All About Fair Use

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Purpose of Copyright Law

“To Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

United States Constitution, Article I, Section 8, Clause 8
Limits on Copyright Holder’s Exclusive Rights

• Copyright law imposes several statutory limits on a copyright holder’s exclusive rights.

• If a use falls within one of these limits, permission does not need to be obtained from the copyright holder prior to using a copyrighted work.

• If a use exceeds these limits, permission must be obtained prior to use.
"...the fair use of a copyrighted work...for purposes such as criticism, comment, news reporting, teaching (including 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
(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.
Balancing Test

Fair Use is a broad exception allowing for legal and unauthorized use of copyrighted works under certain circumstances.

Balancing test – examine all four factors considering the facts of the proposed use.

- No single factor controls.
- There is no “educational” fair use; nor is there an “emergency” fair use.
- Case by case analysis.
Purpose and Character of the Use

Rightsholder
- Uncontrolled distribution
- Commercial
- Mirror-image copying

Fair Use
- Transformative
- Nonprofit
- Educational
- Limited distribution
**Transformative Use** - Does the use of the original work create a new work or use the work in a new, "transformative" way?

**RED FLAGS** – uses that are Supplemental, Substitutionary, “Decorative,” or for Convenience
Nature of the Work

Rightsholder

- Highly creative work
- Consumable

Fair Use

- Non-fiction
- “Non-consumable”
- Published
Amount and Substantiality of Portion Used

Rightsholder

- Large portion and/or more than needed for purpose.
- Central to work/"Heart of the work"

Fair Use

- Decidedly small portion
- Narrowly tailored to purpose
- Amount reasonable in relation to market alternatives
Numerical Guidelines are NOT the Law!
There is no safe haven in number of chapters or percentages.
Effect of the Use on the Market for the Original

- **Rightsholder**
  - Convenient and accessible version is available (in either format).
  - Reasonably priced digital license is available.

- **Fair Use**
  - Conveniently and efficiently accessible version not available.
  - Reasonably priced digital license not available.
  - Work in any format is not commercially available.
Fair Use Court Rulings and Libraries
Authors Guild v. Google

Libraries provided Google with copies of public domain and in copyright books for the purpose of scanning for preservation and for facilitation of full text searching (“snippets”).

Authors Guild filed suit (2005) against Google and others for copyright infringement.

“Google’s unauthorized digitizing of copyright-protected works, creation of a search functionality, and display of snippets from those works are non-infringing fair uses. The purpose of copying is highly transformative, the public display of text is limited, and the revelations do not provide a significant market substitute for the protected aspects of the originals…. while authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship.”

~ Judge Pierre Leval, 10/16/15
Author’s Guild copyright infringement action against HathiTrust and partner universities for digitization of books for purposes of making preservation copies, for search and data mining, for access by persons with disabilities, and for orphan works access.

• Trial court granted summary judgment in favor of HathiTrust and universities. Appellate court affirmed (2014).

• All major HathiTrust initiatives deemed to be fair use – trial judge wrote “I cannot imagine a definition of fair use that would not encompass the transformative uses made by defendants.”

• (Also note – Court ruled that under § 121 academic libraries are an “authorized entity” that can provide access to copyrighted materials for persons with disabilities.)
Georgia State University Case

- Publishers sued Georgia State University in 2008 for posting copies of book chapters in learning management system. Several opinions (trial and appellate) and 12 years later, case finally concluded in September 2020.

- Impact of GSU on Fair Use Analysis
  - Factor One - lack of transformative use not dispositive as all uses were exclusively nonprofit and educational or for the sole purpose of teaching students in classes at nonprofit educational institution.
  - Factor Two – may weigh against fair use if work principally comprises evaluative, analytical, or subjectively descriptive material that surpasses bare facts necessary to communicate information or derives from author’s experiences or opinions.
  - Factor Three – repeated rejections of numerical guidelines; analysis varies based on the purpose found under factor one and impact of any unfavored market substitution found under factor four.
  - Factor Four - market includes market for sales of full books as well as market for licensing portions of the work for placement on e-reserve; GSU courts reached different conclusions about different works, depending on whether the excerpts were available for sale or licensing.
Code of Best Practices in Fair Use for Academic and Research Libraries

8 Common Practices and How Fair Use Applies (enhancements and limitations):

• Digital access to library materials (e.g. reserves)
• Exhibits
• Digital preservation
• Digital collections from archives and special collections
• Reproduction of material for persons with disabilities
• Institutional repositories
• Creation of databases for non-consumptive research
• Harvesting online content for access and preservation
Codes of Best Practices in Fair Use

http://www.cmsimpact.org/fair-use/best-practices
Final words of advice....

- Be mindful of contracts and license agreements – these terms control over fair use (look for fair use language in agreement).
  - Linking over copying!
- Educate faculty and students about fair use.
- Be thorough and not afraid when making fair use determinations – and always act in good faith.
- Pay for permissions and licenses only when there is no other alternative – and look for ways to make the request fair use if possible.
- Look for an open access version (Unpaywall, Open Access Button, repositories).
- Employ transformativeness when digitizing large collections (and attend April webinar on digitization of special collections!)
Additional Resources

• SCOOP column – frequent posts on copyright and fair use, including lengthy summary of recent conclusion of Georgia State Case. https://www.atla.com/topic/scoop/


• Copyright and Online Teaching (webinar recording) - https://www.atla.com/webinar/copyright-for-online-teaching/
Thank you

https://atla.libguides.com/copyright