

When Fair is Foul: Why Fair Use Isn't an Impenetrable Defense for Indie Films



This situation is probably familiar to you: You don't own it and you need to use it.

Most films use or reference another work of art. Maybe it's a popular song that will crescendo as your protagonists finally kiss. Or maybe your characters are watching a scene from *Reservoir Dogs* to teach themselves how to commit a heist. Or maybe you need to use news footage of whaling ships in your orca documentary. So how do you do that without getting sued for copyright infringement?

Well, duh: You license it! You figure out who the owner is, then you call or email them and ask for permission. Sometimes that means having to sign onerous-looking contracts and pay hefty fees, but if you want a foolproof plan for avoiding litigation as your film premieres, that's what you do.

But maybe you can't find the copyright owner, or maybe they're being unreasonably restrictive, and the use of that material is still critical to your film. Will fair use protect you? Half the questions I get in my law practice deal with this issue. Unfortunately, fair use is badly misunderstood and misapplied. Let me unravel its mysteries for you.

What is Fair Use?

Normally, using someone else's copyrighted work without permission constitutes copyright infringement, since only the creator has the exclusive right to reproduce, sell or otherwise use it. However, fair use is a legal defense that allows you to legally use someone else's copyrighted work without his or her permission.

How Do You Apply Fair Use?

Understanding fair use is the easy part. Applying it gets tricky. That's because, like most things in the law, there's no hard and fast rule about it. According to Section 107 of the Copyright Act of 1976, you determine fair use by balancing four factors against each other.

1. Consider the purpose and character of your use. The more your use differs from the original intended use, the more likely it will be a fair use. What is your intended use of the original work? Profit? Parody? Education? Has your use transformed the meaning of the original work or commented on it in any way? Profit is generally frowned upon, but parody, education in a school setting, news reporting or criticism are more likely to be given protection. (Without fair use, CNN would get sued every hour of every day).

A client of mine once wrote a scene in his film where characters repeatedly sang "Pinball Wizard" by The Who, but kept messing it up. I felt that his use of the song was not transformative enough because it didn't comment on the song in any way or illuminate its meaning; it was just there because the writer liked The Who. It could've been any song by any artist. I advised that he needed permission if he wanted to use it.

2. Consider the nature of the copyrighted work. Is the fiction or nonfiction? Fair use is generally more applicable if the work is fact-based, since facts are non-copyrightable. In *L.A. News Serv. v. CBS Broad., Inc.*, CBS used footage of the 1992 L.A. riots filmed by the Los Angeles News Service without permission. The court found that CBS's use of the footage was for the purpose of news reporting and that the factual and informational nature of the footage made it a fair use.

Fair use is also more applicable if the work you're using is already published. Courts are not very forgiving if you use an author's work before he or she has a chance to publish it to the masses.

3. Consider the amount and substantiality of the portion you use. How much of the original work are you using? Typically, the less of the original work you use, the more likely it will be fair use. But if that small portion you do use is substantially well-known, or gets to the heart of the whole work, it may not be fair use.

Last year, a client of mine asked if he could use a few clips from a *60 Minutes* report in his documentary. Even though the clips he wanted to use were only a few seconds each, the clips represented the most salient pieces of information from the report; in essence, they were the "heart" of the whole thing. I instructed him that it would not be a fair use and to obtain a proper license to use them.

4. Lastly, consider the effect of the use upon the potential market value of the copyrighted work. Does your use deprive the copyright owner of income, or undermine a new or potential market for their work? Will your use become the de facto way for audiences to see that person's work? If your use could conceivably take money out of the copyright

owner's pocket, then that's not fair use.

In *Lennon v. Premise Media Corp.*, Yoko Ono, Julian Lennon and Sean Lennon sued the makers of a documentary that included a 15-second clip of John Lennon's iconic song "Imagine." The court held, in part, that because so little of the song was used, it would not usurp the market for the song and would not cut off potential revenue streams for Ono and Lennon's sons.

None of these factors carry more weight than the others, and judges have a lot of discretion over how to balance them. For instance, a lot of people assume that if they don't profit from the use of someone's copyrighted work, then it's a fair use. But some courts have de-emphasized the importance of financial gain, making an infringing party liable even if they never make a cent.

How Do You Balance These Factors?

Honestly, you can't. At least not without an attorney advising you. That's partly because what may appear to be fair use in one situation may not be in another. Determining whether fair use applies is heavily fact-specific and requires someone who is trained to know those differences to make the call.

There's a second reason you shouldn't make the judgment yourself. Fair use will not prevent you from getting sued for copyright infringement. It's not a get-out-of-jail-free card that will protect you from litigation; fair use is what lawyers call an "affirmative defense" and it can only be asserted *after* you've been sued. This is important so I'll repeat it again. You can only use the fair use defense after you've been sued for copyright infringement, which means you're already spending time and money defending yourself in court. This is probably the biggest misconception people have about fair use, and it makes the doctrine dangerous if you don't know what you're dealing with.

Now this may not always be the case. Last year, in *Lenz v. Universal Music Corp.*, the Ninth Circuit Court of Appeals determined that fair use is more than a defense—it's a right granted to all under The Copyright Act. In other words, under this ruling, you *don't* need to wait until you're sued to assert it. You can claim fair use right away. It's a ruling that could upend the way we think about copyright law. But even if the Ninth Circuit ruling becomes common, you still have to engage in the balancing test mentioned above.

So if you can't get an attorney to sign off on your fair use argument, you're not safe enough to use the material, which means you either have to work around it or get the license. I know it's tempting, especially with limited funds, to throw the dice and hope you won't get sued. But the risk isn't worth it. And your pleas for forgiveness will probably fall on deaf ears, especially with large corporate copyright holders like record labels and movie studios who tend to be unforgiving when their intellectual property is on the line.

So the next time you find yourself wanting to use someone else's copyrighted work in your film, ask them for permission. The worst thing they will say is "no." Compared to a potential years-long legal battle, that's not such a bad thing. Then all you need to do is get creative. And isn't that why we all got into this business, anyway?

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