

## ***Fair Use Policy in the Michael C. Carlos Museum***

### **What is “Fair Use”?**

If an unlicensed use of a copyrighted work generates social or cultural benefits greater than the cost imposed on the copyright owner, then it can be considered Fair Use. By law, courts use the following Broad Factors to evaluate Fair Use Claims:

1. What is the purpose and character of the use?
2. What is the nature of the copyrighted work?
3. What overall portion of the copyrighted work does the use include (less=“Fairer”)?
4. What effect does the use have on the market for the copyrighted work?

Courts have been consistently liberalizing their interpretations of Fair Use since the 1970s, and the state of the art in today’s digital world is radically different from that of even 10 years ago. In practice, courts now tend to collapse the 4 Broad Factors into 2 Key Factors when evaluating a Fair Use claim.

1. Is the use “transformative”? Does it make a new use of the image for purposes that are significantly different from the artist’s original intended use for the image (changing the context, audience, or “meaning” of the image)?
2. Is the amount of material taken (including the entire work) from the copyrighted work appropriate for the nature of the use?

Fair Use is always a judgment call on behalf of the courts. There is no safe, cut and dried definition of what is and is not Fair Use. When claiming Fair Use, the user must always be willing to defend the use in court.

### **It’s Open to Interpretation**

From the College Art Association’s perspective<sup>1</sup>, if you can build an argument that the use furthers the mission of the museum, while being mindful of the Key Factors, then nearly all museum-related uses of artwork images can be claimed as Fair Use. The Association of Art Museum Directors<sup>2</sup> is in broad agreement with CAA, but it makes a clear division between scholarly uses (catalogues, journal articles, etc.), which it claims are more transformative, and promotional uses (coffee table books, brochures, etc.), which it claims are less transformative. AAMD stresses the importance of context within a publication in claiming Fair Use. More catalog data, copyrights, citations, etc.

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<sup>1</sup> <http://www.collegeart.org/pdf/fair-use/best-practices-fair-use-visual-arts.pdf>

<sup>2</sup> <https://aamd.org/sites/default/files/document/Final%20Fair%20Use%20Guidelines%20060116.pdf>

identifying the works depicted in the image in combination with original research, interpretation, criticism, etc. make a use “Fairer” in AAMD’s eyes.

Emory General Counsel recommends a more cautious and measured approach to claims of Fair Use than do CAA and AAMD. Counsel reminds us that Emory has valuable IP of its own to defend, making us both rights-holder and Fair User. As a private university that is often perceived by the public to be abundantly wealthy, Emory makes an attractive target for lawsuits. State universities are able to claim sovereign immunity when faced with copyright infringement claims, but Emory does not have this right. When claiming Fair Use with images, “how much is too much?” can be difficult to determine. Weighing Key Factor #2 (*is the amount taken appropriate?*) is relatively easy when excerpting text from a book. Images, however, are almost always presented in their entirety, and Fair Use of images is always risky.

### Rights-Holder Rabbit-Holes

A rights-holder is, quite simply, anyone who owns or controls the right to reproduce or otherwise use a creative work. Some examples of rights-holders are artists, heirs/estates of artists (keeping in mind that heirs may include charities or other corporations), publishers, gallery owners, and agents for artists or their estates (e.g. ARS and VAGA). Keep in mind, however, that a photograph taken of a copyrighted work of art is itself a copyrighted creative work. Copyright can cause serious rabbit-holes in this area. A video that the museum posts on Youtube might contain a clip showing a series of posters on a wall, one of which shows a sculpture on loan from another museum. In this example, the artist of the sculpture, the lending museum (owner of the sculpture), the photographer who took the poster photo, and the videographer who shot the video all could conceivably hold at least some rights to the video(!). Because of this rabbit-hole problem, the museum must concern itself with artists’ rights, but we also must be mindful of the rights of photographers whom we hire to shoot our artwork.

