



OFFICE OF THE GENERAL COUNSEL

COPYRIGHT AND FAIR USE: A GUIDE FOR THE HARVARD COMMUNITY

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Harvard University Office of the General Counsel

Copyright and Fair Use: A Guide for the Harvard Community

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Basics of Copyright

What is copyright?

Copyright is the right of an author, artist, composer, or other creator to control other's use of their original work. Under the U.S. Copyright Act, as soon as a creator sets a work 'down' in a tangible medium (like drawing on paper, recording on cassette, video on tape, or words on a website), the creator has the exclusive right to:

- To reproduce and make copies of the work;
- To prepare derivative works based on the work;
- To distribute copies of the work to the public;
- For literary, musical, dramatic, and choreographic works, pictorial, graphic, or sculptural works (including individual images or screenshots from audiovisual works), to display the work;
- for literary, musical, dramatic, and choreographic works and audiovisual works, to publicly perform the work; and
- for sound recordings, to perform them publicly through digital audio transmission.

Though there are exceptions to this rule, notably the fair use doctrine discussed below, generally unauthorized exercise of any of the above rights is copyright infringement.

Note that a number of the seemingly straightforward terms in the above list are defined in odd ways in the Copyright Act. For example, "perform" means "to recite, render, play, dance, or act [the work], either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." "Display" means "to show a copy of [the work], either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially."

Keep in mind that a work can have multiple authors and that there can be layers of copyright. For example, in a given musical piece, one person may hold the copyright to the composition and another to the recording of the composition. A video of dancers dancing to that piece of music would have even more layers.

Why is copyright necessary?

Copyright is the law's attempt to reconcile two conflicting goals. On the one hand, we want to encourage creation of new and useful works by providing incentives to creators. Copyright gives an intellectual work some attributes of private property, allowing the creator to control how the work is used and to make money from it if others are willing to pay for its use.

On the other hand, we want society as a whole to benefit from new ideas and information, and so copyright protection is limited. Copyright protects only the form in which ideas

and information are expressed. Copyrights expire after a certain period of time and the law allows certain limited uses of copyrighted material by others, without the creator's permission. The most important such use is "fair use," which is discussed below.

What can be copyrighted?

Broadly speaking, one can copyright any original work of authorship that can be "fixed in any tangible medium of expression," such as written on paper, or encoded on disk or tape, or recorded on film. This includes fiction and nonfiction writings, poetry, musical compositions (words and music alike), sound recordings, photographs, paintings and drawings, sculpture, architectural works, databases, choreographic works, dramatic works, audiovisual works such as movies, and multimedia works such as those on compact discs. Software code is copyrightable as well.

Unlike a patent, the degree of creativity necessary to qualify for a copyright is very modest. Virtually any original work—even a casual letter, or a compilation of information that involves some originality in selection or arrangement, such as a directory, an anthology, or a bibliography—can be copyrighted.

What does copyright protect?

Copyright protects only the form in which ideas or facts are expressed; it does not protect the ideas or facts themselves. For example, you may read a copyrighted article and appropriate its ideas or the facts it conveys into your own work without violating the copyright. However, unless fair use or another exception to copyright protection applies, you may not reproduce the actual text of the paper without permission. Another example: if you visit a museum and see a painting of a dragon breathing fire, you may paint your own painting of a dragon breathing fire, in your own way, or write about one. The painter's rights in the first painting do not include exclusive rights to the subject matter, just the particular way in which the painter interpreted the subject matter when they put brush to paper.

Though copyright does not protect ideas, names, slogans, or short phrases, there may be other intellectual property rights in those things, including trademark and patent.

Who owns the copyright?

Ordinarily, the creator does. However, if the creator creates the work in the course of employment or enters into a contract to make the work, then the work is a "work made for hire," and the employer or the contracting party owns the copyright. If two or more creators work together to make a work, they may be co-creators and jointing own the copyright in the work.

At Harvard, University policies may vary the ownership that would otherwise result under copyright law. For example, faculty often own the copyright in works they create even in the course of their employment. Harvard's Intellectual Property Policy can be

found at <https://otd.harvard.edu/faculty-inventors/resources/policies-and-procedures/statement-of-policy-in-regard-to-intellectual-property/>.

Can a copyright be transferred to someone else?

Like any other property, a copyright can be sold or given to someone else, who then becomes the owner of the copyright. A copyright is a bundle of exclusive rights, which can be transferred separately or all together. For example, an author might grant a publisher the exclusive right to publish the author's book, while retaining other exclusive rights, such as the right to write a sequel.

A copyright owner can also retain the copyright but permit others to exercise some of the owner's rights. For example, a photographer might permit the use of one of their photographs on a book jacket. A software company might permit customers to use its software program. In both cases, the copyright owner grants permission to use the copyrighted work and retains ownership of the copyright.

How does a work become copyrighted?

Under current law, copyright protection begins when an eligible work is fixed in a tangible medium of expression, such as by being written on paper or recorded on film. It is not necessary to register a work with the Copyright Office in Washington, D.C. to obtain copyright protection.

Should I include a copyright notice or register the copyright in my work?

