that's just *one* factor and it cannot, alone, be determinative of fair use. Likewise, whether or not a secondary work is commercialized plays a part in weighing the first factor, but alone is not determinative. The other factors that must be considered are:

- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

Myth: If I add a disclaimer saying that my video is fair use, I'll be in the clear

I watched a video on YouTube that incorporated clips from a popular cartoon and, in my opinion, it was *in no way* fair use. Nevertheless, the author included the following message just under the video: "This transformative remix work constitutes a fair-use of any copyrighted material as provided for in section 107 of the US copyright law."

It was Shakespeare who wrote "...a rose by any other name would smell as sweet," and what he meant by that was it doesn't so much matter what we *call* something; that doesn't change the essence of what that something is. That's an important lesson. It doesn't matter that you *say* your creation is fair use, it matters whether it actually *is* fair use, and as discussed above, the only way to determine that is by an analysis which applies each of the four factors.

Myth: If it's online, anyone can use it

This morning I decided to drive my neighbor's car in to work; since they just left it outside, I figured they wouldn't mind. I think I've made my point, but I'll go on:

Having grown up in the era of screeching AOL dial-up, Napster (before it left the dark side), and smartphones, it's sometimes easy to forget that having such ease of access to pretty much *anything*, is a privilege. It is not a right. And just as we do not have the right to take other people's property in the "tangible realm" simply because we have access to it, we also don't have that right online. When creators choose to make their work available online, they

don't magically give up their copyright protection. And again, the *only* measure of whether something is a fair use comes from the four statutory factors. When in doubt, look to the factors.

Myth: As long as I give credit, it's fair use

Giving credit for the use of someone else's work is a great way to avoid committing plagiarism, but it doesn't quite cut it with respect to copyright and fair use. Infringement is infringement, credit or no credit.

U.S. copyright law doesn't require that you give credit—also known as the attribution right—but it does require permission in most cases. So that saying “*it's better to beg for forgiveness than to ask for permission*” is terrible advice when it comes to the use of someone else's copyrighted works and it could land you in hot water with hefty damages to pay. For more on the differences between copyright and plagiarism, [click here](#).

When it comes down to it, fair use is about *the way* you've used an original creation in your secondary work. Copyright and fair use were designed so that, when appropriately balanced, they *together* generate progress. Progress isn't achieved by free-riding on the creative efforts of others. True progress requires appreciation and *respect* for content of the past and present (and the creators), but with a creative eye to the future.