

Position Statement on Fair Use and Academic Freedom

The AAUP-TNS Fair Use Working Group

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Problem

As pertains to the question of fair use elaborated below, the AAUP-TNS Fair Use Working Group convened to discuss the urgent necessity of implementing University-wide guidelines on fair use, given the precarious position of faculty and student artists, activists, and scholars to litigation and trolling, a risk that has expanded dramatically in this new age of automated web scrapers. The lack of a copyright office at The New School subjects faculty and students to potential harm, including diminished academic freedom. The University library's page devoted to copyright and fair use, which takes its cues from the General Counsel, reflects the University's lack of a policy as well as its failure to take a strong, progressive, and public stance on fair use. The University's conservatism, compounded by its outright *refusal* to defend particular faculty faced with frivolous charges, extortion, and harassment, serves as a potential lure to trolls, litigious copyright holders, and other nefarious actors, who see that their faculty and student targets at The New School enjoy no institutional protection.

Queer and POC faculty and students are especially vulnerable because they lack the social protections that accompany their straight, white counterparts, and are frequently targeted by trolling attacks and right-wing digital opposition to feminist, queer, and critical race scholarship. Under the Equity, Inclusion, and Social Justice mandate, TNS puts the intellection and creative work of such faculty and students front and center, yet without the necessary protections.

Context

The New School is a vibrant learning environment where scholars, creative practitioners,

and activists – faculty, students, and staff – frequently theorize, historicize, critique, create, and coordinate discussion and civic action around literary, art, and media works. Some of those works are protected by copyright, which affords their creators control over who can copy, distribute, publicly perform or display the work, or create derivative works. In most cases, faculty and staff can be expected to do due diligence in obtaining rights clearances, and paying any necessary reproduction fees, for any copyrighted material they might reproduce in a formal publication, media production, artwork, or performance. But there are certain instances when such clearance is neither possible nor necessary – and such cases are often protected by “fair use.” The limited use of copyrighted material for “transformative” use – in classroom instruction, in student work, in public pedagogy, in scholarly analysis or critique, in creative production, and for other non-commercial, educational purposes, or uses that do not affect the market value of the original work – would, in most cases, constitute “fair use.” “Transformative” use is that which has a purpose and audience different from the uses and audiences for which the copyrighted material was originally created; it modifies, revises, repurposes, and/or recontextualizes the original work. All of the aforementioned instances could constitute “transformative” use.

The Center for Media & Social Impact at American University, a nationally renowned center for fair use scholarship and activism, [acknowledges](#) that “fair use is not a specific exception with clearly defined borders,” and that judges – and, by extension, institutional and legal defenders of fair use – must consider “four factors”:

the purpose of the use, the nature of the work used, the amount and substantiality of the original work used, and the effect on the market for the original, as well as the overall purposes of copyright.

The AAUP Fair Use Working Group calls on The New School to interpret these factors liberally, and to vigorously defend its community members’ right to use copyrighted material for transformative educational, scholarly and creative purposes. While we recognize the right of scholars and creative practitioners within our community to have control over, and to be fairly compensated for, their own copyrighted work, we also recognize that such work – and particularly the pedagogical functions of the institution – cannot take place without the exceptions encompassed within fair use.

Furthermore, fair use and academic freedom go hand-in-hand insofar as the citation and use of copyrighted material can involve:

- the critique of material in ways that an originating author or artist might disagree with and might wish to suppress;
- the creation of custom platforms for teaching and scholarship that embody one’s critical, aesthetic, pedagogical, ethical, and political commitments;

- and sharing those materials with a broader educational community, in accordance with the principles of “open source,” “open access,” “open education,” and the commons

Defense of Fair Use

The New School’s obligation to defend fair use is not only in keeping with the progressive foundation and contemporary spirit of the school; it is also necessitated by the nature and values of The New School’s ongoing work — work that centers art, media, design, public-facing scholarship and creative practice, and the principles of academic freedom espoused by John Dewey, founder of both The New School and the AAUP.

