



Fair Use FAQ for Librarians/General Overview

What is copyright? How is it different from using proper attribution and avoiding plagiarism?

Copyright is actually a limited bundle of rights that the government grants to authors of original works such as novels, plays, essays, and movies. For a limited time (currently the life of the author plus 70 years, in most cases), copyright gives the author control over who can copy, distribute, publicly perform or display, or create derivative works (such as sequels or translations) based on their work. The purpose of copyright is to encourage the creation and dissemination of new works for the benefit of the public. Copyright is a means to the end of increased access to original works.

Copyright is therefore much broader than the norms against plagiarism. Plagiarism is the presentation of someone else's work as one's own; copyright infringement can take place even where the user is honest about the work's true author. As long as you use proper attribution, plagiarism should not be a worry for you. Copyright is somewhat more complex: unless your use satisfies one of the exceptions or limitations described in the Copyright Act, you cannot use copyright protected material without permission. Fair use is one of the most important limitations to copyright.

What is fair use?

Fair use is a part of copyright law that allows certain uses of copyrighted works, such as making and distributing copies of protected material, without permission. It evolved over time as judges made case-by-case exceptions to copyright to accommodate uses that seemed

legitimate and justifiable regardless of the copyright holder's apparent rights. Typical early fair uses involved criticism, commentary, and uses in an educational or scholarly context. In 1978, fair use became part of the text of the Copyright Act - it's codified at [Section 107](#). In recent years, fair use has been a valuable way to accommodate innovative new uses that involve technology, such as the VCR, Internet search engines, reverse engineering of software, and the like.

As you can see from the text of Section 107, fair use is not a specific exception with clearly defined borders. It continues to evolve as judges consider and apply the four statutory factors to new cases. In every case, however, judges must consider the 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. In recent decades, however, fair use decisions have placed a strong emphasis on whether a use is "transformative," a concept first described by Judge Pierre N. Leval in a seminal [law review article](#) published in 1990. A [recent article](#) by UCLA scholar Neil Netanel concludes that transformativeness has come to dominate fair use decision making in the intervening decades. This form of analysis synthesizes the four statutory factors into two key questions:

- 1) Did you use the work in a different manner or for a different purpose than the original, in Leval's words: "as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings"?

- 2) If so, did you use an amount of the original work that is appropriate to your new, transformative purpose?

Illustrative quotations, excerpts, images, and other material used in scholarly writing and teaching can present a very powerful case for transformative use. A [recent memo](#) from the US Patent and Trademark Office shows that even copying and distributing entire scholarly articles can be transformative in the right context.

What about creative commons materials? Licensed materials (as opposed to books the library owns)? Does fair use always apply the same way to everything?

As part of her copyrights, a copyright holder can license her work for whatever specific uses she likes. [Creative Commons](#) licensing provides a way for authors to announce publicly that their work is available for certain broad types of uses without specific permission, with certain conditions. Works under a CC license can be used in whatever ways and on whatever terms the license specifies, in addition to the uses available under fair use.

On the other end of the spectrum, a license can also limit a user's fair use rights; libraries need to be vigilant as they consider which materials to license and on what terms, and users need to be more careful in using materials governed by a license, such as electronic journal articles.

Why do librarians need fair use? We already have exemptions from copyright law just for libraries and archives.

It's true that the law includes several specific exceptions that benefit librarians and their users. Section 108 allows libraries and archives to make copies for preservation, interlibrary loan, and user research, among other purposes. Section 110 gives teachers special rights to use works in the classroom and online. Section 121 makes it easier for disabled library patrons to get access to works not available to them in accessible editions. Each of these provisions can be extraordinarily helpful where they apply, and they apply in some very important situations. They do not cover every situation, however. Indeed, critics have long argued that these specific exceptions are too limited and do not adequately serve the needs of their intended beneficiaries. Fair use is a broad, general, flexible doctrine that can fill important gaps in these specific exceptions, enabling important activities that might fall just beyond the limits of other exceptions. Fair use also allows for important new technological uses that could not have been foreseen by the drafters of the Copyright Act, such as Internet search.

But don't our exemptions preempt fair use?

Not at all. Uses not explicitly covered by other exceptions can still be covered by fair use. Indeed, when congress wrote some of the exceptions (for example, Section 110(2), also known as the TEACH Act), it specifically intended for fair use to be available to cover 'near-miss' cases. Indeed, as Jonathan Band argues in his article, "[The Impact of Substantial Compliance with Copyright Exceptions on Fair Use](#)," these "near miss" situations should be subject to a kind of 'gravitational pull' that makes a finding of fair use *more* likely.

