Copyright, Fair Use, and Art Making

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**Intended Audience:** Lower-division undergraduates including studio art majors and minors who have taken at least one studio art course. No prior knowledge of copyright and fair use is necessary.

**Session Length:** 60–75 minutes

**Code Section:** Making art
ABSTRACT

Developed as part of a teaching collaboration between an art professor and a librarian at a liberal arts college, this lesson is designed for an intermediate (200) level studio course. The class begins with a student discussion in response to an NPR interview with James Boyle, author of the comic book *Bound by Law*. We follow up with an overview and a discussion of copyright, the four factors governing fair use, and the CAA *Code of Best Practices in Fair Use for the Visual Arts*, after which we introduce the *Carion v. Prince* case and ask students to argue on behalf of either artist. After the debate, students reflect on their own art-making experiences and discuss if their past practices constitute fair use and how those practices align with the best practices outlined in the Code. After the session, students create an artwork that incorporates copyrighted material in a transformative manner.

LEARNING OBJECTIVES

Upon successful completion of this unit:

- Students will be able to define what fair use is in order to invoke it appropriately in art-making.

- Students will consult the Code to assess if a particular use of copyrighted material is fair use and if it conforms to the limitations specified in the Code.

- Students will be able to employ fair use in their own artistic practice in order to create artworks that build on preexisting works, engage with contemporary culture, or provide artistic, political, or social commentary.

- When incorporating copyrighted material, students will be able to
conduct a fair use analysis and make a reasonable determination as to whether the use is appropriate.

- Conversely, students will be able to explain why the use of a copyrighted work is acceptable.

**MATERIALS**

- Flip chart and markers
- Presentation (see appendix 2)

**LESSON PLAN**

**Before class activity**

- Students listen to a seventeen-minute NPR interview with James Boyle, one of the authors of the comic book *Bound by Law*, which explores fair use and the permission seeking culture in documentary filmmaking.¹

- Each student is expected to come up with two to three questions related to the interview and bring them to class.

**Introduction of the session goals and format (1-2 minutes)**

**Discussion prompts to jumpstart the conversation about the NPR interview (5-6 minutes)**

- What do you find interesting, intriguing, or puzzling about the interview?
- What are some of the questions you have?
- How does the interview relate to your personal experience with uses of copyrighted material?
- Does copyright dampen artistic creation?
Basics of copyright (3-5 minutes)

• When does a work become copyrighted? How long is it under copyright protection?
• What rights does the copyright owner have?
• What is public domain? What are the implications?

Overview of fair use (8-10 minutes)

• What is fair use?
  ◦ The four factors governing fair use
• Why is fair use important to artistic creation?
  ◦ Does original work exist?
  ◦ Authenticity vs. originality
  ◦ The 2014 CAA report: *Copyright, Permissions and Fair Use among Visual Artists and the Academic and Museum Visual Arts Communities*
  ◦ 70% of respondents indicate that they use copyrighted material in creating their own work
  ◦ What is your experience using copyrighted material in your own artworks?

Discussion of the CAA Code (5-6 minutes)

• Why a code?
  ◦ 1/3 of the visual arts community has abandoned work due to copyright concerns (2014 CAA report)
• What is in the Code?
Section “Three: Making Art”

- Description
- Principle
- Limitations

**Student debate on the Cariou v. Prince case**

- Brief introduction to the case (2 minutes)
- Divide students into two groups, one representing Cariou and the other Prince.
  - Students discuss the case in groups and write down their reasoning on a Flipchart (5-6 minutes)
  - Does Prince’s use constitute fair use? Why or why not?
  - One representative from each group presents their argument to the class and each group answers questions from the other group after its presentation (8-10 minutes)
- Share with students the court rulings from the original trial and the appeal (Prince lost the original trial but won the appeal.) Solicit feedback and questions from students (8-10 minutes).
  - What is your personal opinion about the case had you not been assigned to a particular group? Why?
  - Could Prince have strengthened his fair use argument had he used fewer images or partial images of Cariou’s photos?
  - Would it have helped if Prince had explained his artistic objective of using Cariou’s photos?
  - Would giving proper credit to Cariou make a difference?
Student reflections on their own art-making and fair use experience (6-8 minutes)

• How have you used copyrighted material in your own artwork?
• Does it constitute fair use? Would you consider it best practice?
• What would you have done differently? How might it have affected your work?

Conclusion and assignment (5 minutes)

• Summarize the class discussions and address any last minute questions students may have.
• Assign the studio project
  ◦ Create an artwork that incorporates copyrighted material in a transformative manner.
  ◦ Write a rationale justifying your use of the copyrighted materials using the CAA
  ◦ Present your work to the class and explain your use of the copyrighted material.

REFLECTION

This session is part of an information literacy collaboration between an art professor and a librarian on a two-hundred level studio art course. Prompted by the professor’s concern that studio art students often regard creative work as merely about self-expression and making pretty images or forms, we developed a series of research and studio projects through which students explore the connection between research and art-making. This session occurs after students have finished their first studio project and are doing research for their second one.
To keep students motivated and engaged, we design and co-teach the session following John Keller’s ARCS (Attention, Relevance, Confidence, and Success) model and employ active learning techniques. The brief interview that students listen to before the session helps pique their interest. The debate gives students an opportunity to verbalize what we have discussed in class and apply it to their argument. It also highlights what students are still confused about and what we need to clarify. The session’s relevance is made even clearer by connecting it to the students’ and professor’s experience.

This class typically has ten to twelve students that can be easily divided into two groups. For bigger classes, one could have a few groups with five to six students in each. The groups that are not presenting can chime in and ask questions during the debate. The participation or co-leadership of a practicing artist—in this case, the professor—is essential. Together, the professor and the librarian can challenge student assumptions and offer different perspectives. In this class, students are always interested in the librarian’s take as a non-artist on the *Cariou v. Prince* case.

When we first taught the session in spring 2014, we discussed a few court cases before introducing the debate exercise. Students found them overwhelming. Since then we have focused only on the *Cariou v. Prince* case, which has worked much better. Due to the deep concern many students expressed about the possibility of others appropriating their artwork, we now spend more time discussing the importance of fair use and examining the relationship between authenticity and originality.

Students are often nervous about using copyrighted material after listening to the interview. This feeling is heightened when they learn
that many artists have abandoned work due to copyright concerns.\(^5\) During the first session, we found it challenging to give students clear and concrete guidance. The Code now provides students, faculty, and librarians much needed clarity. We also tried introducing the Code after the debate, but noticed student confusion and their need for guidance. In subsequent semesters, we will discuss the Code before the debate to give students an opportunity to interpret and apply the Code in class. To help them employ fair use best practices in their own art-making, we will assign a project that requires students to incorporate copyrighted material in a transformative manner. The project will also further strengthen the link between research and art-making, a key information literacy goal for the course.

REFERENCES

4. James Boyle, interview by David Crabtree.