Although no longer required for copyright protection, using a copyright notice is a good idea. A notice informs others that the work is copyrighted and by whom, thus potentially deterring infringement and facilitating requests for permission. In addition, in the event another party uses the work without permission, the presence of the copyright notice will preclude that person from using a defense of innocent infringement.

A proper notice generally requires the symbol “©” or the word “Copyright,” together with the copyright holder's name and the year of first publication—for example, “© 2023 President and Fellows of Harvard College.” This designation should appear on or near the title page in printed works, and on an early screen in electronic works.

Registration of the copyright with the Copyright Office, while not necessary unless you wish to sue for infringement, confers certain benefits—for example, making statutory damages available if you do sue—and thus may be desirable for some works. To obtain some of those benefits, you must register before the infringement commenced or within a specified period after first publication of the work. Forms and instructions for registering a copyright are available at the U.S. Copyright Office website, www.copyright.gov.

Can I avoid infringement by crediting the source?

No. Copyright infringement and plagiarism are two different things. Plagiarism is the misappropriation of another's work, passing it off as your own without indicating the source. It is possible to plagiarize a work without infringing the copyright—for example if you take another's ideas without proper attribution, even though you do not copy the language, or you borrow from a work whose copyright has expired. Conversely, it is possible to infringe without plagiarizing. Properly citing the work you are copying does not avoid liability for infringement.

When do copyrights expire, and how can I determine if an old work is still covered by copyright?

Determining whether a copyright has expired can be complicated, because the rules governing the copyright term have changed a number of times. The term of United States copyright protection will depend upon when the work was created, whether it is unpublished or published, when it was first published, and the type of work (e.g., sound recordings are treated differently because they were not covered under the 1909 Copyright Act).

For works created in 1978 or thereafter, the copyright term commences upon creation. For most works, the term continues for the life of the author plus 70 years. For pseudonymous and anonymous works, and works made for hire, the term continues until 95 years from first publication or 120 years from creation, whichever expires first.

For works created before 1978, generally the following rules apply:

Works that were created before 1978 but remained unpublished on January 1, 1978 have the same term as works created in 1978 or thereafter, as described above, with one exception: the copyright term of any such work published before the end of 2002 will not expire before the end of 2047.

Before the current Copyright Act became effective in 1978, publication of a work in the United States with a proper copyright notice conferred statutory copyright and started the copyright term. Publication of the work in the United States without a proper copyright notice placed the work in the public domain, with narrow exceptions. The same general rule continued, with somewhat broader exceptions, until March 1, 1989. Hence, for works published in the United States before 1978 (or, with more exceptions, before March 1, 1989), if there is no copyright notice, the work *may* be in the public domain. Be particularly careful with works of foreign origin. Special rules have restored copyright in some foreign works published in this country without proper notice.

Works that were created before 1978 and published with a proper copyright notice before 1923 are now in the public domain. Works published with a proper copyright notice from 1923 through 1963 had an initial copyright term of 28 years, which could be renewed for a second term that now extends 67 years, for a total of 95 years. For these works, a

renewal filing with the Copyright Office near the end of the first term was necessary to secure the second term; if a timely filing was not made, the work fell into the public domain at the end of the first term. To determine whether the copyright was renewed, you can check with the Copyright Office in Washington (202-707-3000, or www.loc.gov/copyright/). Alternatively, you can find some, but not all, Copyright Office renewal records online, either at the Copyright Office website (www.copyright.gov/records/index.html) or in a Copyright Renewal Database made available by Stanford University (<https://collections.stanford.edu/copyrightrenewals/bin/page?forward=home>). Works published with a proper copyright notice from 1964 through 1977 also had an initial term of 28 years, with a renewal term of 67 years, for a total of 95 years, but the renewal term vested or will vest automatically at the end of the first term without any filing.

A helpful chart by Lolly Gasaway summarizing these rules in a simple way, entitled “When Works Pass into the Public Domain,” may be found at <https://www.boisestate.edu/generalcounsel/copyright/copyrightbasics/law/>. A more comprehensive and detailed table by Peter Hirtle, entitled “Copyright Term and the Public Domain in the United States,” may be found at <https://guides.library.cornell.edu/copyright/publicdomain>. Footnote 1 of the Hirtle document contains references to a number of other useful resources.

Note that one work may incorporate or be based upon an earlier work. For example, with appropriate permission, a motion picture may be based on a novel, or a book may include a photograph. The copyrights remain separate. Hence, the copyright term of the earlier work is not extended by the use of that work in the later work. But the copyright notice on the later work may pertain only to the later work, which can lead to confusion about the copyright status of the earlier work. Sometimes a work that has fallen into the public domain is published with new commentary, notes or the like. The public domain work may be copied by others, but not the new matter, which is protected by copyright.

The discussion above concerns copyright term in the United States. The copyright term in foreign countries often varies from that in the U.S., especially for works created before 1978. If you are reproducing, publishing, distributing, or displaying a work in a foreign country, you will need to investigate the copyright term in that country, a subject beyond the scope of this guide.

Does a copyright expire when a work goes out of print?

