

Secret #9: Risk tolerance is directly proportionate to provision of valuable information.

Fair use, in a very practical sense, always involves a risk assessment. The underlying question is: “How legally risky is it for me to use this item in the way in which I want to use it?” Your ultimate analysis may be that your use is not risky at all (you’re very confident yours is a fair use); slightly risky (you’re pretty sure it’s a fair use); risky (you can argue it’s a fair use, but you’re really not confident about that); or extremely risky (you’re sure it’s not a fair use).

But your actual decision as to whether to *use* the work hasn’t been made yet. Having conducted that analysis, what do you *do*? How do you decide how to proceed?

Your decision will depend on your institution’s tolerance for risk. If your institution is highly risk averse, you may not even have to make a fair use analysis at all; your institution’s policy may be to abide strictly by one of the very conservative published guidelines on fair use, such as the “[Classroom Copying Guidelines](#)” or the [Conference on Fair Use proposed guidelines](#) for electronic reserves. To be sure, such a policy makes part of life easier: by strictly following such guidelines, no one has to make judgments, analyses, or decisions. But this approach has serious negative ramifications as well.

The study of a range of educators cited in Secret #7 discusses the many ways in which interpreting guidelines as an absolute limit of how much of a work can be used greatly weakens the abilities of educators to teach and students to learn. Renee Hobbs, et al. [The Cost of Copyright Confusion for Media Literacy](#), American University School for Communication Center for Social Media (2007).

A 2014 study commissioned by the College Art Association found that a full one-third of visual artists and visual art professionals “have avoided or abandoned work in their field because of copyright concerns.” The types of projects that were not pursued because of “copyright concerns” included creation by art historians and editors of works pertaining to modern-era art history and digital scholarship; creation by artists of collage, pop-culture critiques, and multimedia works; and curating of group exhibitions, controversial exhibitions, and exhibitions made cost-prohibitive by the cost of obtaining copyright permissions. Patricia Aufderheide et al, [Copyright, Permissions, and Fair Use among Visual Artists and the Academic and Museum Visual Arts Communities](#), College Art Association (2014). p.5.

Many institutions choose to use guidelines as they were intended to be used: as a starting point in the fair use analysis, stating the *minimum* use that will be considered fair, not a *maximum*. Those institutions are willing to assume some risk in order to claim the rights that copyright law grants them, for the purpose of furthering the educational goals and mission of the institution.

Each institution must decide on its own what level of risk tolerance is most appropriate for it. However, this should be a decision made knowingly, with awareness of the pros

and cons, rather than as a knee-jerk reaction resulting from a lack of knowledge or understanding.

Every decision we make is an act of choosing, a trade-off. Every option contains both pros and cons. When you choose Option A over Option B, you do so because to you, the pros of A are great enough, and the cons small enough, to make A more attractive than the combination of pros and cons in B.

When we pursue a romantic relationship, we are valuing the pros of being in love (passion, joy, companionship), despite its cons (risk of heartbreak), over the pros of avoiding romance (knowing that your heart won't get broken), despite its cons (loneliness).

If you sunbathe, you value the pros it provides (relaxation, warmth, golden skin), despite its cons (increased risk of skin cancer), over the pros (decreased risk of skin cancer) and cons (stuffy indoor air, pasty skin) of staying indoors.

The same is true in making decisions in copyright risk management.

For an educational institution, the pros of acting conservatively on fair use include avoiding the complexities of making fair use assessments and a sense of security against legal challenges. The cons of taking a conservative position include higher costs associated with licensing and obtaining permissions, and self-censorship[#].

Indeed, the 2014 study of artists and visual arts professionals mentioned previously found that “the economic and noneconomic consequences of avoiding fair use are significant.” As a direct result of “the monetary and opportunity costs of seeking permissions, ... the largest cost of all [of not relying on fair use] [is] the erasure of the imaginative future, as a result of self-censorship.” Patricia Aufderheide et al, [Copyright, Permissions, and Fair Use among Visual Artists and the Academic and Museum Visual Arts Communities](#), College Art Association (2014). p.8.

In contrast, the pros of taking a more liberal approach to fair use include encouraging the institution's community to use materials more widely, thereby promoting broader learning experiences and greater production of scholarship; and reducing the amount of resources expended on licensing and obtaining permission. The cons include an increased risk of attracting the scrutiny of copyright owners and increased cost of investing in training staff and faculty in fair use.

Each institution must weigh the pros and cons of both approaches to fair use and then chose which will best help it to meet its goals.

Take away:

Every decision is a trade-off. Be sure your institution knows what it is trading.

[#]In the context of fair use, scholars use “self-censorship” to refer to creators choosing to not use certain works out of a fear of repercussions from upset copyright owners. See

Patricia Aufderheide et al, [*Copyright, Permissions, and Fair Use among Visual Artists and the Academic and Museum Visual Arts Communities*](#), College Art Association (2014).