

Copyright for Graduate Students

Audience FAQs & Answers for Presenters

What does it mean to say a use is “transformative”?

A use may be considered “transformative” if it:

1. Actually transforms expression in the work, as a parody of a song might do;
2. Is included in a new work of authorship, such as quoting from the writings of a person in a biography;
3. Is used for a different purpose than the original, causing it to have a different meaning, as when a newspaper publishes a photograph that has become controversial.

Transformative uses will not always be fair. A new arrangement of a song, for instance, may well infringe the derivative work right. But especially when done for purposes of criticism or commentary, the transformativeness of a use will tend to tilt in favor of fair use.

Courts have recently been receptive to the idea that copyright owners do not have the right to control all transformative uses of their works. Transformative uses are less likely than non-transformative uses to pose a risk of supplanting market demand for a work.

What does it mean to say a use is “non-transformative”?

A use will be considered “non-transformative” if it is, for example, an exact copy of a work or part of a work. Making a time-shift copy of a television program is an example of a non-transformative use that courts have deemed fair. Posting a chapter of a book on an electronic course reserve system is another example of a non-transformative use. (The *Cambridge University Press v. Becker* case, which is presently pending before an appellate court, is testing whether this kind of use is fair.) Scanning a photograph you like and posting it online is a third example of a non-transformative use.

Non-transformative uses may be fair uses, but they are less likely to be fair uses insofar as they pose a stronger risk of harming the market for the work. If someone makes a copy of a movie or computer program, for instance, instead of buying a copy of his own, that non-transformative use is more likely to have a negative effect on the copyright owner’s market. Even though one person’s peer-to-peer file-sharing of music or a movie would seem to be relatively trivial, courts take into

account that if they say this use is fair, then many others will do the same thing and the aggregation of these uses are likely to cause market harm.

Are charts, graphs, and tables protected by copyright and, if so, can I rely on fair use to incorporate them into my nonfiction work?

Charts, graphs, and tables may be protected by copyright, but the underlying facts represented in them are not copyrightable. Creative choices in the way that facts are presented in a chart, graph, or table may be sufficiently original to warrant copyright protection. That said, where applicable, you may still be able to rely on fair use to use a copyrighted chart, graph, or table that includes expressive elements.

How does a work's copyright status affect fair use?

Copying of works that are not protected by copyright is not copyright infringement, regardless of fair use. But sometimes it can be difficult to determine whether a work is protected by copyright. For example, you may not be able to determine whether a work's copyright has expired, or you may not be sure whether a scientific chart has the requisite level of creativity to warrant copyright protection. Even where you cannot determine a work's copyright status, you may still want to understand whether your use of the material would be permitted by fair use should the material be protected by copyright. In fact, in some cases, determining whether the use would be permitted by fair use may be easier than resolving the work's copyright status.

How does a work's orphan work status affect fair use?

Orphan works are works for which it is difficult or impossible to identify or locate the work's copyright owner, even after a diligent search. The use of an orphan work may be permitted by fair use, just like any other work. In fact, orphan works often have characteristics that make it more likely that a use may be fair use eligible. For example, orphan works are by definition not active in the market, limiting any resulting economic harm to rightsholders. In some cases, determining whether the use of an orphan work would be permitted by fair use may be significantly easier than securing permission from a rights holder that, by definition, is difficult or even impossible to track down.

Does the fair use analysis change when the copyrighted material I want to use is owned by a litigious estate?

No. Some estates are notoriously aggressive in trying to prevent the use of materials to which they own the copyrights. However, just because a copyright owner is forceful in asserting copyright claims doesn't make fair use any more or less likely. It may, however, change your assessment of the

practical risk that a copyright owner might complain or sue. Authors in this situation may be especially interested in obtaining errors and omissions coverage prior to publicizing their work.

What can I do if my publisher asks me to obtain permission instead of allowing me to rely on fair use?

Some publishers may require that authors get permission to use copyrighted materials in their works instead of allowing them to rely on fair use when it applies. If you find yourself in this situation, you may find it helpful to ask your publisher to reconsider its position and to explain why you think your intended use is protected by fair use. You may also want to share with them related codes of best practices, if relevant. If fair use is important to you or essential to your project, you may want to search for a publisher that recognizes fair use before signing a publishing contract.