What about the Section 108 Study Group? Shouldn't we wait for reform of Section 108, which gives specific exceptions for libraries?

Unfortunately, the Section 108 Study Group concluded its work without reaching consensus on workable fixes in most of the key areas where the law needs updating. The Section 108 Report gives a helpful account of the problems faced by libraries and other institutions operating under current law, but it is unlikely that any such process will yield helpful substantive fixes in the near future. Fair use is going to be the best option for innovative users for the foreseeable future.

There are lots of guidelines on how much we can use under fair use. The 1976 Classroom Guidelines, for example, look very official. I can't exceed those rules, can I? How do I navigate the sea of guidelines and "rules of thumb" for fair use that I find online?

The only binding authority on the limits of fair use comes from the text of Section 107, where fair use is codified in the law (though the text was never really intended to do more than guide judges, not bind them), and the court cases applying that text to particular facts. Guidelines like the ones created in 1976 do not have the force of law and were never intended to serve as outer boundaries that users would have to obey. Guidelines that give a numerical boundary, like "no more than 10% or 1000 words," are especially dubious, as courts have expressly abandoned such limits, looking instead to the interplay of the four statutory factors

and the overarching purposes of copyright. Recent cases have found fair use where entire works were used in highly transformative contexts.

It's also important to look at the individuals and groups who sponsor the various guidelines, FAQs, and websites about fair use as you try to determine how useful or trustworthy they are. Like its predecessors, this Code of Best Practices is based on two years of research into the challenges that libraries face and the fair use solutions that librarians themselves favor. As a statement of community practice, the Code adds a powerful new tool to the existing guidance available to librarians with questions about fair use.

Isn't fair use pretty vague? I need to have clear guidelines, not just for me but for my staff.

It's true that fair use is intentionally broad and flexible, and it will apply differently to different users in different situations. That may seem frustrating, but it can also be liberating, especially for communities who have a code of best practices. It means the law is responsive to local norms and conditions - it will apply differently to libraries than it does to for-profit vendors, for example. For communities with a code of best practice, the doctrine of fair use has already been thoughtfully applied to some key recurrent situations in light of the norms of your community to yield comprehensible principles, limitations, and enhancements. The code itself is flexible in that it gives rules of reason that each library or librarian will still need to apply to her particular situation. But those rules are founded in library practices and values and tailored to key practice contexts; that should make the code much easier to apply than the plain text of the law.

Of course, every institution will have to write its own policies based on its own values, resources, and priorities. The code of best practices is an input for that process, not a substitute for it, and it will not obviate the need for some institutions to create rules and guidance for staff that is necessarily more constrained than the language of the code. For example, limitations on staff time may necessitate a policy framed in terms of numerical limits, even though there are no such limits in the law. Hopefully the code will help to ensure that any constraints on library practice are chosen with a clearer understanding of how fair use applies, and prevent unnecessary limitations on practice that might have been grounded

in a misunderstanding of fair use.

Fair use is a “case by case” analysis—none of us have time to keep making judgment calls all day long!

Fair use, as a free speech right, is a case-by-case decision, but people make such decisions in other free speech areas with such speed and confidence that they don't even think about it. That is because in those other areas, they understand what is normal and expectable. Codes of best practices, such as the academic and research librarians' code, and those created by film scholars, communication scholars, and visual arts scholars, make it much easier to find the normal and expectable.

While it is a cliché in the law that fair use must be analyzed on a “case-by-case” basis, this does not mean that general policies cannot be framed in reliance on fair use. Uses that are similar in important ways will all be susceptible to the same overarching fair use analysis, and so to the same initial conclusion. That is why companies that make VCRs (and now DVRs) and run search engines don't go out of business, even though the tools they make can and do copy hundreds of thousands of different works. They don't have to re-think the situation for every new web page they scan or every new television show a user might record for later viewing.

By the same token, libraries don't necessarily have to start from scratch when they do a fair use analysis for every work they use. Instead, they can make workable policies based on the general characteristics of a use and the set or collection of works to be used. The code of best practices relies on this kind of reasoning to present what librarians believe to be fair as a general matter across general categories of use. Of course libraries will have to consider their particular context, but that does not mean reinventing the wheel.

Isn't fair use too risky to use? I don't want to put my institution at risk.

While it is true that the boundaries of fair use are not laid out as clearly in the law as other doctrines, that does not mean that taking advantage of fair use has to be 'risky.' Indeed, individuals, institutions, and even huge corporations rely on fair use every day. If you are

coloring within the lines of existing case law, and especially if you are following established norms in your practice community, taking advantage of fair use should not involve any special risks. Indeed, the law even creates a special safe haven for employees of non-profit educational institutions who act with a good faith belief that they are within their fair use rights, protecting you from paying damages for some uses. You should also remember that fair use creates risks for rights holders, too. It is costly to file a lawsuit, and they can't know for sure ahead of time whether your use is fair. Judges have dismissed cases at a very early stage where the fair use case is strong, and even forced rights holders to pay defendants' legal fees.

