

INSTRUCTION AIDS
in COMPLIANCE with
COPYRIGHT

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Robert J. Bremer
Prescott Memorial Library
Louisiana Tech University

rbremer@latech.edu

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Thanks to Prof. Linda K. Enghagen, J.D., of the University of Massachusetts at Amherst

Instruction & Copyright: The Linkage

- “Each day on most university campuses, faculty [deliver] course materials to their students by posting them in course management systems, in electronic reserves operated by libraries and on departmental or personal Websites. Every time copies are made and distributed, questions of copyright and compliance arise.” Georgia Harper, University of Texas at Austin.
- Protecting only the public university, the doctrine of “sovereign immunity” prevents neither faculty from being sued for monetary losses & fees resulting from their personal copyright violations nor university administrators from being sued to end practices that permit or suffer infringements of copyright by faculty.

Copyright and Fair Use

- **Copyright:** Ownership of “original works of authorship fixed in any tangible medium of expression from which they can be perceived, reproduced, or otherwise communicated,” e.g., literary, musical & dramatic works, motion pictures and sound recordings. 17 USC 102(a).
- **Fair Use:** “The fair use of a copyrighted work, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright.” 17 USC 107.

Fair Use – The Key

- **Rule:** “Fair Use” authorizes the faculty of a university to make some use of the works of other authors for educational purposes without obtaining those authors’ permission to do so ... uses that are essential to teaching-and-learning.
- **Application:** Though easily stated, “fair use” is not a rule to be used mechanically ... its application requires judicious reflection.

What's Needed . . .

A clear, meaningful procedure through which any faculty member can determine with reasonable accuracy whether or not each of her/his instructional aids, in-print and on-line, in fact make “fair use” of any copyrighted material incorporated into them.

What's Currently Provided: University Policy No. 7115 ...

- **University faculty and staff may want to use additional materials to supplement research & teaching.**
- **Copying of materials must comply with copyright laws.**
- **The fair use of a copyright work is not an infringement of copyright ... “Fair Use”
Section of Copyright Act copied in full (17 USC 107).**

Additional Guidance Is Available – Three Approaches ...

- **Georgia State U “Policy” ... All’s Fair!**
- **Rule of Risk Avoidance ... Nothing’s Fair!**
- **Follow Logic of Fair Use ... Think!!**
**Rationally employ the principles of “fair use”
on a work-by-work basis.**

Georgia State U ... What NOT to Do!

- **“Policy.”** “All nonprofit educational use, no matter how much and no matter how long it’s used, is fair.” Georgia Harper, UT-Austin.
- **Application:** Merely re-use copyright-protected works ... by posting portions of books & articles well in excess of 100 pages each & ‘compilations of material surpassing even the thickest printed coursepack’ ... and provide open web access to the electronically mounted materials.

See, “Complaint” in Cambridge University Press v. Patton,
U.S. District Court for Northern District of Georgia (2008-)

Note: The publishers’ Complaint may well list extremes, not the norm.

Risk Avoidance ... Capitulation!

- **Rule:** Subscribe to a clearinghouse licensing service, *such as* has been developed by the Copyright Clearance Center (at www.copyright.com/).
- **Rationale:** Reliance on fair use always involves some risk & universities are prone to be risk averse, so use a licensing clearinghouse & avoid all risk, *esp.*, now that publishers are suing universities for copyright infringement. Georgia Harper, UT-Austin.

Logic of Fair Use ... Follow It !!

- **Rule:** Sensibly employ the principles of “fair use” each time you incorporate another’s work into an instruction aid ... “If you are reusing the work for its original purpose, you would be stealing if you didn’t get permission to use it. If you are repurposing the material for a specific purpose and are using only what you need for that purpose, the copyright holder doesn’t have a legal objection to your use.”
- **Rationale:** Fair use is a right, the most important tool in copyright for educators, and a common sense “rule of reason” federal courts developed & continue to apply.