The AAUP-TNS Fair Use Working group has identified the following principles and tenets that should guide an expansive and progressive New School Fair Use policy that we believe exemplifies the university’s mission:

- In order to teach and learn about contemporary art and media – and to learn *with and through* contemporary art and media that address the critical themes explored in our social science and liberal arts classes – faculty must be able to share restricted material in class, and students must be able to incorporate it into their coursework without fear of retribution.
- In order to practice public pedagogy and encourage civic engagement, and to ensure that its programming is open and accessible – among the university’s *foundational* commitments – the institution must defend its community members’ right to make transformative use of copyrighted materials in public, non-commercial, educational fora. What’s more, given the historical and ongoing limitations of TNS’s digital infrastructure, the university must extend its protections to pedagogical and civic platforms that extend beyond “official” websites and learning management systems, including Canvas.
 - Canvas, the University’s official learning management system, offers little capacity for design- and tech-oriented faculty to construct learning environments that model the aesthetic and epistemological principles central to their courses. Canvas has also been criticized for fostering a [“carceral” approach](#) to education and monetizing student data. What’s more, New School Marketing and Communications’ oversight of the institution’s websites, and its prioritization of content that targets *prospective* students, has consistently prevented departments, programs, faculty, and students from creating institutionally hosted and supported digital material that serves its existing communities’ evolving intellectual, creative, and pedagogical needs. We thus see a decades’-long history of “rogue” websites – including department websites hosted on private servers – created outside the institutional ecosystem to serve critical informational and educational needs. Precedent also shows that, when TNS has hosted

digital platforms for various projects or classes, the institution has exhibited minimal commitment to maintenance and preservation (some members of our group have lost years' worth of faculty and student contributions to institutionally hosted platforms), which again drives faculty and students to build their own digital tools. Given the University's failure to provide the technical resources necessary to fulfill its mission, including full staffing of the Office of Distributed Education and the Libraries, TNS must recognize and extend its protections to external digital platforms designed to fill institutional gaps.

- In order to engage with current events and the pressing social issues of our time, faculty and students must be able to work with contemporary media in a public forum, whether in-person or online, particularly in light of multi-industry pivots to online platforms during the ongoing Covid-19 pandemic.
- In order to foster the progressive scholarship and boundary-pushing creative practice for which the University has long been known, and which it has long encouraged and celebrated, community members are often obligated to make use of restricted material and must have the institutional support necessary to allow such creativity to flourish.

Many faculty incorporate dozens of images or artworks into each class lesson, and, in turn, students incorporate images or artworks into their class assignments and thesis and capstone projects. It is neither feasible nor legally necessary to obtain permission for such uses. In order to address culture without censorship, and also with accuracy and relevance, faculty and students must refer widely to recent examples of art, design, audio-visual, and material culture, which can be poorly represented in scholarly and open-access digital-image resources and databases (public domain repositories consist primarily of *historical* material). Permissions based on restrictive interpretations of copyright are often logistically and financially prohibitive. Loss of access stymies creativity and produces curtailed, misleading accounts of history and culture, which is especially concerning when The New School's curriculum and research across divisions foregrounds contemporary art, design, visual culture and media, and bold engagement with the pressing issues of our time.

Vigorous defense of fair use is in keeping with the guidelines set forward by numerous professional associations: [the Society for Cinema and Media Studies](#), [the College Art Association](#), the [Center for Media & Social Impact](#), and the [Visual Resources Association](#), to name just a few. Particularly in this age of web crawling and copyright trolling, it is important that cultural heritage institutions and institutions of higher education establish progressive policies on fair use to counteract a chilling effect on academic freedom and creative experimentation. They must protect the sanctity of the classroom, even, perhaps especially, if it is an open, inclusive, public one. What's more, taking a bold, public stance on fair use – and, by extension, in favor of academic freedom and pedagogical autonomy –

would bolster The New School's purportedly progressive values and position it, within broader public consciousness, as a champion of intellectual and creative freedom, justice, and innovation.

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