No. The copyright lasts for a term of years (see above), regardless of whether the work is still in print.

How do I get permission to reproduce or disseminate someone else's copyrighted work?

Find the copyright owner and ask. There are no special forms that must be used, and permission can be oral or written, though it is good practice to obtain permission in writing. The copyright owner is free to charge whatever fee the copyright owner wishes,

though the user is likewise free to try to negotiate a lower fee. Most major publishers and periodicals have a “permissions desk” or a “rights editor,” and a written request addressed in this way will usually find its way to the right person. You should specify the publication you wish to take from; the precise pages, chapters, photographs or the like you want to use; how many copies you want to make; and the purpose of your use (for example, “as a handout in an undergraduate course in economics at Harvard College”). Many permissions desks accept requests by e-mail or through the publisher’s website.

You can make as many copies as you like, without advance permission, from certain academic and scholarly journals now enrolled with the Copyright Clearance Center, a private clearing house (978-750-8400; www.copyright.com). After you copy, you remit the prescribed per-copy fee to the CCC. If a publication is enrolled with the CCC, its masthead will usually provide the necessary information. (The CCC rules for course packs may differ; check with them for current information.)

If you are requesting permission to post material for the use of students in a Harvard course, your request should specify that the material will be restricted (for example, by password or student ID number) to students enrolled in the course, and that the site will be deactivated at the conclusion of the course. Specify the expected enrollment. This information lets the publisher know that the material will not be available to the public and allows publishers to set fees according to the number of users.

Does copyright apply to online materials?

Even though it may be possible to copy content from the Internet, doing so may still be copyright infringement. Though it may appear that images, video, music, text, and other content online are available to be copied and distributed without need of permission, that is frequently not the case. Authors retain copyright, even if they post their works online.

In addition, that you can download a copyrighted work does not mean that you are free to disseminate that work to others, either electronically or in hard copy.

You should abide by the following principles when you access material available online:

- Downloading material to your own computer necessarily makes an electronic copy of it, and printing what you’ve downloaded makes another copy. A copyright owner is therefore entitled to prohibit downloading and printing.
- Remember that the site owner is not necessarily the copyright holder of the site’s content. A site owner may hold the copyright to some materials but not others, or to none of it. Requests for permission should be directed to the copyright holder, not necessarily the website owner.
- Even materials made available for “free” online may be subject to license terms. For example, stock photographs are often subject to an attribution

requirement even if there is no license fee. Use of those materials must be in accordance with those license terms.

- Keep in mind that there are ever-improving detection tools that copyright owners can use to identify unauthorized uses of their copyrighted materials online. For example, it is common for photographers to use tools that crawl the internet looking for unauthorized uses of their images and then seek compensation from infringers.
- Look for a copyright notice on the copyrighted material you wish to use. The notice may be on the opening screen, a home page, an “About this Program” screen, or at the beginning or end of individual items (such as an article or a graphic) within the database.
- If you are in a commercial database that charges a fee for searching material, and also permits you to download or print the material through mouse or key-stroke commands, you may assume that the copyright owner has authorized the operator of the database to allow users to download and print. You may pay an additional fee for this privilege. Multiple copies for classroom use may require additional fees.

What should I be aware of when I create a website?

If you create a website and wish to post copyrighted material on it, you must obtain the permission of the copyright holder unless fair use or another exemption applies. See the section entitled “How does fair use apply to the use of third-party materials on a course website” below.

Harvard faculty and academic staff who create course web pages should consult their school’s experts in this area (for example, FAS Academic Technology Group), who can provide technical assistance.

How do I handle linking to material licensed by Harvard?

The Harvard libraries license a vast number of periodicals and other copyrighted works for educational use. If material you wish to make available to students is licensed, you will be able to establish a link to the resource from a course website, or otherwise furnish students a URL, which will enable them to access the material in electronic form and print a copy for personal use. To find out whether a particular article or other work is available through Harvard’s licensed resources, see <http://p.lib.harvard.edu/discovery/journals.html>. For instructions on creating links to those resources, see <http://guides.library.harvard.edu/links>.

What about linking to other material?

Like other aspects of digital media, the law relating to links from one website to another is not entirely settled. Generally, however, you should not have a problem if you simply post a link to another site, even if that site contains copyrighted material. In such a case, you are not publishing the material; you are simply pointing the way to someone else's publication.

You should not, however, provide a link to a site that you have reason to know is violating copyright law—for example, a site that illicitly allows the free downloading of copyrighted software, music, or other material. You may reasonably assume that a website has the right to include the material found there, unless you have reason to know it is infringing.

If the site you wish to link to specifies particular requirements or restrictions concerning linking (e.g., in its “Terms of Use”), you should generally comply with them or seek permission if you wish to depart from them. Ordinarily, sites that require users to enter a user name and password do not permit linking that would bypass that process.

When you construct a link, be sure that it simply sends the user to another site. If you actually bring the material onto your own site, or “frame” it, you may be infringing copyright and may also mislead users as to the source of the content.

Fair Use of Copyrighted Material

What is “fair use”?