### Permissions Fees (and What You Buy with Them)

Evaluating whether to request permission to use a copyrighted work versus claiming Fair Use is a calculation of relative risk set in the context of building and maintaining relationships with rights-holders. In our modern digital world, artists and those who represent them fight a never-ending battle to defend the integrity of their “brands” against the likes of Café Press coffee mug peddlers<sup>3</sup>, Target, and Vanilla Ice<sup>4</sup>. That said, ARS, VAGA, and others who represent the interests of artists, are all too often willing to offer a dollar value for museums’ planned uses of artworks in their collections, regardless of the (positive!) effect that these might have upon the market

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<sup>3</sup> <http://www.cafepress.com/+famous-artists+mugs>

<sup>4</sup> <https://99designs.com/blog/tips/5-famous-copyright-infringement-cases/>

for the artists' work. We must position ourselves as artists' allies, while not reinforcing rote use of reproduction fee laundry lists.

- Are we cultivating a relationship with an artist or her estate? If so, we might consider requesting permissions/paying license fees regardless of other factors.
- We might want to consider requesting permissions initially out of courtesy, but we might later draw the Fair Use line when a rights-holder requests a license fee that we feel is excessive. Even if we have paid a license for a past use, it does not change our legal right to claim Fair Use for the next use of the same image.
- In cases where we fear the embarrassment of a legal claim at all costs, then it might be worth paying license fees simply in order to avoid the bad press. Always remember that no use fee levied by a rights-holder will approach the costs of litigation in court.
- If the rights-holder is the only source of a high-quality image of the artwork, then we may be forced to pay a license fee/sign a licensing contract in order to get a copy of the image for use. That said, Fair Use defends uses of both “authorized” and “unauthorized” images of copyrighted works.

#### ***always seek permissions for these:***

- Marketing materials, merchandise, and other pieces that are primarily promotional in nature (print ads, street banners, press releases, postcards, posters, invitations, blogs, web pages, e-newsletter articles, social media posts, etc.)
- Brochures, checklists, and other informational publications with basic, tombstone-style data about artwork
- Any images of artwork taken by non-staff photographers who are not contracted by the museum

#### ***consider claiming Fair Use for these:***

- Catalogs, journal articles, and other formal scholarly publications (whether free or produced for sale)
- Informal pieces containing scholarly interpretations or reporting original research (blogs, social media posts, e-newsletter articles, etc.)
- Didactic uses in exhibitions and programs available exclusively within the museum's walls (exhibition graphics, lectures, etc.)
- So called “orphaned” works and other artworks by artists who do not make themselves easily available for contact.
- Uses in virtual exhibitions and online databases, provided that the uses follow these limitations:
  - In ArtStor and other private databases requiring authentication to use, downloadable image copies should not exceed standard full-screen resolution (1080 x 1920 pixels).

- In Carlos Collections Online (Luna and Omeka), Shared Shelf Commons, and other public access applications, downloadable image copies should not exceed ¼ of a full screen resolution (560 x 843 pixels).
- Applications that offer higher-resolution copies of images for up-close viewing should not allow downloading.
- Images should be accompanied by thorough attribution information, catalog data, and copyright statements.
- Users should be informed that materials are provided for their personal/scholarly use, and that they are responsible for obtaining permissions from rights-holders for their other uses.
- Users should be offered a “contact us” option to request further information and to make complaints/claims.

**to-dos when claiming Fair Use:**

- When publishing images of copyrighted works or exhibiting the copyrighted works themselves, we should present as much data about the artworks as is practical, including copyright statements.
- When providing images of copyrighted works to others (press, researchers, authors, etc.), we should encourage them to include as much rights information as is practical.
- In all claims of Fair Use, the museum must prepare and keep on file a written statement justifying why it considers the use to be “Fair”. In the event of a claim by a rights-holder, this written justification will be the basis for Emory General Counsel’s reply. The statement should include language indicating that the museum adheres to CAA’s Code of Best Practices in Fair Use for the Visual Arts and AAMD’s Guidelines for the Copyrighted Materials *and Works of Art by Art Museums*.