Pat Aufderheide & Peter Jaszi, American University.

Fair Use ... Section 107

“The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means [or format], for purposes such as criticism, comment, news reporting, teaching (*incl.*, multiple copies for classroom use), scholarship, or research is not an infringement of copyright.

“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (1) The purpose and character of the use, including whether such use is of a commercial nature [*i.e.*, less “fair”] or is for nonprofit educational purposes [*i.e.*, more “fair”]; (2) The nature of the copyrighted work; (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) The effect of the use upon the potential market for or value of the copyrighted work.”

17 USC 107.

Note: The U.S. Supreme Court does not consider either the “purposes” list in the opening paragraph (“preamble”) or the list of “factors” to be exclusive. There may be other non-infringing uses-&-factors to be considered in any particular case. *E.g.*, the Court has “added” parody to the list of non-infringing uses (as a form of criticism & comment).

Logic of Fair Use ... Procedure (to begin)

- **Is Copyright an Issue?**

Not if work is yours, out-of-copyright, or on open web (*i.e.*, posted by owner for all to use, *not* merely found on the Internet where placed without owner's permission).

- **Is Work Simply Being Copied?**

Don't Use It! 17 USC 107 [Factor 4: "Market Effect" very harmful.]

E.g.: A textbook intended for students, such as those in your class (undergraduates or graduates);

An educational software program sold in association with a textbook (in-print or on-line) created for college students;

A DVD created/sold specifically for limited distance ed use.

Logic of Fair Use ... Procedure (cont. 2)

- **Is the Work Being Repurposed and Transformed from Its Original Use to a Teaching Use?**

**IF for criticism, comment, parody, scholarship, research or other educational purpose (e.g., to illustrate a point, stimulate discussion, etc.),
Use It.** 17 USC 107 [Factor 1: “Purpose of Use,” Educational.]

***E.g.:* (1) Works of several modern authors; (2) early, mid-life & mature works of a modern artist; (3) articles showing evolution of an hypothesis to fact, (4) current articles showing differing opinions upon a contemporary theory ... for purposes of comparison & comment and as part of an anthology prepared/tailed by you (*i.e.*, not merely a copy of an earlier anthology).**

Logic of Fair Use ... Procedure (cont. 3)

- Is only so much of work being employed as is needed for its repurposed use?

There is no set “this amount & no more” rule.

IF pertinent to topic, Use ...

“All” is okay, if required satisfactorily to present/illustrate concept, stimulate discussion & the like.

Don't be over ambitious ...

Use only the amount sufficient to present the concept.

17 USC 107 [Factor 3: “Amount & Substantiality of Portion Used.”]

And, Provide Attribution!

Logic of Fair Use ... Procedure (cont. 4)

- Are course materials available only to enrolled students?

Must Be, always.

- Are course materials removed, reviewed, revised & remounted for next class?

Must Be, each & every Quarter.

17 USC 107 [Preamble: Educational Purposes.]
[Factor 1: Educational Purpose.]
[Factor 4: Limited Market Effect.]
[Factor 3: Amount Used (reinforcing 1 & 4).]

Non-Print Media ... Sight & Sound

- **Non-Print Formats ... Audio, Visual & A-V.** Rights of “display” & “performance” belong to copyright owner. 17 USC 106.
- **Exemptions for Educational Purposes ...**
 - **Face-to-Face Instruction ...** any work may be displayed “during teaching activities” in any “nonprofit educational institution.” 17 USC 110(1).
 - **On-line Instruction ...** audio-visual & visual works may be displayed only in “reasonable & limited portions;” other works may be displayed “in an amount comparable to” that in “a live classroom session.” 17 USC 110(2), *i.e.*, the “TEACH Act.”

And, in each instance must have been “lawfully” made/acquired.

Non-Print Media ... Sight\Sound (cont.)