Even if I employ fair use correctly, I could still be challenged, and that would cost my institution a lot even if I'm right.

While nothing can guarantee that a bad actor will not sue, plaintiffs are not (typically) completely unaware of fair use and the rights you have under fair use. They know that they are taking a risk in suing you, and their legal costs can be significant, too. If you have a strong, good-faith story to tell about why what you are doing is fair (for example, that your use is transformative), that should be a powerful deterrent to a reasonable rights holder. The Code of Best Practices can help you by giving you examples of practices that your peer librarians have thought deeply about and found to be fair. That statement can also be a deterrent to rights holders, because it tells them that the community of practice has endorsed these norms.

Fair use is a mere defense, not a right.

This is a meaningless technicality. Yes, if you are actually sued, the issue of fair use will be raised as a "defense" to the charge of infringement. This is also true for libel - if you are accused of libeling someone, the fact that what you said was true is a "mere defense." But, of course, it's really the heart of the matter! If you know that what you're saying is true, you can know with confidence that you aren't guilty of libel. The same is true for fair use. Even the statute gives fair use a greater status than this old canard about "mere defenses" – Section 107 says that any use that is fair is "not an infringement." It's that simple.

I can't depend on a code of best practices in fair use created by my peers; I need a document that's been accepted by people who otherwise might sue me for my choices.

While it can be useful to negotiate with potentially adverse groups and come to agreement where possible, there are two reasons that best practices written by your own community are still very important. First, case law shows that courts care about what a practice community has to say about its own norms of fairness and best practice. The values of librarianship are internal to libraries, and to carry the authority and authenticity of the community, these best practices needed to originate in the community. A negotiation between those values and the values of other groups, especially where those values can be in tension, would not have the same kind of power or authority. Second, and not unrelated, past efforts at such negotiated arrangements were simply unworkable. Unfortunately, libraries and other groups interested in facilitating access to copyrighted work have been unable to reach consensus with rights holder groups on the most basic issues regarding copyright reform. We hope that will change one day, but progress on these issues can't wait.

What happens when someone makes a bad judgment using the Code of Best Practices and gets us all in trouble?

Every library (and every librarian) will have its own interpretations and applications of the Code, and some will undoubtedly make mistakes. That should not be a concern for good faith actors who apply the Code conscientiously. This is where the "case-by-case" nature of fair use is actually an advantage for users, because your uses will be judged on their own merits, not on the basis of what other institutions do.

We can't expect much help from the fair use doctrine until we get copyright reform.

While the copyright law could certainly benefit from reform, the truth is that libraries cannot and should not wait for that reform to take advantage of rights they already enjoy under fair use. In fact, the more you take advantage of fair use, the more you can benefit from copyright

reform, if and when it ever comes to pass. By taking advantage of your fair use rights, you help to strengthen values and interests that will themselves support broader reform.

What we really need is a “test case” that makes it clear what we can and cannot do.

While trends in cases over time provide important clues as to how future cases will be decided, the value of particular test cases can be surprisingly limited. First, these cases take a long time to wind their way through courts, leaving libraries hanging in the meantime. Second, particular parties may mount better or worse defenses, and may decide to settle claims rather than litigate. Third, and most importantly, if your use differs in a significant way from the ‘test case,’ even a final fair use determination after a well-mounted defense could be of little use to you. Ultimately, libraries are much better off taking advantage of their rights now, rather than waiting for the perfect case to make its way through the system.

Fair use is all well and good for creators who are making a new and “transformative” work with copyrighted material, but it’s not going to work for librarians who are making copies of work available.

Actually, “transformative” doesn’t just mean creating a new work. It means doing something different with the work than the original author. That includes creating new works, such as criticism or commentary, but it also includes making the work available in contexts and for purposes that are not a part of the author’s original intent. Search engines, for example, copy huge swaths of content on the web in order to index those pages and help users find the sites they’re looking for. Search engines use fair use to create a valuable new service, and that’s a perfectly valid, transformative project. More recently, the US Patent and Trademark Office has [argued persuasively](#) that its use of entire scholarly articles in the patent review process constitutes a transformative use. Similarly, libraries undertake valuable projects that may not create new works, per se, but serve new and different purposes than the ones intended by the original authors. A [2012 article](#) by American University copyright scholar Peter Jaszi explains how practices in the educational context present strong cases for transformative use. The code of best practices identifies several specific uses with strong transformative rationales: preserving fragile materials, presenting exhibits that illustrate themes and trends in collections materials, and making physical artifacts searchable and analyzable via non-consumptive methods are great examples.

