



**OFFICE OF THE GENERAL COUNSEL**

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**COPYRIGHT AND FAIR USE:  
A GUIDE FOR THE  
HARVARD COMMUNITY**

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**Last Updated  
May 31, 2016**

Copyright and Fair Use: A Guide for the Harvard Community

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## Basics of Copyright

### *What is copyright?*

Copyright is the lawful right of an author, artist, composer or other creator to control the use of his or her work by others. Generally speaking, a copyrighted work may not be duplicated, disseminated, or appropriated by others without the creator's permission. The public display or performance of copyrighted works is similarly restricted.

There are exceptions to this rule—notably the fair use doctrine discussed in the following Section—but generally the unauthorized use of a copyrighted work is copyright infringement, and may subject the infringer to civil and criminal penalties under federal law.

The present Copyright Act dates from 1978, but copyright is an ancient doctrine, with its roots in Elizabethan England. The framers of the Constitution authorized Congress to "promote the progress of science and the useful arts, by securing for limited times to authors . . . the exclusive right to their respective writings . . . ." Today, copyright law goes far beyond "writings" narrowly construed. It extends to literary, dramatic and artistic works, musical compositions and computer programs.

### *Why is copyright necessary?*

Copyright is the law's attempt to reconcile two conflicting goals. On the one hand, we want to encourage the 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 in the next Section.

### *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, audiovisual works such as movies, and multimedia works such as those on compact discs. Computer programs can be copyrighted, and almost always are. Unless a program is clearly denoted "freeware," you should assume it is subject to copyright protection.

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 does not protect ideas, nor does it protect facts. It protects only the form in which ideas or facts are expressed. For example, you may read a copyrighted paper and appropriate its ideas, or facts it conveys, into your own work without violating the copyright. However, you may not reproduce the actual text of the paper (unless fair use or another exception to copyright protection applies), nor may you evade this prohibition simply by changing some words or thoroughly paraphrasing the content.

***What does a copyright authorize the copyright owner to do, or to restrict others from doing?***

Subject to certain limitations, a copyright owner has the exclusive right to:

- reproduce the work by making copies of it;
- distribute copies of the work to the public by sale, donation, rental, or lending;
- prepare new works derived from the original (for example, a novel adapted into a play, or a translation, or a musical arrangement); and
- publicly perform or display the work.

Anyone who does any of these things without authorization infringes the copyright and can be liable to the copyright owner for damages. In some cases, in lieu of proving actual damages, the copyright owner can recover statutory damages of up to \$30,000, or up to \$150,000 if the infringement was willful, for the infringement of a work. Infringement can also be a crime, punishable by fine or imprisonment.

***Who owns the copyright?***

Ordinarily, the creator does. However, if he or she creates the work in the course of employment or is retained under an appropriate contract to make the work, then the work is a "work made for hire," and the employer or the contracting party owns the copyright. Co-creators jointly own the copyright in the work they create together.

In some situations, when a work is created by a member of the University, Harvard policies 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 [www.techtransfer.harvard.edu/resources/policies/IP/](http://www.techtransfer.harvard.edu/resources/policies/IP/).

### ***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, in signing a book contract, an author typically transfers or grants the publisher exclusive publication rights.

A copyright owner can also retain the copyright but permit (or non-exclusively license) others to exercise some of the owner's rights. For example, a photographer might permit the use of one of her photographs on a book jacket. A shrink-wrap license accompanying a computer program is another example of a non-exclusive copyright license.

### ***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 or disk. Contrary to popular belief, it is not necessary to register a work with the Copyright Office in Washington in order to copyright it, nor is it any longer necessary to include a copyright notice.

Although *statutory* copyright now arises when a work is fixed in a tangible form, *common law* copyright may protect expression that has not been fixed—for example, an extemporaneous lecture. In addition, bootlegged recordings of live musical performances are subject to statutory remedies.

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

Although no longer required for copyright protection, a copyright notice is advisable. 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, "© 2002 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. Though not required for copyright protection, a notice will prevent a defense of innocent infringement and will inform others that the work is copyrighted and by whom, thus potentially deterring infringement and facilitating requests for permission.