- **Digital Millennium Copyright Act ...**
Proscribes circumvention of copyright protection measures in digital media, *such as* CDs & DVDs, even if you own the CD, DVD, *etc.* and your purpose is to make “fair use” of the content. 17 USC 1201.
- **“Best Practices” ...** Codes cooperatively set by consensus in certain media communities to define “fair use” for their group of creators, owners & repurposers. Employ them per the logic of fair use.

See, “Fair Use” at <http://www.centerforsocialmedia.org/>, published by Center for Social Media in the School of Communication at American University.

Best Practices v. Guidelines

- **“Best Practices.”** “Fair Use” policies set by a consensus among the entire creative community affected ... to be considered reasonable exercises of the logic of fair use.
- **“Guidelines.”** Rules defining “fair use” in terms of “safe” *minimums*, set by single institutions or groups that do not fairly represent the entire creative community affected ... helpful, but not robust exercises of the logic of fair use.

E.g., “Fair Use Guidelines for Educational Multimedia” (1998)
from but not adopted by the Conference for Fair Use (CONFU).

Aids ...

- **ALA Copyright Slider ...** to find out if work is out-of-copyright. <http://librarycopyright.net/digitalslider/> .
- **“Fair Use & Copyright” ...** to follow the “Logic of Fair Use” & “Best Practices.” Center for Social Media in the in the School of Communication at American University <http://www.centerforsocialmedia.org/> (“Resources” & “Fair Use”).
- **“Faculty Guide” & “Fair Use Checklist” ...** to know what’s safe, not to do all may do. Copyright Information Center at Cornell U. <http://www.copyright.cornell.edu/>.
- **CONFU “Fair Use Guidelines for Educational Multimedia” ...** to be “sure” safe <http://www.utsystem.edu/ogc/intellectualproperty/ccmcguid.htm>.

Noted by UL System Attorney as ‘a guide found on the Web.’ 11/09

PERMISSIONS ...

To pay for a work if merely copying it or to avoid all risk:

- **For Print Rights ...**

- **Copyright Clearance Center**

- at <http://www.copyright.com/> (“Academic”).

- **The Publisher ... begin at its WebSite.**

- **For Performance Rights ...**

- **Swank Motion Pictures**

- at <http://www.swank.com>.

- **The Distributing Company ... or google for info.**

QUESTIONS-&-ANSWERS: #1

As has been your practice in the past, for each session in your survey course this quarter (arts, humanities, or sciences), you pair a chapter or work in the textbook you're using ... purchased by your students new through the University Bookstore or used through any one of several used-book markets ... with a current work (some short, some long, some from the University Library's print book-and-journal collection, some from certain of the Library's full-text databases, some from your books-and-journals, and some from other collections) ... copied and mounted on the BlackBoard site for the course ... so your students can compare-contrast, comment upon, and otherwise learn from the juxtaposition of different styles, thought, and the like, distinguished by author and/or time.

Depending upon how busy you are in the weeks leading up to a particular quarter in which you teach the course, you are more or less attentive (1) to how much of an existing, current work you use to illustrate or stimulate discussion on the point being taught through use of the work and (2) to updating and refreshing the course content on your BlackBoard site ... though you do make sure at the end of each quarter that your students no longer have access to the BlackBoard site for the then-completed course.

Q & A: #1 (cont.)

Certain publishers have learned of your BlackBoard site and sent the University a “take down” letter from their attorneys, alleging that you have violated the publishers’ copyrights in the works on your site.

Have you?

NO ... Fair Use:

Repurposing/transforming one or more existing works from original use to a teaching purpose ... *such as* comment, criticism, parody, research, scholarship, or other educational use (e.g., to illustrate a point, stimulate discussion, or teach news-reporting) ... is “always” fair use of the prior work, so long as [i] carried out in fact to repurpose (not merely copy) the earlier work(s) and by using [ii] no more of each work than is reasonably needed to serve the intended educational

Answer: #1 (cont. 2)

purpose (which may in certain instances be the entire work) and [iii] no more works than the more capable and interested students in the class can reasonably be expected to read, process, and understand.

