SET OF PRINCIPLES IN 
FAIR USE FOR JOURNALISM 
FAQs | June 2013

What is the Set of Principles in Fair Use for Journalism?

It is a statement of journalists’ shared understandings about what is fair and reasonable in employing fair use, available at centerforsocialmedia.org/journalism.

What is fair use?

Fair use is the right to use copyrighted material without licensing it or getting permission, when you are re-using the material in a way that adds value and using an appropriate amount that adding value requires.

What should I think about in making a fair use decision?

Although the language of the Copyright Act and court decisions on the subject is complicated, you can boil it down to a few basic questions.

- Did the unlicensed use add value to the preexisting material, rather than just exploiting it?
- Was the use made in good faith, using the amount and kind appropriate to the task?
- Was it reasonable according to the general opinion of the field?

But doesn’t copyright protect owners of creative material?

Copyright policy has been designed from the beginning for the express purpose of providing government encouragement to generate more culture—“Science [Knowledge] and the Useful Arts.” Copyright policy provides some monopoly privileges to people who have created work, as an incentive. At the same time, people make work building on the work of others. So it’s also important in some cases to encourage other users for using this very same material.

So copyright law has features that permit users to quote other creators copyrighted work without permission. The most important and general of those features is fair use.

Isn’t taking other people’s work stealing?

Under copyright law, taking other people’s work merely to avoid payment for using it as it was intended is copyright infringement, which is illegal. Furthermore, if you act like it is your work, it is also plagiarism, which is unethical. But re-using others’ work as you add value is a routine way to make new work.

How are journalists using fair use today?

Journalists do it every day when they “advance the story,” quoting or paraphrasing what has gone before. They do it when they review a work and quote a line from a movie or a book or a play, or show a clip or
an image. Journalists do it when they quote from a corporate or government document or a think tank report in a story. They do it when they use a clip showing a famous singer performing in their reportage on a July Fourth celebration.

How were the Principles created?

The document was created by journalists, in a process funded by the McCormick Foundation and facilitated through a joint collaboration of American University’s Center for Social Media, in the School of Communication, and the Washington College of Law’s Program on Information Justice and Intellectual Property. The project was funded by the Robert R. McCormick Foundation.

Chapters of the Society of Professional Journalists and the Online News Association, and in some cases the Association of Alternative Newsweeklies convened journalists in ten cities across the country, meeting in 17 deliberative meetings to find consensus on appropriate employment of fair use for the best possible journalism. The results were reviewed by a bank of lawyers and legal scholars. Among endorsers are the Association of Alternative Newsweeklies, the Association for Education in Journalism and Mass Communication, the Association of Schools of Journalism and Mass Communication, J-Lab, MediaShift, the National Association of Black Journalists’ Digital Journalism Task Force, New America Media, and Poynter Institute. More endorsers are welcome, and available at centerforsocialmedia.org/journalism.

How can journalists use the Principles?

This document is a tool that helps journalists and their editors, lawyers, and others they need to interact with to get their work done use the copyright doctrine of fair use with greater assurance that they are doing the right thing.

Why do we need a Set of Principles in Fair Use for Journalism?

Today, journalists are self-censoring because they’re unsure about the law.

Journalists spend too much time, suffer too much frustration, and fail to take on new challenges because of copyright confusion, anxiety and misunderstanding. This hurts both the present and the future of journalism.

How do we know journalists are self-censoring because they don’t understand fair use?

Journalists said so.

In a study conducted with some 80 journalists throughout the country, an American University 2012 report (centerforsocialmedia.org/journalism) revealed the extent of the problem. It showed that where journalists operate in traditional newsroom environments, they employ fair use very vigorously—but usually without knowing it. Their habits have been baked into newsroom practice without explanations for the legal reasons why they can employ fair use.

So when journalists, even very experienced ones, move into unfamiliar situations, new journalistic operations, and use non-print media and social media, they often stumble over copyright questions.

Often, the journalist hesitates, or decides to get permission for safety’s sake, or waits for a check back from someone in charge. That can lead to delay, higher costs, and even missing a story opportunity.
This adds up to self-censorship.

Isn’t fair use legally risky?

Perceived risk is the most common reason why journalists hesitate to employ fair use. They are most often afraid that they will get themselves or their organizations in some kind of trouble over an accusation of copyright infringement.

Actually, lawsuits around fair use are extremely rare. But they have happened. Furthermore, copyright law has built-in “statutory damages,” or high potential fines for copyright infringement. Although such fines are inevitably negotiated down to far smaller amounts than the highest fine possible, it is nonetheless a serious consideration.

So journalists usually become extremely cautious when they actively have to make a fair use decision rather than simply doing what’s always been done.

Why not play it safe, and make get permission?

Because you can’t get permissions for everything and also do journalism. Journalists build upon copyrighted material in all aspects of their work.

Our world is, basically, copyrighted. Current copyright law makes copyright the default for all expression, which means everything already made is under copyright.

Waiting will not help. Today, the term of an owner’s monopoly so long that copyrighted material only falls into the public domain long after everyone who has experienced it for the first time is dead.

Not everything is copyrighted. What about government documents and Creative Commons materials?

There are pockets of non-copyrighted material, but they are very small. Work produced before 1923 is generally not copyrighted. Work entirely produced by a federal government employee at the job is in the public domain. However, in many states, local and state government documents—including court documents—are copyrighted.