I thought fair use is only for copying small parts of a work, and I often need to make the whole thing available. What then?

This is another common myth about fair use. While it's certainly true that one of the four statutory factors asks judges to consider how much of a work is used, that factor is supposed to be balanced against the other three factors and the overall purposes of copyright, and it is not always the case that the less you use, the better. In reality, judges consider whether the amount used is appropriate to a legitimate fair use purpose, and in some cases it is appropriate to use entire works. Rather than following arbitrary maximums, or erring on the side of using less, focus on the legitimate purpose and tailor your use to that purpose.

Does the Code say that it is OK to copy a library's collection of VHS tapes to DVD?

Principle Three of the Code gives guidance on when such copying would be a fair use on an item-by-item basis. In practice, it's hard to imagine a situation where an entire collection would get copied! Principle Three does say that fair use will allow copying a particular work from VHS to DVD in appropriate circumstances. As always, you need to be able to explain why you think fair use is being employed. The Code interprets fair use according to the needs of academic and research librarians faced with the challenge of both preserving and providing access to materials in fragile and difficult to access formats. It explains that copying with this goal is a legitimate exercise of fair use where no commercial copy is available at a reasonable cost, where the use is restricted to the library's patron community, and where the library doesn't circulate both the copy and original at the same time. "Enhancements" to the Principle describe a few ways that librarians can take further measures in deference to rights holders and their concerns about format shifting, though these measures are not required for a strong fair use claim.

Does the Code say that librarians can rip and stream audio and video, even of entire works, for electronic reserves and course sites without paying a special license?

Principle One of the Code expresses the academic and research library community's consensus that fair use does permit posting learning materials to digital platforms, including entire works in audio and audio-visual formats. As we say elsewhere in this FAQ, it is a myth that fair use only applies to the use of small amounts of copyrighted work, or that fair use can never apply to use of entire works. As always, the core questions of fair use—is the use transformative and is the amount appropriate to your purpose?—need to be answered. It's possible that an instructor will need to post an entire movie or an entire song (in fact, the latter is quite likely) to a password-protected course site for her students to explore, but she would need to be able to explain why using the entire work in this way is important to the teaching objectives of the course. The Code helps you reason through to your own conclusion. In particular, the limitations listed in the section will help users ask: Is the work designed for use in courses such as this? If so, it's probably not fair use. Is access to the stream limited to the students and teachers in the course, for the time period of the course (or an otherwise justifiable time period)? Is it clear how this material helps students to learn the material? Other limitations are also discussed in Principle One. People who do these kinds of calculations in other professions tell us that this reasoning is quickly internalized.

Can a library now buy a personal-use copy of a movie and exercise fair use to circulate it or to show it in class?

The Code doesn't refer to this issue at all, actually. But you always have been able to buy a personal-use copy of a movie, just as you buy a consumer copy of a book, and circulate it or use it in class. This is not because of fair use, but because of different copyright exemptions. Circulation is permitted by "first sale," which says that the owner of a lawfully made copy may do what he or she likes with the copy, including lending it, reselling it, or sharing it with others. Many librarians have chosen to pay higher prices in some cases, to some distributors, but that is a choice. It is typically not necessary to pay special prices or obtain special licenses for classroom or educational use.

Under their educational exemptions, your professors and other teachers can use such personal-use copies, even screening them in their entirety, to a class in a course they are teaching. While there is certainly a compelling fair use story to tell, here, there is actually a specific educational exemption codified at Section 110 of the Copyright Act that makes it clear that such uses are legitimate and do not require additional permissions or payments.

There is one context where a special license is required: a personal-use copy of a movie cannot be screened publicly without a special public performance license. That would violate copyright.

What authority does this Code have? Why should anyone pay attention to it?

This best-practices code is the latest in a series of codes developed by professionals faced with the challenge of interpreting fair use for their particular professional needs. In each case, professional associations conducted a survey of some kind with their constituencies, to determine where the needs for employing fair use occur. Then, they gathered in small discussion groups to discuss recurrent practice scenarios and how fair use might apply in these scenarios. The consensus positions expressed in these discussions were then captured in the final Code. Subsequently, a distinguished panel of copyright experts reviewed the Code and determined that the positions it expresses are reasonable ones. By articulating how these uses are fair and legitimate according to their own needs and mission, practice communities send a clear message to judges and other gatekeepers. To date, these statements have had a powerful effect on practice in the affected communities.