Repurposing/transforming one or more existing works from original use to a teaching purpose ... *such as* comment, criticism, parody, research, scholarship, or other educational use (e.g., to illustrate a point, stimulate discussion, or teach news-reporting) ... is “always” fair use of the prior work, so long as [i] carried out in fact to repurpose (not merely copy) the earlier work(s) and by using [ii] no more of each work than is reasonably needed to serve the intended educational purpose (which may in certain instances be the entire work) and [iii] no more works than the more capable and interested students in the class can reasonably be expected to read, process, and understand.

That existing works are digitized, in part or whole, and mounted on an electronic course-management site to supplement a textbook

Answer: #1 (cont. 3)

purchased by students taking the course emphasizes that the digitized works have been repurposed from original to educational use ... a fact that counters any negative conclusion that might be drawn from occasional poor editing of prior works used or occasional inattention to the freshness of a course-site, *especially*, when past students are always barred from future access to the site and its contents.

If an existing work is in fact being transformed from original to an educational purpose when duplicated and mounted on an electronic course-management site, it is of little importance whether or not the prior work is [i] under or out-of copyright or [ii] from the university's library, the faculty member's personal collection, or elsewhere. Only when an existing work is merely being duplicated does its copyright status need to be established, so the faculty member using same knows whether or not to obtain the author/publisher's permission to use the work, by payment or simple consent ... a permission, it should be noted, that is rarely required if the work is available through and

Answer: #1 (cont. 4)

taken from a full-text database in the university's library (because such permission usually comes with the database, since the course-management site merely provides students more convenient access to information their university has already paid for them to receive).

Note:

Though publishers reduce fair use analysis to numbers and quantities ... *i.e.*, small amounts or portions of in-copyright works that may be copied (*such as*, 1 or 2 pages or chapters of a book or one article or 5% of a journal's annual run) ... federal courts have for the past fifteen years clearly stated that there is no hard-and-fast limitation on the quantity of a prior work that may be fairly used in a subsequent work, because "the extent of permissible copying varies with the purpose and character of the use" ... depending upon how much is needed to illustrate a point, stimulate discussion, and the like.

QUESTIONS-&-ANSWERS: #2

You unexpectedly receive in the mail a preliminary report on a study complete but for final validation. Though the subject of the study concerns your area of expertise, you were unaware the study was being made and conclude the report was intended for “that other person” with whom you are occasionally confused and who has neither acknowledged receipt of the few items you’ve forwarded on nor ever forwarded to you whatever, if any, of your mail had been erroneously sent to her/him.

As a matter of curiosity, you read the report, finding it of great interest to you and concluding not only that it will intrigue your colleagues but will also undoubtedly be published in THE professional journal for the author’s and your discipline.

1. Believing many others in your department and several related departments will find the report of interest ... in general or for research projects, in process or in planning ... you photocopy the report and distribute it among them (a total of 30, somewhat to your surprise).

Q & A: #2 (cont. 2)

2. You consider incorporating the report into your undergraduate course covering its general subject-matter but decide to wait until it appears in corroborated, published form before presenting it to students as established fact. Instead, you copy and mount the preliminary report on the BlackBoard site for your class ... both as “What’s New” and as an example of a report in preliminary, pre-publication form.

One of your colleagues congratulates the author on her/his preliminary report, noting your forwarding a copy to her/him. You receive a letter from the author, alleging that you have violated the author’s copyright in her/his report.

Have you?

Answer: #2

1. **YES ... Copyright infringement.**

2. **NO ... Fair Use.**

1. Duplicating a work under copyright ... especially, one in pre-publication form ... principally to share it with individuals in the group for whom the work is primarily intended and who will be/are expected to pay to read/see/hear it violates the copyright held by the author or transferred to her/his publisher. That all of the recipients are educators or researchers at a public university and that some may use the copy of the work received to further scholarship or research does not overshadow the fact that they would purchase it, when available, if they found they needed it for their scholarship or research.

