

## FAQ: Fair Use of Intellectual Property with Examples of Best Practices

The following set of situations (FAQ) is not comprehensive. It is an attempt to indicate likely scenarios and the judgements necessary for reasonable resolution of the interests of teachers, students, copyright holders, and publishers.

These scenarios concern:

- Photocopying printed materials;
- Printed Course Reserves, Blackboard, and Electronic Course Reserves;
- Using videos and video broadcasts;
- Educational multi-media presentations (including music).

The four basic factors involved in a Fair Use analysis (see also Paragraph 11 of "Nineteen Principles" in the accompanying **Good Practices** document):

4 factors in making a Fair Use analysis:

1. What is the character of the use? (educational or other)
2. What is the temporal nature of the use? ("spontaneous" or repeated and planned)
3. How much of the work will be used? (extent)
4. What effect might the use have on the market? (market value)

These scenarios are adapted from "Examples Illustrating the Application of Fair Use," a portion of The Regents Guide to Understanding Copyright and Fair Use by the Office of Legal Affairs of the University System of Georgia.<sup>1</sup> This document has also borrowed from the legal opinion expressed at the University of Texas' website on *Fair Use of Copyrighted Materials*<sup>2</sup> Masculine and feminine pronouns below are used interchangeably.

### ***1. Photocopying Printed Materials***

1. Journal Article for Classroom Use

**SCENARIO A:** A professor copies one article from a periodical for distribution to the class.

QUESTION: Is this Fair Use?

ANSWER: Yes. Distribution of multiple copies for classroom use is a Fair Use.

ANALYSIS: This use is "spontaneous" (or ad-hoc) in a clearly educational setting and is perceived to have no or minimal effect on the market value of the article or periodical. Hence this use is within the "safe harbor" of Fair Use.

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<sup>1</sup> This far longer document can be found here: <http://www.usg.edu/legal/copyright/> This is an example of Fair Use for educational comment, criticism, or parody, and recognizes © 2005 University System of Georgia.

<sup>2</sup> <http://www.utsystem.edu/ogc/intellectualproperty/copypol2.htm>

## 2. Posting Copyrighted Article to Web Page

**SCENARIO B:** A professor has posted his class notes on a Web page available to the public. He wants to scan an article from a copyrighted journal and add it to his Web page.

QUESTION: Is this a Fair Use?

ANSWER: It depends. If access to his Web page is restricted, then this is a Fair Use. Restrictions to enrolled students guarantees "educational" use. If access is not restricted, then this use is probably not a Fair Use. No exclusively educational purpose can be guaranteed by putting the article on the Web, and such conduct would arguably violate the copyright holder's right of public distribution and the market value of the periodical or article.

### Scenario C:

Question: The same professor wants to scan several articles from the same journal and several chapters of a copyrighted book. Is this Fair Use?

Answer: Probably not. Fair Use looks at the amount (extent) copied in relation to the whole. Most guidelines recommend a single chapter or article from the original. The more that is used, the less likely it will be considered a Fair Use. Fair Use materials in a course should also be a small proportion of the total reading required for the course. ("Extent" thus refers not only to a single act of copying, but extent of total required reading.)

## 3. Coursepacks

**SCENARIO D:** A professor copies excerpts of documents, including copyrighted **textbooks** and journals, from various sources. The professor plans to distribute the materials to his class as a coursepack, compiled and sold for profit by the college bookstore.

QUESTION a: Is the preparation of a coursepack for students in the class a Fair Use?

Answer: Probably not. The selling of a coursepack by the bookstore weighs against Fair Use because it is sold for profit. However, if a coursepack were sold by a copy center for no charge or at cost, it could, after Fair Use analysis (intent, extent, nature of use, affect on market value), fall within the bounds of Fair Use. Again, Fair Use material should be a small proportion of the total reading required for the course, not substituting for purchased anthologies or other textbooks.

QUESTION b: Same facts as SCENARIO D, except the professor prepares a digital or electronic coursepack. Is the preparation of an electronic coursepack for students in the class a Fair Use?

**ANSWER:** If the professor anticipates distributing the coursepack via the World Wide Web, e-mail or compact disk, then a Fair Use analysis is required: nature of use, extent, affect on market value. Secured access weighs in favor of Fair Use. Small portions of the original (single chapter, single article) weigh in favor of Fair Use.

