

Copyright Circular 2: fair use guidelines and examples

This document provides guidelines on copyright issues for faculty, staff, and students who wish to create digital course or research materials.

Understanding and complying with copyright law can be a challenge and applying it in the digital age multiplies the questions a user must answer. This information and the included examples should be used to help faculty understand the legal and technical issues involved and enable them to make copyright decisions on their own in most instances. When in doubt about the legality of a proposed use, visit <http://www.library.yale.edu/eli/copyright> to submit a question for preliminary guidance. If you are still in doubt, an attorney should be consulted.

A note about the TEACH Act: A new piece of copyright complexity was added when Congress passed the TEACH Act which gives distance educators expanded rights to deliver course content over a network. The act applies to distance education, not on-campus instruction.

UPDATES : see <http://www.yale.edu/copyright> for current information on new laws.

Material that may be used without obtaining permission:

for use any number of times:

- Exams, lecture notes, other items where the faculty member is the sole author
- Student papers, where prior written permission has been granted by the student
- Many United States government publications, some state government publications
- Works in the public domain (e.g. published prior to 1923, see <http://www.unc.edu/~unclng/public-d.htm>)
- Materials that the University currently licenses for use in course reserves or online courses

for one time use only:

- Copyrighted material if the proposed use meets the “fair use” balancing test

One time use is suggested because, as explained below, it is a favorable factor in the fair use test. Spontaneous use favors a finding of fair use. Once the professor knows that a certain item is needed, she should secure permission from the copyright owner. When this is not possible, it is possible to use a copyrighted item repeatedly and still qualify for fair use if other elements of the test outlined below are met..

Copyrighted Material and Fair Use

The doctrine of “fair use” (codified at title 17 United States Code, § 107) sets out a four-part balancing test. If your proposed use passes the test, you may make “fair use” of the copyrighted material — that is, use the material without seeking permission from the copyright owner.

... the fair use of a copyrighted work, including such use by reproduction in copies ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- ① *The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- *The nature of the copyrighted work*
- ③ *The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- ④ *The effect of the use upon the potential market for or value of the copyrighted work.*

The following four questions derived from the statute provide rules of thumb which, when taken together, **help** to determine whether your proposed use qualifies as fair use of copyrighted materials. No one factor is determinative.

① **What is the purpose and character of the use?**

This factor looks at the reason that copies are being made and the actions of the person doing the copying. Our purpose would usually be for teaching, so our reason for copying weighs in favor of fair use. Good faith acknowledgement of the original source of the copied materials (appropriate citation) also helps tip this factor in favor of fair use.

Favors fair use	Opposes fair use
Teaching	Profit
Personal	Entertainment
Research	Commercial
Transformative uses:	No attribution to owner
• Criticism	
• Commentary	
• News reporting	
• Parody	

□ **What is the nature of the copyrighted work?**

This factor looks at the characteristics of the item being copied. Generally the more creative a work, the more protection it is afforded. Mere compilations of facts — like a phone book — lend themselves to a fair use finding more readily than a creative work like a novel. Unpublished material that has been held confidential — like personal correspondence or a manuscript — is also subject to greater protection than material that has been widely published. Courts recognize that quoting from previous works of scholarship is part of creating new works, thus works like journal articles or published studies (when quoted briefly with citation) lend themselves to a finding of fair use than creative works like fiction or paintings.

Favors fair use	Opposes fair use
Published	Unpublished
Fact-based	Fiction
In support of education	Creative arts – dance, music, drama
	Designed to be consumable (e.g. workbooks)

③ What portion of the work will be used?

This factor considers both the amount of the total work that is copied as well as the qualitative value of the portion that is copied. Generally, copying the entire work will not be considered fair use.

Favors fair use	Opposes fair use
Small amount	Large amount/whole work
Not central/peripheral to work	Central to work
Appropriate to educational purpose	

④ What effect will the use have on the value of the work in the marketplace?