Note:

Copyright attaches to a work automatically upon its creation and, in general, continues for the life of the author plus 70 years, but

Answer: #2 (cont. 2)

may be not enforced until it is registered with the U.S. Copyright Office ... at which time and if the use was not “fair,” the infringer is liable to the owner for “actual damages” suffered by the owner (e.g., the profit the owner would have made from a sale of the work to the infringer) and for “any profits of the infringer that are attributable to the infringement.” No professor, instructor, or teacher is “ever” liable for “statutory damages” (\$200-\$150,000) or the owner’s “reasonable attorney’s fee,” unless she or he had no “reasonable grounds for believing that his or her use of the copyrighted work was a fair use.”

2. Sharing a work in-copyright with one’s students as an example of a format, of how-to-do, of how-not-to-do, and the like ... for comment, criticism, or other educational purpose ... is a “fair use” of the existing work (whether published or not), transforming it into a purpose different from that of the prior work.

Copying a work for students simply as “the most recent” coverage of a

Answer: #2 (cont. 3)

topic or a particular author's "latest work" would infringe upon the author's copyright, or that of her/his publisher, unless the students are not the target audience for the work. *For example*, undergraduates are usually not the reading audience for a professional journal and, thus, not the readers its contributing authors intend to reach, so duplicating for one's students a work from a professional journal should not violate the author/publisher's copyright; *and*, graduate students are an audience in the making, individuals being taught to look for and use the literature of the profession they are being educated to join and, by being exposed to such literature, are encouraged to become upon graduation active, paying members of the target audience ... to the author/ publisher's future benefit.

Note:

Since the students are not the target audience for the work, the "market harm" to the author/publisher is slight, while the "educational purpose" is substantial ... *i.e.*, §107 Preamble & Factor 1 out-balance Factor 4.

QUESTIONS-&-ANSWERS: #3

Several months ago, you received an instructor's edition of a textbook from its publisher, reviewed and selected it for one of your two-quarter courses, and ordered the book for your students through the University Bookstore.

1. During the week before the beginning of classes, the Bookstore notifies you that the textbook is on back-order and should arrive for your students "within a week or two" ... so, from your instructor's edition, you duplicate the first three chapters and an historical time-line at the end of the book and mount them on the BlackBoard site for your class (for the first two weeks of class, plus week three for those students who work ahead).

Early in the second week of the quarter, the store tells you the books still can't be shipped "for another couple of weeks" ... so you copy and mount the next two chapters for your class.

Then, during week four, you are notified that the textbooks will remain on back-order" for perhaps two more weeks" ... so you duplicate and mount the next five chapters, through the end of the first half of the book, and cancel your order for the books this quarter.

Q & A: #3 (cont. 2)

2. As the quarter winds down, the store asks if you want to order the textbook for the second half of the course scheduled for the next quarter. You say, “No” ... and copy and mount on the BlackBoard site for your course-continuation class the second half of the textbook, chapters 11-20, as well as the several tables at the end of the book.

The textbook’s publisher has learned of your BlackBoard site and sent a “take down” letter to the University alleging that you have violated the publisher’s copyright in the work on your site.

Have you?

1. NO ... Fair Use.

2. YES ... Copyright Infringement.

Answer: #3

1. Duplicating a work under copyright merely as a substitute for the existing work usually violates the author's copyright. However, when there is no viable market for the work ... *such as*, when the work is out-of-print or is unavailable for timely purchase to fill an existing, immediate educational need ... to copy the work is to make fair use of it, since the "educational purpose" is great and "market harm" slight.

In addition, duplication of factual information (without any commentary or any special format added to the facts by author or publisher) ... *e.g.*, a simple time-line or set of population statistics, is "always" fair ... since "factual works" are not products of "creative expression."