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—and thus may be desirable for some works. To gain 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](http://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?***

The answer is somewhat complicated, largely because the rules governing the copyright term have been amended 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, and when it was first published.

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, 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 exception is that the copyright term of any such work that was 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 commenced 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 well 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/](http://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](http://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 [www.unc.edu/~unc1ng/public-d.htm](http://www.unc.edu/~unc1ng/public-d.htm). A more comprehensive and detailed table by Peter Hirtle, entitled “Copyright Term and the Public Domain in the United States,” may be found at <http://copyright.cornell.edu/resources/publicdomain.cfm>. 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. This is true for works created in this country by U.S. authors, as well as works created abroad or by foreign authors. 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 he or she 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](http://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.)

### ***What happens to copyright in cyberspace?***

Because the electronic environment presents us with new media, and even calls into question the concept of works "fixed" in a "tangible medium," a great many questions challenge the conventions of copyright doctrine. Congress and the courts are struggling to keep up with new technology, and the opinions of scholars and commentators on how the law should cope with these new changes are in lively conflict.

Nonetheless, certain principles endure. The first and most important is that there is copyright law in cyberspace. A work that is available electronically—even if it is available only electronically—is as eligible for copyright protection as a work in any other medium. Thus, the fact that you can download text or graphics does not mean that the material is not copyrighted. And the ability to download a copyrighted work does not mean that you are free to disseminate that work to others, either electronically or in hard copy.

Those who put their work on the Internet and wish to control its use should use the copyright designation, just as they would do in print or any other medium.

You should abide by the following principles when you access a database or other electronic source of information from your own computer.

- You are free to read, watch or listen to any material to which you have authorized access, even if it is copyrighted. (In some cases you may have to pay a fee to do this.)
- Because downloading material to your own computer necessarily makes an electronic copy of it, and because printing what you've downloaded makes another copy, a copyright owner is 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.
- Look for a copyright notice on the material. 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, just as you would for more traditional media, unless fair use or another exemption applies. See the following section for a discussion of fair use and its application to course websites.

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.

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.

***What about 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?***

The fair use defense is now codified in Section 107 of the Copyright Act. The statutory formulation is intended to carry forward the fair use doctrine long recognized by the courts. The statute 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 questions 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.”

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 profit-making.

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.” 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 goal of copyright, to promote science and the arts. To quote the Supreme Court again, transformative works “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”<sup>1</sup>

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

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<sup>1</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

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 his or her 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.

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 in assessing the impact on the fair use analysis of the amount and substantiality of the portion used. What percentage of the original work has been used? There are no bright lines, but the higher the percentage, the more likely this factor is to weigh against fair use.

Even if the percentage is fairly small, however, if the material used is qualitatively very important, 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.<sup>2</sup>

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

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

varies with the purpose and character of the use. Taking more of the copyrighted work than is necessary to accomplish the fair user's salutary 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. The fact that a use results in lost sales to the copyright owner will weigh against fair use. Moreover, courts have instructed that one must look at the likely impact on the market should the use in question become widespread; the fourth factor may weigh against fair use even if little market harm has yet occurred.

This inquiry is not confined to the market for the original, but also takes into account derivative markets. For example, if a novel were made into a movie, the movie might not harm sales of the book—indeed, it might help them—but the harm to the derivative market for movie rights 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 not an established market. Consistent with the statutory language, courts have also looked at whether there is harm to a “potential market” for the copyrighted work. However, if there were deemed to be a “potential market” for every use asserted to be a fair use, then the fourth factor would always favor the copyright owner, since the copyright owner would be harmed by loss of the licensing fee for that use. One way courts have tried to avoid this circularity is by asking whether a market, if not already established, is “reasonable” or 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

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 secondary use, the less likely it is that the secondary 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).<sup>3</sup>

To understand better how courts have applied the fair use test in different situations, you may find useful the summaries of selected fair use cases at [http://fairuse.stanford.edu/Copyright\\_and\\_Fair\\_Use\\_Overview/chapter9/9-c.html](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?***

Before answering this question, it is worth reiterating that Harvard licenses a vast number of periodicals and other copyrighted works for educational use. 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 “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.