Creative Commons, which is a license creators can use to permit some uses for anyone, is a small but useful body of material available for people who want to abide by the conditions that the creators put on their documents. Since most CC documents come with significant conditions, and many of them require that users will only use them non-commercially, many journalists cannot use them.

Isn’t fair use a vague, “grey area”?

Fair use is flexible, but not unreliable. Its reliability is improved by knowing what is acceptable practice in your professional community.

Like other examples of your exercise of the First Amendment, there is no way to completely avoid flexibility and the attendant risk, because there is no way to predict exactly what you will need in order to have freedom of expression. All exercise of the First Amendment is done on a case-by-case basis, and people typically are more confident in exercising their right of expression when they understand what is expectable and seen as a reasonable exercise of it.
Since court cases are litigated at the extremes of behavior, and often are not decided on the merits of the issue but on other technical reasons, they are rarely what anyone exercising their First Amendment right uses in daily practice. Usually people just go ahead and express themselves without thinking about the First Amendment at all, because their uses of it seem so normal.

When a journalist is making a decision about, say, acceptable criticism of the government (risking a treason charge), what is acceptable speech that some may find indecent or even obscene, what is an acceptable negative portrayal of someone (risking a libel charge), they usually make that decision with understanding of the situation they are speaking in, and the norms for expression in that situation. This behavior is so routine that journalists don’t even think about that either, until they get to grey areas at the edge of what is known to be acceptable.

**But fair use isn’t a First Amendment issue, it’s a copyright issue.**

Fair use becomes a First Amendment issue because it enables new expression. If government permits private actors, such as copyright holders, to censor new expression, copyright law is unconstitutional for violating the First Amendment.

The Supreme Court has ruled, in both the *Eldred* and *Golan* cases, that extended and extensive copyright is still constitutional. Fair use, in the opinions issued in these cases, guarantees the constitutionality of copyright, by giving new makers of culture access to created culture that remains under long and strong copyright.

**How can I know what is acceptable? Each situation is so different.**

Each instance of a journalist’s use of First Amendment rights to free expression is unique; it has never before occurred quite that way. But each of those unique moments happens within a broader category of kinds of activity.

This is why professional communities have developed sets of principles applying to the kinds of activities they engage in, which commonly require employing fair use. Such documents can guide practice by sharing the professional community’s reasoning.

This is what journalists did in creating the Set of Principles in Fair Use for Journalism.

**Will the Principles stop people from threatening me with a lawsuit?**

Under U.S. law, anyone can challenge your use of copyrighted material, although having a consensus document that expresses common understanding significantly lowers the chance of responsible actors doing that. No one can guarantee you that you will never be sued for any reason, including having someone slip on your front step or be hurt by a remark you made.

**How do the Principles lower my risk of a lawsuit?**

Having evidence of professional consensus in six common situations journalists encounter means knowledge is shared, not only with your peers but with anyone who might want to challenge you. This discourages inappropriate challenges. In the unlikely (and extremely uncommon) case of a lawsuit, the Set of Principles would be valuable in determining the professional community’s standards. If the defendant had made uses within the terms of the Principles, they would likely also find that organizations offering pro bono services on fair use such as the Stanford Fair Use Project and law clinics at the University of Southern California and University of California Berkeley were highly interested in helping
with the case—another deterrent for aggressive litigation.

Aren’t the Principles just a non-legal document?

The Set of Principles expresses the consensus of a professional community, and this is usually crucial evidence that courts look to in deciding whether something is “fair use,” so what journalists believe is fair and reasonable is definitely important.

How have consensus documents worked for other professions?

Such sets of principles have been powerful in lowering perceived risk and enabling work without hurting copyright owners. For instance, documentary filmmakers are now able to get errors and omissions insurance that includes fair uses under the terms of their statement without paying any incremental costs. Scholars have been able to get work published by major publishers. Librarians have been able to get work formerly stranded in obsolescing formats into the hands of students and researchers. This has happened without any challenge from large copyright holders.

Why do large copyright holders also support fair use?

Because most large copyright holders, like other makers, also vigorously employ fair use, and benefit from the efficiencies of shared knowledge about acceptable practice.

Is fair use a right, or just a defense if someone sues me?

Fair use is a right. Although some lawyers will point out that fair use is not a right but merely a defense, this is a distinction without a difference. You have a right to self defense, which you will only use formally if someone you defend yourself against sues you. Similarly, fair use is a right to use existing material without a license in some circumstances, which you will use when needed and only formally invoke when challenged.

Usually, you employ fair use without anyone questioning you. You don’t check with anyone, you don’t ask permission, you proceed to make journalism, and then you do the whole thing again the next day—or hour.

You would only ever need to discuss the rationale for your choices were it to be challenged—either by one of your gatekeepers (such as your editor) or in court.

Then you would invoke your fair use right to use unlicensed material to make new work.

Wait a minute—I like my copyright!

Nobody wants to open the door to piracy, and this statement certainly doesn’t. This Set of Principles was created by, and is for, people who are both owners of material and users of existing material.

This Set of Principles specifies under what limited circumstances users’ rights take precedence over owners’ rights, within today’s law.

Fair use doesn’t hurt owners’ rights because of its core definition—it only permits re-use when a new user is adding value, rather than simply re-using the material for the same purpose without paying for it.

For more information, visit http://www.centerforsocialmedia.org/journalism