

## FAIR USE OF COPYRIGHTED MATERIALS

**WHAT IS FAIR USE?** Under the federal Copyright Act (“Act”), copyright owners have exclusive rights subject to certain exemptions. The most well known and most widely misunderstood of these exemptions is "fair use" which stands for the concept that in certain circumstances limited copying of an owner’s work without permission is permitted. However, before determining if the fair use exemption applies, you must first determine if you even need the permission of the copyright owner.

**IS IT FAIR USE? DO I NEED PERMISSION?** Answer these three questions to decide whether you need permission to use a copyrighted work.

**A. Is the work protected?** Copyright law does not protect:

- Works that lack originality<sup>1</sup>
- Works in the public domain
- US Government works<sup>2</sup>
- Facts

**B. If the work is protected, do you wish to exercise one of the owner’s exclusive rights?** If “Yes” to any of the below, you need permission from the owner, unless an exemption applies.

- Make copies
- Create a derivative work
- Distribute a work
- Publicly perform a work
- Publicly display a work

**C. Is your use exempt or excused from liability for infringement?** If an exemption does not apply, you need permission from the original owner. For our purposes, fair use is the only exemption addressed here.

**THE FOUR FACTOR FAIR USE TEST.** In order to claim a fair use exemption, you must apply four factors to your facts. These factors are:

1. What is the character of the use?
2. What is the nature of the work to be used?
3. How much of the work will you use?
4. If the use was widespread, and the use was not fair, would the copyright owner be losing money?

**Here's how it works:** With a particular use in mind,

- Read each question and the comments about it;
- Answer each question about your use;
- See how the balance tips with each answer
- Make a judgment about the final balance: overall does the balance tip for or against fair use?

Applying this simple four part test can lead to disparate answers. In order to further assist you, attached are brief summaries of cases which provide a sample of the holdings reached by various courts.

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<sup>1</sup> 17 USC Sec. 102 (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

<sup>2</sup> 17 USC Sec 105: Copyright protection under this title is not available for any work of the United States Government

**THE FOUR PART FAIR USE TEST**

**Factor 1: What is the character of the use?**

<b><u>Pro Fair Use</u></b>	<b><u>&lt; Tipping Factors &gt;</u></b>	<b><u>Anti Fair Use</u></b>
Nonprofit	Criticism	Commercial
Personal	Commentary	
	News reporting	
	Parody	

Uses on the left tend to tip the balance in favor of fair use. The use on the right tends to tip the balance in favor of the copyright owner (i.e. obtaining permission). The uses in the middle add weight to the tipping force of uses on the left and they subtract weight from the tipping force of a use on the right.

**Factor 2: What is the nature of the work to be used?**

<b><u>Pro Fair Use</u></b>	<b><u>Anti Fair Use</u></b>
Fact	Imaginative
Published	Unpublished

Again, uses on the left tip the balance in favor of fair use. Uses on the right tip the balance in favor of seeking permission.

**Factor 3: How much of the work will you use?**

<b><u>Pro Fair Use</u></b>	<b><u>Anti Fair Use</u></b>
Small amount	Greater than a small amount

As with the above, uses on the left tip the balance in favor of fair use; uses on the right tip the balance in favor of asking for permission. However, if the first factor weighed in favor of fair use, you can use more of a work than if it weighed in favor of seeking permission. A nonprofit use of a whole work will weigh somewhat against fair use. A commercial use of a whole work would weigh significantly against fair use.

**Factor 4: If the use was widespread, and the use was not fair, would the copyright owner be losing money**

<b><u>Pro Fair Use</u></b>	<b><u>&lt; Tipping Factors &gt;</u></b>	<b><u>Anti Fair Use</u></b>
After evaluation of the first three factors, the proposed use is tipping towards fair use	Original is out of print or otherwise unavailable	Competes with the original
	No ready market for permission	Avoids payment for permission in an established permissions market
	Copyright owner is unidentifiable	

Depending on the first three factors, this factor may weigh more than all the others combined or it may weigh nothing. If the first three factors indicate that the use is likely fair, courts will not permit the fourth factor to convert an otherwise fair use to an infringing one. On the other hand, if the first three factors indicate that the use is likely not fair courts are willing to consider lost revenues under the fourth factor.

## **Fair Use Rules of Thumb**

The purpose of the Rules of Thumb is to give guidance on what should be considered fair use. These Rules of Thumb are not absolute and they are subject to change based upon new court opinions.

### **A. Rules of Thumb for Coursepacks**

1. Limit course pack materials to:
  - single chapters
  - single articles from a journal issue
  - several charts, graphs or illustrations
  - other similarly small parts of a work.
2. Include
  - any copyright notice on the original, and
  - appropriate citations and attributions to the source.
3. Obtain permission for materials that will be used repeatedly by the same instructor for the same class.

### **B. Rules of Thumb for Displaying and Performing Others' Works in Distance Learning**

The Rules of Thumb for Distance Learning only tackle fair use to perform and display others' works in two contexts (1) Live interactive distance learning classes, and (2) Delayed transmission of faculty instruction. They do not cover fair use of others' works in online course materials.

1. Incorporate performances of others' works (a) sparingly and (b) only if a faculty member or the institution possesses a legal copy of the work.
2. Include (a) any copyright notice on the original and (b) appropriate citations and attributions to the source.
3. Limit access to students enrolled in the class and administrative staff as needed. Terminate access at the end of the class term
4. Obtain permission for materials that will be used repeatedly for the same class.