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

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 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 at [www.unc.edu/~unc1ng/classroom-guidelines.htm](http://www.unc.edu/~unc1ng/classroom-guidelines.htm). They 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.<sup>4</sup> 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. On the grounds that a viable licensing market for photocopying of excerpts for inclusion in course packs now exists where it did not in the past, one of these courts distinguished a case from 1972 in which an equally divided Supreme Court had affirmed a decision holding that photocopying of journal articles by the National Library of Medicine constituted fair use.

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, in determining whether a given instance of photocopying for

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<sup>4</sup> 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 (6<sup>th</sup> Cir.1996).



course use constituted fair use. Some of the questions bear on more than one of the four statutory factors, which remain the touchstone.

*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? (Unpublished works have traditionally been accorded stronger copyright protection than published works.)
- Is the copyrighted material factual in nature or creative? (More fair use latitude is accorded to factual works.)
- 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? (Fair use is likely to be more restricted for such material, since photocopying it is more likely to harm the market for it than would be true 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? (You should copy no 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 fact will weigh in favor of a finding of fair use, which can be seen in part as a means for remedying market failure.)

- 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, the societal value of the educational use may tend to counter the potential harm to the market for the work in proceeding without buying permission.)

*Other Considerations Bearing on Various of the Factors*

- Is any copyright notice on the original reproduced on the photocopy? (You should reproduce the copyright notice, so that users know the work is in copyright and where to start in seeking permission for subsequent uses, and 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 photocopying of the same material been repeated 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 – ought to be evaluated on its own merits.)
- How extensive is the reliance on fair use in providing materials for this course? Is the copied material supplementing other copyrighted materials purchased or licensed for use in the course, rather than replacing 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 question that follows (How does fair use apply to use of third-party material on a course website?).

As is evident from this discussion, 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. In view of this uncertainty and the need for relatively simple administrative procedures, a number of units at Harvard have adopted specific rules and practices to ensure copyright compliance in connection with photocopying. 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 basic considerations that bear on the use of copyrighted material on a course website are similar to those discussed above concerning photocopying. The questions discussed

above are generally relevant and provide a good starting point. But the difference in the medium—a digital network rather than hard copies—and the fact that more kinds of content can readily be provided via a website—audiovisual works, music and color images, for example, in addition to text—alter the application of the four fair use factors in various ways.

Litigation by Cambridge University Press and other publishers against Georgia State University illustrates some of the issues and analytical challenges in this area. In that suit, the publishers claimed that GSU's policy allowing professors to make digital copies of excerpts from the publishers' research-based monographs infringed copyright. The excerpts were made available through GSU's electronic reserves system to students enrolled in courses for which the readings were assigned, thus functioning much like an online course pack. The lower court found five instances of infringement, 43 instances in which fair use applied, and 26 instances in which the publishers failed to demonstrate ownership of the copyright.<sup>5</sup> The 11<sup>th</sup> Circuit Court of Appeals reversed, rejecting the lower court's analytic framework on various points, and sent the case back to the lower court for further proceedings.<sup>6</sup>

The majority opinion in the Court of Appeals decision held among other things that:

- While GSU's use of the excerpts was not transformative, the nonprofit educational nature of the use tipped the first factor in favor of fair use.
- The lower court erred in holding that the second factor always favored GSU, because, though the works were informational in nature, they also contained evaluative and subjectively descriptive material. The lower court should have evaluated each work. However, the Court of Appeals also noted that the second factor is of relatively little importance in this case.
- The lower court's bright line test, under which the third factor turned on whether GSU copied more than 10% of the pages or one chapter (if less than 10%) of the book, failed to properly analyze each work individually. The appellate court set forth the following test, which is much harder to apply: "The District Court should have analyzed each instance of alleged copying individually, considering the quantity and the quality of the material taken – including whether the material taken constituted the heart of the work – and whether that taking was excessive in light of the educational purpose of the use and the threat of market substitution."
- The lower court properly concluded that where the publishers failed to show that a digital license was available, the fourth factor favored GSU, and vice versa. However, the lower court erred in not giving the fourth factor more weight in the overall fair use calculus, because GSU's copying was non-transformative and the threat of market substitution was therefore serious. In the appellate court's view, the central question under the fourth fair use factor was "whether defendants' use

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<sup>5</sup> See *Cambridge University Press v. Becker*, 863 F.Supp.2d 1190 (N.D.Ga.2012).