Where can I find guidance on other applications of fair use?

The Center for Media and Social Impact at American University has published some [“best practices” guidelines](#) for a variety of authors, including one for poets, journalists, documentary filmmakers, and makers of online videos.

Does fair use still apply if my work will be published outside of the United States?

Fair use as described in this presentation is based on U.S. copyright law. That said, a growing number of countries have similar “fair use” or “fair dealing” limitations and exceptions, and criticism and commentary are often protected by these regimes. If your work is being published in a country other than the United States (including web-based uses specifically targeted toward other countries, to which those countries’ laws may apply), you may want to consult an attorney about similar limitations and exceptions in foreign markets.

Is open access compatible with peer review and prestige?

Yes. Peer review, selective submission standards, and other attributes of prestigious publication are independent of the openness of the publication. Some open access publications apply the highest standards of quality control, some proprietary publications publish low-quality works, and vice versa. While it is true that some new open access publications do not yet command the same level of prestige as the best established conventional publications, this discrepancy will likely disappear over time as open access publishers establish their reputations and proliferate across disciplines. In the meantime, conventional publication and open access are not mutually exclusive. As we discussed in the presentation, some conventional publishers will allow authors who publish with them to also upload the authors’ final versions of their works to open access repositories, and they may even agree to release the work on open access terms.

Do authors always have to pay to make their works openly accessible?

Not necessarily. Although some open access publications charge a fee to cover the cost of publishing a work, many authors make their works openly accessible without incurring any costs. In fact, the majority of open access journals charge no author-side fees at all. Even where publishers charge publication fees, there are many ways that authors can mitigate those costs. For example, your institution or funding entity might have funds available to pay for open access publication fees, and some journals may offer a publication fee waiver. Moreover, depositing a work in an institutional open access repository is always free for authors.

Are open access options available for book authors?

Open access book publication options are increasingly available, and many book publishers are developing programs to make books openly accessible. For example, the University of California Press recently launched Luminos, an open access publishing program for monographs. Open Humanities Press has also launched an open access program for monographs, making the books it publishes in print available as full-text digital editions published under open licenses. Book authors can also negotiate with conventional publishers to publish their books in print while simultaneously releasing an open access version online, or they may allow the author to retain the rights to openly license their books in digital, e-book format. Authors who have already assigned their rights can negotiate to get their rights back and make their works openly available.

Can I require attribution if I make my work openly accessible?

Yes. The vast majority of authors who make their works openly accessible select license terms that require others to give them credit for their works. Furthermore, even if unattributed copying of an open access work does not amount to copyright infringement, it may still amount to plagiarism—thus running afoul of longstanding ethical norms within scholarly and publishing communities.

How can I preserve the integrity of my work if I make it openly accessible?

Authors can use license terms to control how others are allowed to use their works (subject to some limitations, such as fair use). Open access licenses often include provisions that protect against misuse, prevent loss of integrity, and protect author reputation. For example, Creative Commons licenses require attribution, unless the author does not want to be attributed; include an obligation to indicate whether an author's work has been modified or not, even if those modifications are trivial; and require users to link back to the original if a hyperlink is provided. In addition, authors who do not want to permit others to modify their works can select license terms that allow free access and distribution of verbatim copies but not adaptations. Finally, scholarly norms for citation and norms regarding plagiarism are not supplanted when authors openly license their works.

What can I do if I want to incorporate third-party content in my openly accessible work?

Some third-party content that you want to use in your work may be in the public domain, meaning it is not protected by copyright and you are therefore free to use it without charge and without permission (unless other restrictions apply, such as those imposed by contractual terms).