Fair use is the right to use a copyrighted work under certain conditions without permission of the copyright owner. The doctrine helps prevent a rigid application of copyright law that would stifle the very creativity the law is designed to foster. It allows one to use and build upon prior works in a manner that does not unfairly deprive prior copyright owners of the right to control and benefit from their works. Together with other features of copyright law like the idea/expression dichotomy discussed above, fair use reconciles the copyright statute with the First Amendment.

What is the test for fair use?

Fair use is actually an affirmative defense to a claim of copyright infringement, meaning that the alleged infringer has the burden of proving their use was a fair use. It is now codified in Section 107 of the Copyright Act, which provides that fair use of a 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. To determine whether a given use is fair use, the statute directs, one must consider the following four factors:

- the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

These factors are not exclusive but are the primary—and in many cases the only—factors courts examine. The following sections consider each of these four factors in turn.

What considerations are relevant in applying the first fair use factor—the purpose and character of the use?

One important consideration is whether the use in question advances a socially beneficial activity like those listed in the statute: criticism, comment, news reporting, teaching, scholarship, or research. Other important considerations are whether the use is commercial or noncommercial and whether the use is “transformative.”¹

Noncommercial use is more likely to be deemed fair use than commercial use, and the statute expressly contrasts nonprofit educational purposes with commercial ones. However, uses made at or by a nonprofit educational institution may be deemed commercial if they are made in connection with content that is sold, ad-supported, or profit-making. When the use of a work is commercial, the user must show a greater degree of transformation (see below) in order to establish that it is fair.

In recent years, the courts have focused increasingly on whether the use in question is “transformative.” A work is transformative if, in the words of the Supreme Court, it “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.” The Supreme Court recently clarified that for the use of a work to be “transformative,” it is not enough, necessarily, that the use “conveys a different meaning or message.” The extent of the difference matters, and use of a work is more readily regarded as transformative when the use is for a *different purpose* than the original. Accordingly, use of a quotation from an earlier work in a critical essay to illustrate the essayist’s argument is a classic example of transformative use. A use that supplants or substitutes for the original work is less likely to be deemed fair use than one that makes a new contribution and thus furthers the constitutional goal of copyright, to promote science and the arts.

¹ Please note that, as of this writing, the Supreme Court had heard arguments in, but not yet issued a decision on, *Andy Warhol Foundation for the Visual Arts v. Goldsmith*, a case likely to center on the first factor.

Courts have also recognized, however, that non-transformative uses may be socially beneficial, and that a use does not have to be transformative to support a finding of fair use. The Supreme Court has cited reproduction of multiple copies for classroom distribution as the most obvious example of a non-transformative use that may be permitted as fair use in appropriate circumstances. The Court's emphasis on whether a use is transformative, however, makes it difficult to know how to weigh uses that are for non-profit educational purposes but are also non-transformative. In addition, it could be argued in some circumstances that verbatim copying of a work for classroom use is "transformative," in that (to quote from the Court's definition) the instructor is adding "something new, with a further purpose or different character, altering the first with new expression, meaning or message" in the course of presenting the material.

Other factors that sometimes weigh in the analysis of the first fair use factor include whether the use in question is a reasonable and customary practice and whether the putative fair user has acted in bad faith or denied credit to the author of the copyrighted work.

What considerations are relevant in applying the second fair use factor—the nature of the copyrighted work?

The two main considerations are whether the work is published or unpublished and how creative the work is. Unpublished works are accorded more protection than published ones, as the author has a strong right to determine whether and when the author's work will be made public. The fact that a previously published work is out of print may tend to favor fair use, since the work is not otherwise available, but that fact not determinative.

Works that are factual and less creative are more susceptible of fair use than imaginative and highly creative works. This is in keeping with the general principle that copyright protects expression rather than ideas or facts.

However, the second factor is typically the least important of the fair use factors.

What considerations are relevant in applying the third fair use factor—the amount and substantiality of the portion used in relation to the copyrighted work as a whole?

Courts have taken both a quantitative and a qualitative approach to assessing the amount and substantiality of the portion used. A court will ask both "what percentage of the original work has been used" and "is the portion used qualitatively very important to the work"? On quantity, there are no bright lines, but the higher the percentage of the original work used, the more likely this factor is to weigh against fair use. Even if the percentage is fairly small, however, if the material used is central to the work, this factor may weigh against fair use. Thus, for example, in a case in which *The Nation* magazine published excerpts, totaling only 300–400 words of verbatim quotes, from Gerald Ford's forthcoming book-length memoir, the Supreme Court held that the third factor weighed

against fair use, because the excerpts included Ford's discussion of his pardon of Nixon and other central passages that the court found to be the "heart" of the work.²

Also important in applying the third factor is the nexus between the purpose of the fair use and the portion of the copyrighted work taken. The extent of permissible copying varies with the purpose and character of the use. Taking more of the copyrighted work than is necessary to accomplish the fair user's purpose will weigh against fair use. In some cases, the fact that the entire work—for example, an image—was needed to accomplish the fair use purpose has led the court to hold that the third factor was neutral, favoring neither the copyright holder nor the putative fair user.