<sup>6</sup> See *Cambridge University Press v. Patton*, 769 F.3d 1232 (11thCir.2014).

– taking into account the damage that might occur if ‘everybody did it’ – would cause *substantial* economic harm such that allowing it would frustrate the purposes of copyright by materially impairing defendants’ incentive to publish the work” (emphasis in original). Unfortunately, this determination may be difficult for a prospective educational user of an excerpt to make.

On remand, in a 213 page opinion, the lower court reanalyzed each of the 48 instances of claimed infringement in light of the Court of Appeals’ direction. This time around, it found seven instances of infringement and 41 instances of fair use.<sup>7</sup> Since the first factor always favored fair use, and the second factor was accorded relatively little weight, the analysis turned largely on the third and fourth factors.

Where the court found that the third factor favored fair use, the instructor generally had used no more than one chapter and the amount used was fewer than 50 pages (in most cases fewer than 40 pages) and less than 10% of the work. There were only a few exceptions. Use of more than one chapter was held to favor fair use on the third factor in only four of 13 instances, and in each case less than 5% of the work was used. Use of one chapter or less was held to favor fair use in all but two cases. In those two cases, more than 10% of the work was taken. In the few cases where the court found that the excerpt taken was the “heart of the work,” this helped tip the third factor against fair use. Taking an excerpt consisting of less than a whole chapter was viewed more favorably under the third factor than use of a whole chapter.

The fourth factor favored fair use in a significant number of instances because the publisher had not made a digital license available for the work in question. Where such a license was available, either through the Copyright Clearance Center or the publisher, the fourth factor was presumed to disfavor fair use. However, in a number of cases GSU was nonetheless able to prevail on the fourth factor by showing that digital license fees constituted only a very small portion of the publisher’s overall revenue from the work, including book sales. The loss of those fees, even if “everybody did it,” was therefore deemed unlikely to affect the publisher’s incentive to publish. Evaluating the potential economic harm of a non-transformative use in light of the publisher’s incentive to publish (or the author’s incentive to write), as the Court of Appeals directed, makes sense in theory. But it is hard to apply in practice outside litigation, since the potential fair user typically will have limited insight into the publisher’s finances.

Are there practical lessons from this case, which may yet have another bounce? Here are a few thoughts:

- Taking no more than one chapter of a book will not assure that the third factor favors fair use, and vice versa, but it is a good starting point gauge. Be especially careful in your fair use analysis if you take more than one chapter, or if the excerpt consists of more than 50 pages or 10% of the work, or if you are taking the “heart of the work.”

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<sup>7</sup> See *Cambridge University Press v. Becker*, Civ. No. 1:08-CV-1425-ODE, slip op. (N.D.Ga. March 31, 2016), available at <https://www.docdroid.net/doPcJWE/dkt-no-510-order-dated-2016-03-31.pdf.html>.

- In all cases, limit the size of the excerpt to the amount needed for the pedagogical purpose. Use less than a whole chapter if that will suffice.
- If a license to use the excerpt you want cannot readily be purchased from the copyright holder or the Copyright Clearance Center, the risk of infringement is significantly reduced.
- If such a license is available, much will turn on the nature of the work, the size of the excerpt taken, the manner in which it is used (including how transformatively it is used), and the likely economic impact of not paying the license fee on the copyright holder and on the incentive to create and distribute such works.

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 above. Taking images, 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;<sup>8</sup> 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 assist a finding of fair use 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.

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<sup>8</sup> 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.

- 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.
- Limit access to students enrolled in the course and other qualified people (e.g., a professor's graduate assistants). Assuming access is provided over a network, require a password or PIN.
- Allow access 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](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?***

Apart from fair use, 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 or 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**

From time to time, you may run into the following questions about copyright practice 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 "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 do so.

***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 computer 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 license allows it. A computer program that is copyrighted (and virtually all commercially available programs are copyrighted) can be used only according to the terms of the license that is purchased, and much off-the-shelf software is limited to use on one computer. Unless the 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 firm 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 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/>.