



Academic Research on Fair Use and Codes of Best Practices

Why take an approach to determining fair use that is rooted in professional consensus, rather than (for example) negotiating standards with right holders or consulting legal experts?

At the heart of this approach is the record of almost 175 years of fair use decision in the U.S. courts, showing that courts are influenced by evidence of professional consensus within communities of practice about what constitutes fair use. A good resource on this point and others relating to the growth in use of fair use best practices codes in the United States is the new book, [Reclaiming Fair Use: How to Put Balance Back in Copyright Law](#) (Aufderheide & Jaszi, 2011, University of Chicago Press).

Complementary material also is available on-line at
www.centerforsocialmedia.org/fair-use.

For further analysis of the trends in fair use, which demonstrate the vitality of the best-practices approach, we recommend the enclosed materials:

- A [foundational article](#) published in 2004 by legal scholar Michael Madison, entitled "A Pattern-Oriented Approach to Fair Use," shows that judges making fair use decisions tend to bless socially beneficial patterns and practices of use, and that consequently communities that can tell a compelling story about their practices have a better chance of winning favorable fair use decisions. The fundamental insight of this article is the basis for all of the Codes of Best Practice,

which endeavor to find and articulate the rationale for socially beneficial fair uses in a series of practice communities.

- A [short article](#) introducing the benefits of codes of Best Practices by copyright expert litigators Jennifer Urban (of the Berkeley Law School Samuelson Clinic) and Anthony Falzone (who directs the Stanford Fair Use Project), originally published in a special issue of *The Journal of the Copyright Society of the U.S.A.* devoted to the fair use doctrine today.
- A [Note](#) from the 2008-2009 volume of *the Harvard Law Review*, the most widely respected general legal periodical, praising the best practices approach as a moderate, practical way of securing the benefits of the doctrine to all of its beneficiaries.
- A 2011 [law review article](#) by UCLA legal scholar Neal Netanel, describing current judicial decision-making on fair use. His point is that, increasingly, courts regard the decisive question as whether a use is “transformative” – a legal term meaning uses that repurpose copyrighted material and add significant value to it. When the answer to that question is in the affirmative, and the extent of the use is proportionate to the transformative purpose, fair use almost always triumphs. As librarians explained in shaping The Code of Best Practices in Fair Use for Academic and Research Libraries, the work they do in support of scholarship and teaching is highly transformative.
- A [2012 article](#) by American University’s Peter Jaszi arguing that that much unlicensed use of copyrighted content in and around education (including in academic and research libraries) should, in fact, be considered transformative, within the meaning of that term as the case law has defined it; and that educators, including librarians, should embrace this way of looking at what they do if they want to achieve the full possible benefits of fair use in the current legal environment.

- A 2001 [law review article](#) by Columbia University legal scholar Professor Kenneth Crews documenting how the use of negotiated guidelines, co-designed by rights holders with no stake in the mission of higher education or libraries, to establish fair use claims has repeatedly disappointed and frustrated educators and librarians. This research powerfully documents the cost to teachers, scholars, librarians and the public of depending on others to permit them to use their rights. And it is a reminder of why the 1976 Classroom Photocopying Guidelines cannot be a template for fair use standards for other technological environments.