2. Duplication of a textbook for use in a course teaching the same subject-matter as the content of the book is "always" a violation of the owner's copyright in the work (with exception of unavailability, see *above*). The copying of factual information (only) ... *e.g.*, math tables or chemical reaction calculators ... for educational purposes is, however, "always" fair [a Factor 2, "nature of work," issue, see *above*].

QUESTIONS-&-ANSWERS: #4

In your opinion as an educator, there is no single textbook suitable for your “modern survey” course, so you prepare a full electronic course-pack for your students from existing works, or portions thereof, you judiciously select from the University Library’s collection of books, journals, and periodicals (in-print and on-line), from your personal collection, and from other sources and then mount them on the BlackBoard site for the course, digitizing those works not already in electronic format.

For the more ambitious students taking the course, you also support each class week with a supplemental reading list of one or two works per scheduled class (a total of 3-to-6 each week) ... some placed in the Library’s “On Reserve” section, some specifically linked to one of the Library’s full-text databases, and some copied and mounted on the course’s BlackBoard site.

Q & A: #4 (cont. 2)

1. For most class weeks, you mount on the BlackBoard site six works ... usually but not always in abbreviated form (from a few pages, to a chapter or two, to all of a short work and, on occasion, to all of a “long” work) ... so your students can compare, criticize, and otherwise comment upon differing conclusions, ways of thinking, world views, writing styles, *etc.*

2. For one week you download clips from each of three movies ... two from DVDs in the College of Liberal Arts’ audio-visual collection for its creative writing and performing arts programs and one from your personal collection ... and, after deactivating the encryption or scrambling feature in those so protected, mount one significant scene from each movie germane to the subject-matter of your course ... one more “true” to the subject-and-substance of the print work portrayed than not, one less so, and one not at all true ... so your students can compare, criticize, and otherwise comment on format, as well as different outlooks, styles, and the like.

Q & A: #4 (cont. 3)

You faithfully remove all content from your BlackBoard site for this course at the end of the quarter it is taught (such as by in fact blocking access to all students who have taken the course) and review all works on the site before the next academic year in which the course is taught ... deleting older or less relevant works, adding current or more relevant ones, and otherwise updating and refreshing the course content.

Certain publishers and multi-media producers learn of your BlackBoard site. The University has received a “take down” letter from their attorneys, alleging that you have violated the publishers/producers’ copyrights in the works on your site.

Have you?

Answer: #4

1. **NO ... Fair Use.**

2. **YES, as DMCA violation ... not copyright infringement.**

1. Repurposing many existing works to educational uses over the length of an entire course is no less “fair” than so repurposing one or a few works for one or a few classes within a course ... so long as [i] the existing works are in fact so transformed (not merely copied) and as, in the educator’s opinion (*i.e.*, in the exercise of her/his sound professional discretion as an expert in the subject being presented), [ii] no more of any work is used than reasonably needed to serve the intended educational purpose (which may in any particular instance be much or all of the work) and [iii] no more works are employed than the more capable and interested students in the class can reasonably be expected to read, process, and understand.

Answer: #4 (cont. 2)

2. Though transforming audio-visual and other multi-media works from entertainment to educational purposes may make fair use of the existing works (*i.e.*, there is no copyright infringement), the Digital Millennium Copyright Act outlaws all circumvention of copyright protection measures in digital media, such as CDs and DVDs ... *including for “fair use”* ... unless the user has received an exemption from the U.S. Copyright Office (or received permission from the work’s owner). Of course, if no ‘protective feature’ is present, DMCA doesn’t apply.

Film & media studies programs (only) have asked for and been provided a limited exemption to circumvent copyright protection measures to reproduce *clips* from any audio-visual material in any library serving their institution for the purpose of making compilations of portions of existing works *for face-to-face teaching-learning* activities.

“Fair use” as defined by §§107 and 110(1) permits you show some-or-all of an audio-visual work in face-to-face instruction. The TEACH Act permits you to show “reasonable & limited portions” on-line.



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by

Robert J. Bremer, MLIS, JD
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rbremer@latech.edu

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