#### 4. Textbooks

**SCENARIO E:** A professor wishes to use a textbook he considers to be too expensive. He makes copies of the book for the class.

**QUESTION:** Is this a Fair Use?

**ANSWER:** No. Although the use is educational, the professor is using the entire work, and by providing copies of the entire book to his students, he has affected the market. This conduct clearly interferes with the marketing monopoly of the copyright owner. The professor should place a copy on reserve or require the students to purchase the book. See following examples.

**NOTE:** Placing an original (as opposed to photocopies) that belongs to the library on course reserves, and then allowing students to make copies of small portions of the work, is one way to avoid copyright violation. This can be done from semester to semester (because the original copy is legal, and the obligations of the affect on market value have been met).

#### 5. Textbooks for Library Reserves

**QUESTION:** If in SCENARIO E the professor decides to make three copies of the book and place them on reserve in the library for the class, is this a Fair Use?

**ANSWER:** No. This conduct still interferes with the marketing monopoly of the copyright owner (affect on market value). The professor may place the textbook, not the photocopies, on reserve.

#### 6. Public Domain Materials

**SCENARIO F:** A teacher copies a Shakespearian play from a copyrighted anthology.

**QUESTION:** Is this a Fair Use?

**ANSWER:** The play is in the public domain and not subject to copyright protection and, therefore, one need not do a Fair Use analysis. Other public domain materials include U.S. government documents, works whose copyright has expired and unsealed court records. There are other public domain materials; for a determination, consult an expert in intellectual property.

## ***2. Printed Reserves, Blackboard, and Electronic Reserves***

**GENERAL NOTE: Repeated use of materials under copyright:** If a course is taught in more than one semester (**especially consecutive semesters**), the professor must request permission for repeated use of a copyrighted work for the same course, or the library must acquire a copy of the work, in print or in electronic format.

The University of Texas legal counsel has this to say about repeated use of an item under Fair Use:

"Although the statutory Fair Use analysis does not address time limits, . . . all the Guidelines contain time limits on Fair Use. Many people do not understand this and wonder why a use that is fair today would cease to be fair at the end of a semester. This is hard to explain because it does not seem to have a basis in statutory requirements or case law. But there the limits are: in the Classroom Guidelines (1976)<sup>3</sup>; the CONFU Proposed Distance Learning Guidelines<sup>4</sup> . . . and Image Guidelines<sup>5</sup> (all 1996); and even in the Electronic Reserve Guidelines<sup>6</sup> (1996, non-CONFU). I have discussed this with other attorneys within the university community and have not heard a satisfactory legal explanation. Nevertheless, I have concluded that there may be two reasons we seem to agree to time limits anyway:

- 1) publishers clearly believe Fair Use has time limits;
- 2) courts seem increasingly willing to let the fourth factor of the Fair Use analysis trump all the other factors so that where there is a market for permissions, "Fair Use is negated." This was the position articulated by the majority in the recent Princeton University Press vs. Michigan Document Services<sup>7</sup> decision."

### 1. Printed Course Reserves (See also: **SCENARIO E** on page 3 above)

**SCENARIO G:** A professor wishes to place a personal copy of a book on reserve for repeated use in the same course. He encourages students to photocopy portions of the book as necessary. Is this Fair Use?

ANSWER: No. The "effect upon the potential market for the work" is one of the four criteria determining Fair Use in the the Copyright Act. A library should whenever possible purchase one or more copies of the book. Personally-owned items should not continue on reserve reading lists for more than one semester, because the publishers may perceive a negative affect on the market value of the work.

**SCENARIO H:** A professor wishes to place separate photocopies of numerous essays from a multi-author monographic work on reserve. Is this Fair Use?