What considerations are relevant in applying the fourth fair use factor—the effect upon the potential market for or value of the copyrighted work?

Use that adversely affects the market for the copyrighted work is less likely to be a fair use. This ties back to the first factor, and the question whether the putative fair use supplants or substitutes for the copyrighted work. If a use results in lost sales to the copyright owner (or could, if the type of use became widespread), that will weigh against fair use.

This inquiry is not confined to the market for the original work; it also considers derivative markets. For example, if a novel were made into a movie without permission, the movie might not harm sales of the book—indeed, it might help them—but if there is still harm to the author's market for a movie based on the book, that would count against fair use. This principle works in a straightforward way in the case of well-established markets, like the market for movie rights for a novel, but it becomes much more difficult to apply if there is no established market. Consistent with the language of the Copyright Act, courts have also looked at whether there is harm to a "potential market" for the copyrighted work, if one could be reasonably expected or is likely to be developed by copyright owners. In keeping with this approach, courts have concluded that there is no protectible market for criticism or parody, but have considered evidence of harm to markets under development or viewed as attractive opportunities for copyright owners, such as the market for downloads of songs. In some cases, courts have indicated that the absence of a workable market will tend to favor the fair user on the fourth factor because there is no efficient means to buy permission for the use in question.

This is a difficult and evolving area of the law. We can nevertheless venture a few generalizations: Uses that substitute for the copyrighted work in its original market or an established derivative market generally cause market harm that is cognizable under the fourth factor. Where there is no established market, harm is less likely to be found, but still may be found depending on the facts, especially if the fair use case under the other factors is weak and the "market" in question is under development by copyright owners or obviously attractive commercially. In any case, the Supreme Court has said, market harm is a matter of degree, and the importance of the fourth factor will vary, not only

² See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

with the amount of harm, but also with the relative strength of the showing on the other factors.

How should one weigh the various factors in arriving at a determination whether there is fair use?

The fair use test requires an assessment of all the factors together. The courts have repeatedly emphasized that there are no bright line rules, and that each case must be decided on its own facts. The factors often interact in the analysis. For example, the Supreme Court has stated that the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use. The more transformative the use of the original work, the less likely it is that the use will substitute for the original and cause direct market harm. In reaching a fair use determination, all of the factors should be explored, and the results weighed together, in light of the goal of copyright law to “promote the progress of science and useful arts” (U.S. Const., art. I, § 8, cl. 8).³

To understand better how courts have applied the fair use test in different situations, you may find the summaries of selected fair use cases at http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-c.html. In addition, the U.S. Copyright Office maintains a Fair Use Index, which offers a searchable database of selected judicial decisions involving fair use, together with brief summaries: <http://copyright.gov/fair-use/>.

How does fair use apply to photocopying of course materials?

If you would like to make copyrighted material available to students for course use, you should find out whether the material is already licensed by Harvard, before wrestling with the question whether fair use applies or seeking permission to reproduce the material. If the material is already licensed, you will be able to establish a link to the resource from the course website, or otherwise furnish students a URL, which will enable them to access the material in electronic form and print a copy for personal use. To find out whether a particular article or other work is available through Harvard’s licensed resources, see <http://p.lib.harvard.edu/discovery/journals.html>, and for instructions on creating links to those resources, see <http://guides.library.harvard.edu/links>.

Alternatively, a copy of the material you wish to use may be publicly available on the Internet—for example, through Google Scholar or a repository such as SSRN—in which case you may be able to link to it. See generally the section entitled “What about linking to other material?” above. If the material is not available through Harvard’s licensed resources, and is not otherwise available on the Internet, in some circumstances you may be able to copy and distribute the material for course use under the fair use doctrine.

When the Copyright Act of 1976 was being enacted, there was extensive debate about photocopying of copyrighted material for educational and scholarly purposes. Congress declined to adopt a specific exemption for such photocopying, and instead left this to be

³ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

addressed under the fair use doctrine. Section 107 provides that, if the traditional criteria are met, fair use can extend to reproduction of copyrighted material for purposes of classroom teaching. The difficulty comes in applying those criteria. Recognizing that difficulty, the House Judiciary Subcommittee urged representatives of copyright owners and educational institutions to work out a set of specific guidelines, and the resulting guidelines were included in the House Report on the Copyright Act of 1976.

Those Guidelines for Classroom Copying can be found beginning on page 3 of this circular: <https://www.copyright.gov/circs/circ21.pdf>. The Guidelines are intended as a “safe harbor,” to define certain activities that, at a minimum, will qualify for fair use. The Guidelines set forth requirements for “brevity” (limiting the amount of material that may be copied), “spontaneity” (requiring that there not be time to secure permission between when the decision to copy is made and the copy is used in class), and “cumulative effect” (limiting the aggregate amount of such copying). In addition, the Guidelines contain a number of further restrictions, including that an item may not be copied again by the same teacher for use in a subsequent term. The Guidelines also permit, somewhat more liberally, the making of a single copy of excerpts of a work for use by an instructor in research or teaching. When the Guidelines were agreed to by certain representatives of copyright owners and educational institutions, a number of educational groups dissented, objecting that the rules were unduly narrow, even as a safe harbor, and would constrain the reasonable application of fair use to photocopying of classroom materials.