This factor considers the harm to the owner’s expected income from the work. Courts recognize that copyright owners can argue that any copy damages a potential market, otherwise the copy would not have been made. Courts in our area have avoided this circular logic by indicating that the factor should only be applied to markets that are “traditional, reasonable or likely to be developed.”

Favors fair use	Opposes fair use
Few copies reproduced or out-of-print	Many copies produced
No effect on current or potential market	Impairs current or potential market
No market for permission – owner unidentifiable	Affordable permission exists
No licensing mechanism exists	Reasonable licensing mechanism exists
Limited access to within a class or institution	Competes with original copyrighted work
Limited time use (e.g. one semester)	Long term or repeated use

These are guidelines only and not absolute determinants. They represent a four-part balancing test to determine fair use; no one factor is determinative, all must be considered. If your proposed use of course material falls mostly under the first columns, it is likely acceptable. Some

courts consider the fourth factor the most important and weigh it quite heavily when deciding whether a given use is fair. If the first three factors are close and the fourth factor is heavily in favor of fair use, the result could be a determination of fair use.

Examples for Fair Use Determination

The examples below are designed to help instructors and staff make a determination of fair use for digital materials they may wish to use. Each checklist takes you through the four factors of fair use and gives you some idea of what conditions may or may not tend to support a finding of fair use with that particular factor.

1. Images and Moving Images (Video and Streaming Video)

General information about images:

The photographer owns copyright to his or her photographs, except when copyright has been transferred to someone else (a newspaper or magazine, for example). A photograph in a book is usually not copyrighted by the publisher, editor, or anyone else associated with the book.

For use beyond scholarship, people depicted in the image(s) may have a “right of publicity” that must be considered.

Streaming video is a sequence of moving images that are sent in compressed form over the Internet and displayed by the viewer as they arrive. Streams are not generally saved on a user’s computer. Both video and audio can be streamed or saved as files and downloaded. Streaming is akin to an over-the-air television broadcast. A video file that is downloaded to the student’s computer is more like a VHS tape.

→ **Example:** The day that classes start, a professor asks that newspaper photographs of the Kent State shooting in 1969 be scanned from a microfilm copy of the newspaper and put up on the web for her U.S. History class. Only students in the class have access to the web site and the professor has not taught the class before.

① Purpose of the use

The use in this case is spontaneous (it’s the first day of classes and she has not taught this class in previous semesters). It is also for a purpose related to the course — a photo of an event in U.S. history being used in a history class. The purpose of the use favors a finding of fair use.

□ Nature of the work

The photograph is of a news event and was previously published. Because this is a factual photograph, although there is some creativity involved, this is not a work of fiction or fantasy, so there is more room to claim fair use. The nature of the work slightly favors a finding of fair use.

③ Amount of the work used

The professor wishes to use the entire photograph. Because the photograph is copyrighted separately (in addition to the newspaper as a whole) the picture is the entire work. This weighs in against of a finding of fair use.

④ Effect of use on the marketplace

The professor could attempt to get permission to use the photograph. Because there is no easy licensing mechanism to “buy” the picture by itself, the effect on the marketplace (for licensing individual photographs from a newspaper for classroom use) is negligible. Because only students enrolled in the class have access, no other markets are affected. On balance, this factor weighs in favor of finding fair use.

Because three of the factors weigh in favor of finding fair use, with factor four weighing heavily in favor, the overall balance weighs in favor of a finding of fair use.

2. Music and Audio

General Information About Music:

Music has several types of copyright associated with it. There is a copyright in sheet music and lyrics or in a recording of a song. There is a “performance right” in the score and in many recordings. Because of this, there are two things to think about when using music: first, copying the music (sheet or recorded) and second, performing the music, either on an instrument or by playing a recording. These are addressed separately below.

→ **Example — Sheet Music:** A professor proposes to have students compare two arrangements of the same 1960s song by scanning two scores and putting them on a class website on the Yale network.

① Purpose of the use

This factor strongly favors a finding of fair use because the use is educational.

□ Nature of the work

This factor attempts to recognize that some works may be more deserving of copyright protection due to their creativity and whether or not a work is published or unpublished. Since most musical scores are creative works this factor leans against a finding of fair use.