If, on the other hand, the third-party content you want to use in your work is protected by copyright, there are still options that may enable you to incorporate this content in your openly accessible work:

1. **Rely on fair use, when appropriate:** Some uses that authors may wish to make of third-party content are permitted by “fair use.” Fair use is an exception to U.S. copyright law that gives authors the right to use copyrighted material without permission or payment in some circumstances. For example, quoting from a letter in a biography or reproducing a painting that is the subject of an article may be fair use, especially when the amount used is reasonable in light of your purpose and your use will not undermine the market for the original work. Making fair use of a work is not infringement.
2. **Request permission:** Copyright owners of third-party content may readily grant an author permission to use their work—sometimes without charge—particularly if the content is attributed to them.

How can I navigate contractual restrictions or high permission costs to include third-party works in my openly accessible work?

If your use of the third-party content is subject to contractual restrictions, you may find it more challenging or costly to use that third-party content in your work. Some archives or museums that control access to works place contractual restrictions on the use of images of those works, even when the work is in the public domain. Authors who want to include images of these works in their writings often encounter high permission costs. For example, art history scholars often pay high fees to museums and archives for permission to use images of artwork in their articles and books. Even if your use of a work is not subject to contractual restrictions, permission costs for in-copyright works can pose a challenge for some authors. Here are some strategies you might try to reduce permission costs that might otherwise prevent you from making your work openly accessible:

1. **Negotiate:** Authors may wish to negotiate with the institutions or individuals that control the use of the third-party content they would like to include in their works. Particularly when the third-party content is in the public domain or when the institution controlling access to the work has a public interest mission, authors can ask the institution to consider reducing or eliminating permissions costs. Authors of scholarly works, for example, might succeed in persuading a public interest institution that including images of items from its

collection in a scholarly work would further the institution's mission by increasing public access to—and appreciation of—these pieces.

2. **Use alternatives that are in the public domain and free from contractual restrictions, or are openly accessible:** Authors may choose to reduce permissions costs by incorporating third-party content that is already freely available. Many art galleries, museums, and other cultural heritage institutions are now making images of works in their collections freely available to the public.
3. **Take advantage of grants and institutional funding:** Where available, authors may obtain “subventions,” or grants from governments, foundations, or even your institution, that can be put towards permissions costs. Some grants are available for the specific purpose of reducing the expense that authors might otherwise incur when acquiring images for publication.
4. **Reference the image:** Authors may direct a reader to the original source of third-party content, rather than including the third-party content itself in their own works. Similarly, authors may choose to include third-party content in the restricted-access print version of their works, for which permissions costs may be lower, but remove the third-party content in the version uploaded to an open access repository or personal website.

I thought publication contracts were “take it or leave it.” What leverage do I bring to the negotiating table?

Copyright laws give authors something very valuable to bring to the negotiating table: their copyrights! Copyright confers on the author of a work certain exclusive rights—such as the right to reproduce the work and to distribute copies of it to the public—for the life of copyright. Currently, copyright protection for works by an individual author lasts for the life of the author plus seventy years. Without your permission to use some of your copyrights, your publisher cannot publish your book. So even if negotiating feels tough, remember that with your manuscript and your copyrights, you bring something very valuable to the table.

If I try to negotiate, won't this offend my publisher and cause it to revoke its offer?

In all likelihood, no, especially if you negotiate in a respectful and reasonable way. In fact, being a polite, realistic advocate for yourself and your book may engender more respect from your publisher. In most cases, the worst that can happen is that your publisher says “no” to your requests, which doesn't leave you any worse off than you were to begin with. You can then decide whether to try to reach a compromise with an alternative version of your request, work with a different publisher, or seek additional assistance with the negotiation. Or you may choose to accept the terms and sign the contract, knowing that at least you tried to craft it to fit your goals. But if you are successful, you'll

thank yourself in the future for making the effort to negotiate for terms that work for you and your book.

Are the terms I can successfully negotiate likely different for university presses vs. trade publishers?