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<sup>3</sup> <http://www.copyright.iupui.edu/academ97.htm>

<sup>4</sup> <http://www.utsystem.edu/ogc/intellectualproperty/distguid.htm>

<sup>5</sup> <http://www.utsystem.edu/ogc/intellectualproperty/imagguid.htm>

<sup>6</sup> <http://www.utsystem.edu/ogc/intellectualproperty/rsrvguid.htm>

<sup>7</sup> <http://www.law.emory.edu/6circuit/nov96/96a0357p.06.html>

ANSWER: Probably not (because of the affect on market value). If the photocopying reflects fairly spontaneous decisions by the professor during the course of a semester, Fair Use probably applies, but the library should still purchase a copy of the monograph which may be placed on reserve during subsequent semesters.

### **Scenario I:**

Question: A professor wishes to place a copy of a journal article on reserve. Is this Fair Use?

Answer: Yes, for single chapters from books, or single articles from a journal. To copy larger portions from a single work, permission should be sought. Also, **the use should not occur repeatedly for the same course**. To avoid the time constraint, use a journal or book that the library owns, and place the original (not photocopies) on reserve, or ask the library to obtain other legal copies (legal offprints, for example).

### 2. Blackboard and Electronic Course Reserves

**SCENARIO J:** A professor wants to add a book chapter (of an electronic text) to Blackboard or the library's electronic reserve system.

QUESTION: Is this a Fair Use?

ANSWER: Yes. The chapter may be added if access to the system is limited to students enrolled in the class, and **the use is not repeated for the same course**. If the use is repeated, a legal digital copy must be obtained, or permission obtained to make one.

### 3. Retention of Book Chapters on Blackboard or Electronic Reserves

**SCENARIO K :** The professor in SCENARIO Q will be teaching the same course for two or more consecutive terms.

QUESTION: Is leaving a book chapter on the electronic reserve system for this period of time a Fair Use?

ANSWER: No. Permission should be requested for repeated use of copyrighted materials in the same course, because of the effect on market value. (See general observation above.)

## ***3. Video and Video Broadcasts (on VHS, DVD, or other media)***

### 1. Showing a Video for Classroom Instruction

**SCENARIO L:** A teacher wishes to show a copyrighted motion picture to her class for instructional purposes.

QUESTION: Is this a Fair Use?

ANSWER: Yes. It is Fair Use since it is for classroom instruction and no admission fee is charged. Tuition and course fees do not constitute admission fees.

## 2. Copying a Video for Classroom Instruction

**SCENARIO M:** A teacher makes a copy of the video described in SCENARIO L for a colleague to show in her class at the same time.

QUESTION: May she do so?

ANSWER: No. This is not a Fair Use. The teacher may lend her personal copy of the video to a colleague for this purpose.

## 3. Showing a Video That Is Copyright-Protected for Non-classroom Use

**SCENARIO N:** A professor or other member of the campus community wishes to show a video outside of the classroom. The event is not part of the day-to-day instruction of a particular course(s), and furthermore is open to anyone who wants to attend.

QUESTION: Is this a Fair Use?

ANSWER: No. Fair Use does not apply to performances that are not part of day-to-day instruction limited to students registered for a particular course. Such "public performances," even brief clips, of a video require permission from the film's distributor, or the purchase of public performance rights.

## 4. Renting a Video with a "For Home Use Only" Warning

**SCENARIO P:** A professor rents a video with bearing the "FOR HOME USE ONLY" warning. May she show the video in class?

ANSWER: In general Yes. But if the professor signed a membership form or card indicating that rentals "are for home use only," *contract* law applies which usually prohibits over-riding "instructional use." The professor may attempt to obtain a release statement from the rental agent granting permission for "instructional use," but in reality the agent does not have the authority to grant such rights, and may become a "contributory infringer" in a copyright lawsuit. A case-by-case decision must be made, and case law in this scenario is not settled. A more clearly legal course of action is for the professor or library to purchase a legal copy of a video.

### ***4. Educational Multi-media***

#### 1. Classroom Presentation

**SCENARIO Q:** A teacher or student prepares and gives a presentation that displays photographs. Permission was not obtained to use the photographs.

**QUESTION:** Can the photographs be included in the initial presentation, if it is in a traditional classroom?

**ANSWER:** Yes. The copyright Fair Use provision explicitly provides for classroom use of copyrighted material. Instructors and students may perform and display their own educational projects or presentations for instruction, as the "character of use."