### **C. Rules of Thumb for Digitizing and Using Images for Educational Purposes**

1. Is the image you wish to digitize readily available online or for sale or license at a fair price?
  - If YES - Purchase or license the image. Do not digitize it unless you are in the process of negotiating a license. If you have a "contract pending," digitize and use the image in accordance with these Rules of Thumb until the license is finalized.
  - If NO - Digitize and use the image in accordance with the following limitations:
    - Limit access to all images except small, low resolution "thumbnails" to students enrolled in the class and administrative staff as needed.
    - Terminate access at the end of the class term.
2. Periodically review digital availability. If a previously unavailable image becomes available online or for sale or license at a fair price, acquire it.

**D. Rules of Thumb for Digitizing and Using Others' Works for Educational Purposes.** The rights described here are rights to *create* unique works, but *not to make multiple copies and distribute them*.

1. Students, faculty and staff may:
  - incorporate others' works into a multimedia work
  - display and perform a multimedia work
2. In connection with or creation of:
  - class assignments
  - curriculum materials
  - remote instruction
  - examinations
3. Use only small amounts of other's works.
4. Do not make any unnecessary copies of the multimedia work.

**E. RULES OF THUMB FOR MUSIC**

1. Limit copying as follows:
  - sheet music - entire works: only for performances and only in emergencies;
  - sheet music (performable units (movements, sections, arias, etc.)) - only if out of print;
  - student performances - record only for evaluation or student portfolio
  - sound recordings - one copy for classroom or reserve room use
2. Include:
  - any copyright notice on the original; and
  - appropriate citations and attributions to the source.
3. Replace emergency copies with purchased originals if available

**F. RULES OF THUMB FOR RESEARCH COPIES.** Limit research copies to

- single chapters;
- single articles from a journal issue;
- several charts, graphs, illustrations; and
- other similarly small parts of a work.

**G. RULES OF THUMB FOR DIGITIZING AND USING OTHERS' WORKS IN ELECTRONIC RESERVES.**

1. Limit reserve materials to:
  - single articles or chapters; several charts or illustrations; or other small parts of a work;
  - a small part of the materials required for the course;
  - copies of materials that a faculty member or the library already possesses legally
2. Include any copyright notice on the original and appropriate citations and attributions to the source.
3. Limit access to students enrolled in the class and administrative staff on an as needed basis. Terminate access at the end of the class term.
4. Obtain permission for materials that will be used repeatedly by the same instructor for the same class.

## FAIR USE CASE LAW SUMMARIES

**Not a fair use.** An author copied more than half of an unpublished manuscript to prove that someone was involved in the overthrow of the Iranian government. **Important factors:** A substantial portion was taken (half of the work) and the work had not yet been published. *Love v. Kwitny*, 772 F. Supp. 1367 (S.D. N.Y. 1989).

**Fair use.** A biographer of Richard Wright quoted from six unpublished letters and ten unpublished journal entries by Wright. **Important factors:** No more than 1% of Wright's unpublished letters were copied and the purpose was informational. *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991).

**Not a fair use.** A biographer paraphrased large portions of unpublished letters written by the famed author J.D. Salinger. Although people could read these letters at a university library, Salinger had never authorized their reproduction. In other words, the first time that the general public would see these letters was in their paraphrased form in the biography. Salinger successfully sued to prevent publication. **Important factors:** The letters were unpublished and were the "backbone" of the biography--so much so that without the letters the resulting biography was unsuccessful. In other words, the letters may have been taken more as a means of capitalizing on the interest in Salinger than in providing a critical study of the author. (*Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987).)

**Not a fair use.** A company published a book of trivia questions about the events and characters of the "Seinfeld" television series. The book included questions based upon events and characters in 84 "Seinfeld" episodes and used actual dialogue from the show in 41 of the book's questions. **Important factors:** As in the "Twin Peaks" case, the book affected the owner's right to make derivative "Seinfeld" works such as trivia books. *Castle Rock Entertainment, Inc. v. Carol Publ. Group*, 150 F.3d 132 (2d Cir. 1998).

**Not a fair use.** Kinko Graphics Corp ("Kinko's") was held to be infringing copyrights when it photocopied book chapters for sale to students as "coursepacks" for their university classes. When conducted by Kinko's, the copying was for commercial purposes, and not for educational purposes. Most of the works were factual—history, sociology, and other fields of study—a factor which weighed in favor of fair use. The court analyzed the percentage of each work, finding that five to twenty-five percent of the original full book was excessive. The court found a direct effect on the market for the books, because the coursepacks competed directly with the potential sales of the original books as assigned reading for the students. Three of the four factors leaned against fair use. The court specifically refused to rule that all coursepacks are infringements, requiring instead that each item in the "anthology" be subject individually to fair-use scrutiny. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F.Supp. 1522 (S.D.N.Y. 1991).

**Not a fair use.** A private copy shop created and sold "coursepacks" under circumstances similar to Kinko's, and the copy shop was also found to have acted outside the limits of fair use. When performed by commercial shop, copying is infringement even if professors select the coursepack materials. The defendant used more than five percent in all instances of copying. Licensing or potential licensing opportunities existed for all copied works, and other commercial copy shops routinely requested permission to reproduce copyrighted works. This court held that the effect on the market is the most important factor of a fair-use determination; accordingly, the court provided relatively little analysis of the other three factors. The decision is built on market effect and particularly emphasizes (1) that an existing licensing system will weigh heavily against fair use, and (2) that "coursepack" production by a commercial copy shop does not constitute fair use even if professors select the copied materials. **Important Factors:** As in the Kinko's case, this court did not address the question of whether "coursepack" production may be fair use if conducted by a university or nonprofit copy shop. This appeal was heard by all judges of the Court of Appeals for the Sixth Circuit. Eight judges ruled against fair use, and five judges dissented, finding that the copying should be fair use. *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996).