All publishers have different business models, and publishers may even have imprints that publish different genres of books and follow different business models (and some university presses have substantial trade programs). So it is difficult to draw any hard and fast rules for any category of publisher. That said, there are some general tips that can guide you as you consider what type of publisher may be suitable for your book and your goals. For example, it is uncommon for university presses to offer sizable advances to authors—most don't offer advances at all—whereas advances are generally expected in trade publishing. Similarly, university presses may be more amenable to allowing books to be distributed under open access terms (like a Creative Commons license) than a trade publisher, since they are usually less concerned with maximizing profits and open access may align with their academic mission. On the other hand, trade publishers may offer advantages for certain authors. For example, they often have larger distribution networks (though online bookselling has diminished this advantage somewhat), and they may offer better marketing and advertising support.

Should I have an agent or an attorney negotiate for me?

For many genres (such as fiction and trade nonfiction), literary agents function as gatekeepers to publishing houses. It is therefore common for authors of these types of books to be represented by agents rather than to negotiate directly. Conversely, many academic presses accept submissions directly from authors, making it less common for academic or technical authors to have agents—though it's not unheard of, and some agents specialize in working with academic authors. Even if you don't need a literary agent, you may still want one. Literary agents typically work on commission—i.e., a percentage of your royalties.

Literary attorneys are lawyers who specialize in legal matters related to the business of publishing, including contractual negotiations. By law, only attorneys can give legal advice, so if you have specific questions about the legal effects of your agreement, you might need to engage an attorney. Typically, literary attorneys negotiate publication contracts for authors, but they do not get involved in book editing. Literary attorneys often charge a per-hour fee, though some work on commission.

Although it may be difficult or costly to hire an agent or an attorney, such a representative can provide expertise about how best to conduct negotiations and offer distance between you and your publisher if the negotiation gets sticky. Regardless of whether or not you have representation, understanding your own agreements is essential to getting what you want out of the publishing relationship.

What should I expect the negotiation process to be like?

Every negotiation follows its own trajectory, but it is not uncommon for a contract to go through multiple drafts before it is signed by the parties. Usually, this process begins with the publisher sending you its template contract with the terms it generally seeks from authors; other times, a publisher may first send an offer letter with basic terms listed. Often, it will be up to you to initiate negotiations, either by marking up the contract or corresponding with the publisher about changes you'd like to implement in the contract. You may go back and forth, each making suggestions and accepting or rejecting counter-proposals, and the contract may go through multiple drafts before the agreement is finalized.

When should I consider walking away?

As the negotiation proceeds, it may become clear that you and the publisher just don't see eye to eye. If that happens and you've clearly reached an impasse, it's okay to walk away. Though it may be disappointing in the moment, it is better in the long run that you find the right publisher for your book. Remember, not all publishers are the same, and just because one wasn't a good fit doesn't mean that you can't find another that will fulfill your needs. In fact, there are more publishing companies pursuing innovative business models now than ever before. For example, some publishers specialize in publishing digital-only books, and some university presses now offer open access publishing programs for monographs. Some authors may also want to consider self-publishing, which has become a much more viable option since the advent of e-books and "a la carte" publishing services.

What form should my final contract take?

A best practice for book contracts is to make sure everything the parties agree to is written down, and that everyone signs the document reflecting this agreement. This provides a record of the agreed-upon terms and helps ensure that everyone understands the substance of the agreement. In fact, certain kinds of contracts, such as those that transfer exclusive copyright rights or cannot be performed within one year, must be in writing and signed by the book's author (or her representative) to be valid and enforceable.

What do I need to be aware of if I co-authored my book?

When more than one author contributes to the creation of a new work and each author intends their contributions to be merged together as a whole, the copyright in that work is shared (that is, co-owned) by the authors. In this case, the work is known as a "joint work."

In practice, many authors negotiate a book agreement together with their co-author(s). However, by law, each author of a joint work can authorize a wide range of uses of the copyright in the work without the permission of fellow co-authors. Each author can transfer her ownership interest in the work, or she can grant other people a non-exclusive license to make specific uses of the work. Unless they made an agreement to the contrary, each author of a joint work has a duty to give any other author a per

capita share of revenues made from exploitations of the work, regardless of whether the co-author knew about, objected to, or supported the deal. This means that if a book has two authors, they are each entitled to 50% of the profits, even if one of the authors only did 10% of the writing. Multi-author contracts often stipulate the division of royalties, which is typically, but not always, an equal split.

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