## 2. Electronic Transmission or Broadcast of Classroom Presentation

**QUESTION:** What if the presentation incorporating the photographs discussed in SCENARIO Q is broadcast to a distant classroom?

**ANSWER:** Yes. This use would be considered Fair Use, as long as the presentation is broadcast for remote instruction (character of use) to students registered for the course.

## 3. Broadcast of Classroom Presentation to Home or Office

**QUESTION:** What if the presentation discussed in SCENARIO Q is broadcast to students at their homes or offices? Would such use be a Fair Use?

**ANSWER:** Yes. This use would be considered Fair Use if the individuals are enrolled in a course and viewing the presentation for purposes of criticism, comment, teaching or instruction, scholarship, or research.

## 4. Videotaping of Classroom Presentation

**QUESTION:** What if the teacher's or student's presentation explained in SCENARIO Q is video-recorded? Would such use be a Fair Use?

**ANSWER:** Yes. This use would be considered Fair Use, if the video recording is used for educational purposes such as student review or if the video is for instruction.

## 5. Broadcast of a Video-recorded Classroom Presentation

**QUESTION:** What if the SCENARIO Q presentation incorporating the photographs is video-recorded and rebroadcast? Is this a Fair Use?

**ANSWER:** Yes. The use of the photographs is Fair Use as long as the presentation is video-recorded and rebroadcast only for instruction. General broadcast over a local cable or public station is not sufficiently "educational" to allow Fair Use (by the character of use test).

## 6. Incorporation of Photographs in an Electronic Presentation (Excluding the Internet)

QUESTION: What if the SCENARIO Q presentation is included in an electronic presentation such as Microsoft's Power Point?

ANSWER: Yes. This should be considered Fair Use as long as the electronic presentation is for educational or instructional use.

## 6. Incorporation of Photographs in an Electronic Presentation on the Internet

QUESTION: What if the SCENARIO Q presentation is included in an electronic presentation and is posted to the Internet?

ANSWER: Maybe. This would be considered Fair Use as long as the posting is password-protected, accessible to registered students only.

## 7. Making Changes to Photographs

QUESTION: What if the student or teacher were to change the attributes of the pictures discussed in SCENARIO Q?

ANSWER: Yes. This would be considered Fair Use for education, comment, criticism, or parody. One must inform the audience that changes were made to the photographer's copyrighted work.

## 8. Use of Copyrighted Music

**SCENARIO R:** A teacher or student creates a presentation and incorporates copyrighted music into the background. Assume that permission was not obtained to use the music for the presentation.

QUESTION: Can the music be included in the teacher's or student's initial presentation?

ANSWER: Yes. This is Fair Use if instruction is occurring.

## 9. Use of Music in Video-recorded Classroom Presentation

**SCENARIO S:** The facts are the same as in Scenario L. What if the teacher's or student's presentation itself is video-recorded? Is this a Fair Use?

ANSWER: Yes. This is Fair Use if instruction is occurring.

## 10. Use of Music in Broadcast of Video-recorded Classroom Presentation

QUESTION: What if the SCENARIO S presentation is video-recorded and rebroadcast? Would this be a Fair Use?

ANSWER: The answer is not clear. If instruction is occurring and there are no admission charges to the rebroadcast, the presumption is that it may be Fair Use. Tuition and course fees do not constitute admission fees.

#### 11. Use of Music in an Electronic Presentation (Excluding the Internet)

QUESTION: What if the SCENARIO R presentation is included in an electronic presentation (excluding the Internet)? Would this use be an appropriate Fair Use?

ANSWER: Yes. This is Fair Use if instruction is occurring.

#### 12. Use of Music as Content in a Classroom Presentation

**SCENARIO T:** A professor teaches an opera course, and the professor creates a presentation. The presentation contains the works of ten contemporary artists and is presented to a new class every semester.

QUESTION: Is this a Fair Use?

ANSWER: Yes, as long as the use of the presentation continues to be for instruction.

#### 13. Use of Music in Classroom Presentations on the Internet

QUESTION: The opera classroom presentation (SCENARIO T) or the presentation containing background music (SCENARIO S) is placed on the Internet? Is this a Fair Use?

ANSWER: This would be Fair Use so long as access is restricted, e.g., by use of a password or PIN or other means (character of use test).