If the work is unpublished, the weight of this factor would be more negative. If it is published, the factor is only slightly negative.

③ Amount of the work used

Because the entire work is used, this factor does not favor a finding of fair use.

④ Effect of use on the marketplace

Digitizing song scores for the limited purpose of the course does not have an effect on the market for the works provided they are posted to a restricted access site. Because only enrolled students will have access and they would not otherwise be likely to purchase two arrangements of the same song, the market for the work is not affected. This factor favors a finding of fair use.

Taken together, the factors favor a finding of fair use (unless the song is unpublished, then the balancing is much closer).

→ **Example — Performance:** A professor would like students to compare two different performances of an aria from Mozart's *The Magic Flute*, which will be digitized so students can complete the assignment at home.

① **Purpose of the use**

This factor strongly favors a finding of fair use because the use is for criticism and educational purposes.

□ **Nature of the work**

Musical recordings are creative works, but in this case only the recording is original because the underlying score is no longer copyrighted. This factor leans slightly against a finding of fair use.

③ **Amount of the work used**

While the whole aria is being used, it represents only a small portion of the total recording. This factor weighs in favor of fair use.

It is important to note, however, that if the two-minute aria is a substantial portion of the value of the recording — for example if it was the only recording of a certain star soprano and the rest of the opera had a mediocre cast — this factor would not weigh as heavily in favor of fair use because the aria to be copied is a substantial portion of the work. Substantiality is not purely a mathematical calculation based on time.

④ **Effect of use on the marketplace**

This factor could fall either way. If only students will have access to the recordings and that they are available as “streaming” files, not downloadable files, this factor favors fair use because there is negligible effect on the market for the recordings (in fact, there may be a positive effect if some students decide to purchase a copy of the recording after studying it in class). If, on the other hand, the files are placed on the open web for anyone to download, this factor does not favor fair use. Yale generally uses restricted access streaming files.

On balance, the factors favor a finding fair use, and the works may be used.

General note on performing music: Performing (or playing) music in a public, non-classroom setting usually requires a license. “Performing rights societies” represent large repertoires of

songs. One fee is generally paid to these societies regardless of how many different songwriters' works are performed. The societies handle distributing the royalties to the composers. The largest U.S. societies are ASCAP (American Society of Composers and Producers) and BMI (Broadcast Music, Inc.).

3. Text

Text includes unpublished and published materials including original manuscripts.

→ **Example:** A professor would like to scan and post to the course website several complete poems from an anthology so that students may examine and critique style development.

① Purpose of the use

The purpose of the material is solely for teaching and criticism. This factor favors fair use.

□ Nature of the work

The poems are creative works so they are a kind of work that is subject to greater protection. This factor does not favor a finding of fair use.

③ Amount of the work used

The entire poem will be posted. Fair use is not favored.

④ Effect of use on the marketplace

Because the few poems selected would not be commercially viable on their own, this factor favors fair use.

However, if any poem is lengthy enough to be published on its own or if the poems taken together would constitute a new type of anthology, all other factors taken together would have to weigh heavily in favor of fair use to lessen the weight of factor 4 against fair use.

You cannot create, replace or substitute for anthologies or collective works, which can be otherwise purchased.

As with images and text, posting the materials to the open web will tilt this factor away from fair use while limiting access to currently enrolled students will tilt the factor more towards fair use.

Classroom performance or display exception

The copyright act (codified at title 17 United States Code § 110) provides that certain *classroom* performances or displays are not infringing as long as the copy being performed or displayed was made legally.

...the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution...

(2) performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission, if —

(A) the performance or display is a regular part of the systematic instructional activities of a ... nonprofit educational institution; and

(B) the performance or display is directly related to and of material assistance to the teaching content of the transmission; and

(C) the transmission is made primarily for —

(i) reception in classrooms or similar places normally devoted to instruction...

□ **Reminder:**

- The Professor teaching the class or doing research, or the institution should already own a purchased copy of a work being digitized.
- Always include any copyright notice on the original.
- Appropriately cite the source.