Two noteworthy cases addressing photocopying of course materials have rejected the fair use defense.⁴ In both of those cases, however, the defendant was a commercial copy shop, and the commercial nature of the use figured importantly in the analysis. It is therefore not entirely clear how those precedents bear on copying by a professor or university for non-profit educational purposes. In those cases, the excerpts of the plaintiff’s material contained in the course packs ranged from 14 to 110 pages in length in one case, and from 17 to 95 pages in the other, representing 5% to 25% of the works from which they were taken in one case, and 5% to 30% in the other. In assessing the third fair use factor, both courts found that these amounts weighed against the defendant. Both courts also held that the fourth factor weighed against the defendant, primarily because the plaintiffs had lost permission fees for this copying – in other words, that the copying had a negative effect on the licensing market for photocopying of excerpts for inclusion in course packs. Previous cases had held the opposite, but that licensing market did not exist at the time.

Looking at these cases and the legislative history of the Copyright Act of 1976, the following are factors that a court might take into account, in the framework of the four factor fair use analysis, to determine whether a given instance of photocopying for course use constituted fair use. Some of the questions bear on more than one of the four statutory factors, which remain the touchstone.

⁴ See *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F.Supp. 1522 (S.D.N.Y.1991), and *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir.1996).

First Factor: Purpose and Character of Use

- Will the material be the subject of significant commentary, criticism, explanation, or the like by the instructor? (The more the material functions to illustrate, support, or enable the *new* meaning or message delivered by the instructor—as opposed to functioning mainly as material for students to engage in its own right—the more likely its reproduction and distribution for course use will qualify as “transformative” in the sense described above and hence favor a finding of fair use.)
- Is the copied material integral to the nonprofit educational purpose of the course? For example, is the material important to a lecture or classroom discussion? (Even if the use is not “transformative,” use for a nonprofit educational purpose will weigh in favor of fair use.)
- Is the copyrighted material recently published (for example, in a newspaper), or is the instructor inspired at the last minute to use the material in class, with the result that there is little or no time to obtain permission? (An affirmative answer will weigh in favor of fair use.)
- Are copies distributed to anyone other than students in the course who need one? (Distribution to others could weigh against a finding that the use is for a nonprofit educational purpose. Unless there is a compelling educational reason to do otherwise, materials copied in reliance on fair use should be restricted to enrolled students.)
- Are students being charged for the copies? If so, does the charge have any profit component, or does it only recover costs? (Copying and distribution of a commercial nature will weigh against fair use.)

Second Factor: Nature of the Work

- Is the copyrighted material published or unpublished? (If unpublished, it will weigh against fair use.)
- Is the copyrighted material factual in nature or creative? (If factual, it will weigh in favor of fair use; if creative, against.)
- Is the copyrighted material readily available for purchase? Is it in print or out of print? (The fact that a work is out of print and unavailable for purchase through normal channels will favor fair use copying for educational purposes, though this may be mitigated if permission to photocopy may readily be purchased.)
- Was the copyrighted material prepared primarily for the higher educational market—e.g., a textbook? (If the original work was prepared primarily for the higher ed market, it will tend to weigh against fair use, since photocopying it is

more likely to harm the market for it than if the original were aimed primarily at a different market.)

Third Factor: Amount Copied

- How much of the copyrighted work is being copied? How long is the portion copied and what percentage of the work does it represent? (The smaller the portion, the more likely the copying will qualify as fair use. Generally, a strong showing on the other factors will be needed to justify copying more than one chapter of a book, or one article from a periodical or newspaper, or one short story, short essay or short poem, or other similarly small parts of a work.)
- Is the portion copied the “heart” of the work? (Even a quantitatively small portion of a work may weigh against fair use if it is the most important or commercially valuable part of it.)
- Is the amount copied limited to that which is necessary for the educational purpose to which it is being put? (It will weigh against fair use if you have copied more than is necessary for the educational purpose.)

Fourth Factor: Effect on the Market

- Will the photocopying result in lost sales of copies of the copyrighted work? (Copying that substitutes for sales of the copied work will weigh significantly against a finding of fair use.)
- Can permission to photocopy the material in question readily be purchased through the Copyright Clearance Center (the “CCC”) or another efficient licensing mechanism, such as the publisher? (Even if the copying will not supplant sales of the entire work, the market for the work may nonetheless be harmed if there is an efficient mechanism for buying copies of the excerpt you want or for buying permission to copy the excerpt. Whether this market harm, if present, will tip the overall determination against a finding of fair use depends on how the other fair use factors weigh in the particular situation. The economic significance to the publisher of permission fees, as compared to revenues from book sales, may also weigh in the analysis.)
- Is it difficult or perhaps impossible to locate the copyright holder or are there other significant obstacles to seeking permission? Is the expense of seeking permission greater than the value of the permission sought? (Where there is no cost-effective way to obtain permission, that will weigh in favor of a finding of fair use.)
- Does the University, or other person making the copy, own a lawfully acquired or purchased copy of the work? (A negative answer will weigh against fair use.)

- Is the price of permission prohibitive—i.e., so high that the instructor would reasonably forego educational use of the material in question rather than pay it? (If so, this may counter the potential harm to the market.)

Other Considerations Bearing on Various of the Factors

- Is the copyright notice on the original reproduced on the photocopy? (You should reproduce the copyright notice(s), so that users know the work is in copyright and where to start in seeking permission for subsequent uses, and you should include appropriate citation or attribution to the source.)
- Is this the first time this instructor has photocopied this excerpt for course use, or has the instructor repeatedly photocopied the same material from term to term without permission? (Some people assume that “the first use is fair.” This is incorrect. Each use – whether it is the instructor’s first use or a later use – should be evaluated on its own merits.)
- How extensive is the reliance on fair use in providing materials for this course? Is the copied material a supplement to other purchased or licensed materials in the course? Or does it replace such materials? (Copying that fills out a reading list of purchased or licensed materials—for example, to bring a subject up to date or supply missing pieces—may be more likely to qualify as fair use than copying that substitutes altogether for materials that are purchased or for which a license or permission has been acquired.)

You also will find some further guidance on these issues under the section that follows entitled “How does fair use apply to use of third-party material on a course website?”.

The law in this area is difficult to apply. Outside of the limited Classroom Guidelines, it is hard to know with certainty when fair use applies to photocopying for course use. For that reason, a number of units at Harvard have adopted specific rules and practices for photocopying to ensure copyright compliance. Whenever dealing with those units, you should follow their rules and practices. In other situations, if you wish to make photocopies for course use without obtaining permission from the copyright owner, you should have a good faith reasonable belief that the copying qualifies as fair use.

How does fair use apply to use of third-party materials on a course website?

The fair use factors apply similarly, regardless of the medium. However, when you apply the fair use factors to multimedia content, the analysis is likely to differ in some ways from the analysis of textual materials. For example, there may be two different copyrights in an image—one in the underlying work of art and the other in the photograph—that need to be considered, though it is sometimes difficult or impossible to identify the

photographer;⁵ you typically need to use the entire image to achieve your educational purpose, and courts have recognized that copying the entirety of an image where necessary for a legitimate fair use purpose will not weigh against a fair use finding; there is a longstanding tradition in higher education of making slides from art reproductions in periodicals, exhibition catalogs and books for teaching and study; there is no centralized and efficient mechanism for licensing educational images that is analogous to the CCC in the case of text; and the reproductions made for educational use on a course website are typically lower in resolution and quality than the images that copyright holders sell or license for publication, thus reducing the likelihood that a digitized image will harm an existing market.

In recent years, a number of fair use “best practice” guides have been promulgated. Though they have been developed primarily by user communities, and may not be fully accepted by copyright owners, the guides are another useful point of reference. Various guides can be found on the website of the Center for Media & Social Impact: <http://www.cmsimpact.org/fair-use/best-practices>. See, for example, the [Code of Best Practices in Fair Use for the Visual Arts](#) and the [Code of Best Practices in Fair Use for Academic and Research Libraries](#).

The following are some general measures that, while not substituting for the four factor fair use test, will tend to boost a fair use argument when copyrighted material is made available on a course website:

- Use others’ copyrighted material in your course website only if the material is integral to the course curriculum.
- Include your own comments, criticism, and explanation, or otherwise make your use of the copyrighted material transformative.
- Use only a limited portion of others’ copyrighted material, and only what is necessary for your educational purpose.
- Be wary of using others’ copyrighted material that is produced in digital form primarily for instructional use, or where your use would reasonably be expected to harm the market for the analog version of the material.
- Consider whether a license (permission) allowing the educational use of the material that you wish to make can readily be purchased. If it can, this fact generally will weigh against fair use, though it still may be possible to prevail on fair use depending on the other circumstances (see the preceding discussion).
- Don’t incorporate material in your website in lieu of having students buy books or other such material.

⁵ You normally need not be concerned about a second level of copyright in a photograph of a two-dimensional work of art, since a federal district court has held that a photograph that aims to reproduce a painting faithfully lacks sufficient originality to qualify for copyright protection.

- Limit access to the materials to students enrolled in the course and other qualified people (e.g., a professor's graduate assistants).
- Allow access to students in a course only during the term in which the course is given and disable student access thereafter.
- Wherever feasible, employ streaming formats and technological limits on copying, retention, and further dissemination of the work by students.
- Only incorporate portions from lawfully acquired copies of others' materials.
- Avoid taking many excerpts or portions from any one work.
- Alter others' works only where necessary to support specific instructional objectives.
- Credit the sources fully and display the copyright notice from the original.
- Include a notice that material on the website is being provided under fair use, and that the material may only be used for personal, noncommercial, educational purposes. An example of such a notice can be found at http://ogc.harvard.edu/files/ogc/files/user_notice_for_course_websites.pdf?m=1365193735.

For each item of copyrighted material you wish to use, make a good faith fair use determination. If you do not reasonably believe your proposed use passes the four factor test, you should obtain permission for the material or should not use it.

What are the rules for performing a musical or literary work, or showing a film or video, in class?

The Copyright Act contains a special provision, Section 110(1), that allows teachers to perform or display a copyrighted work, either live or recorded, "in the course of face-to-face teaching activities . . . in a classroom or similar place devoted to instruction." Thus, you can use sound recordings, live performances, readings, films, videotapes, slides, or any other performance or display of copyrighted works without restriction and without permission, so long as you are teaching students in a classroom or similar place such as a studio. The only exception is that you may not use a film or videotape that you have reason to believe is an illegally made copy.

Note, however, that this special classroom dispensation applies to performance and display only. It does not authorize making copies. Nor does it appear to enable you to put materials on your web page, even for course use, because it requires that the performance or display occur "in the course of face-to-face teaching . . . in a classroom or similar place devoted to instruction." Similarly, if you wish to videotape a class session in which you

have performed or displayed others' copyrighted material and to transmit the video to remote students (e.g., via streaming), a different set of considerations comes into play. Amended by the TEACH Act in 2002, Section 110(2) of the Copyright Act provides a special exemption for such distance learning activities. The exemption is conditioned on a detailed set of requirements. You can find useful descriptions of the TEACH Act requirements at <http://www.ala.org/advocacy/copyright/teachact/distanceeducation>. If you cannot meet all of the TEACH Act requirements, you may be able to rely on fair use, if the statutory four factor test is satisfied, or you should obtain permission to use the copyrighted material in the video of your class session.

Copyright and Permissions at Harvard

How do I determine whether or not copyright should be in Harvard's name?

There is no fixed rule on whether to affix a copyright notice on something that you write or create where Harvard owns the copyright. (On the question of ownership, see the section entitled “Who owns the copyright?” above.) If the material is to be published and widely disseminated or publicly available, and if further distribution would be inappropriate without Harvard’s permission, you should warn potential infringers by affixing the copyright notice “Copyright [and/or ©] [year] President and Fellows of Harvard College.” The “[year]” should be completed with the year in which the current version of the work was first published. This is the all-purpose copyright designation for any Harvard publication on paper, disk or other medium. (Drafts may bear a copyright notice as well, particularly if they are widely distributed.) It is also very useful to append to the copyright notice an indication of the unit at Harvard that administers the copyright, so that people who would like to use the work later will know where to turn for permission. For example, you could add after the copyright notice: “For permission to use this work, contact the Peabody Museum of Archeology and Ethnology at Harvard.”

What happens if I receive a request from someone else to copy or quote from a work that is copyrighted by “President and Fellows of Harvard College”?

There is no central “permissions desk” at Harvard. The decision to grant or deny permission to copy or quote from works copyrighted by Harvard—and the decision whether to charge a fee for the permission—is made by the unit that published the work originally or is now responsible for it. For example, the Peabody Museum of Archeology and Ethnology can grant permission to quote from, or copy portions of, works published under its auspices, and the Office of Admissions and Financial Aid can grant permission for the brochures about Harvard that it distributes.

It is not necessary to consult the Office of the General Counsel on this decision, but we will advise you on the mechanics of it, or on questions in particular cases, if that would be helpful to you.

Do I need permission to use or copy material that has already been copyrighted by Harvard?

You should call the Harvard office that produced the material and ask permission to use the it.

What provisions should I make when retaining an outside vendor to create a work for Harvard (sometimes known as a “work for hire”)?

An agreement for the preparation of material to be published by Harvard should always include a provision stating that Harvard will own the copyright. This avoids later disputes over whether Harvard or the individual creator owns the rights to the work.

You can find model forms of Consulting Agreement with appropriate provisions regarding copyright on the Office of the General Counsel website. You should also address this issue if you contract with students concerning creation of copyrighted works.

If I am using a commercial software program for my work, can I make a copy for a colleague or a copy for my computer at home so that I can work there?

No, unless the software license allows it. Much off-the-shelf software is limited to use on one computer. Unless the software license specifically provides otherwise, such programs may not be copied, no matter how legitimate the need for its use elsewhere.

The solution in most instances is to purchase a license that specifically authorizes the program to be used on more than one computer, either individually or through a server. Site licenses are generally less expensive than multiple purchases of individual programs, and home or laptop computers can be included if the vendor agrees. Harvard University Information Technology (HUIT) may be able to provide information on Harvard's site licenses.

Harvard University's policy is that no program is to be copied or used except as specifically allowed by the terms of its license. Those who violate this policy may be personally liable for infringement.

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We hope that this guide answers some of your questions about copyright and fair use. By its nature, this guide provides a general, and necessarily limited, discussion of various topics; it does not purport to give specific legal advice. The Office of the General Counsel advises Harvard and its faculty and staff on specific copyright questions and on other legal concerns that may arise in their work for the University. Please let us know how we can be helpful to you. You can reach us at 617-495-1280.

Please also be aware that the Harvard Library's Office for Scholarly Communication coordinates a group of "Copyright First Responders" who may be able to help you with copyright-related inquiries. You can find a member of this group in your Harvard library at <https://osc.hul.harvard.edu/programs/copyright/first-responders/>.