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for
LIBRARIANS

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Thanks to Prof. Linda K. Enghagen, J.D., of the University of Massachusetts at Amherst.
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Copyright … A Brief Introduction
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For All Libraries: Academic, Public & Special
‘Each day, librarians copy materials from the in-print or on-line collections of their library and either post those copies for viewing on-line or deliver them to borrowing libraries. Every time copies are made and distributed, questions of copyright and compliance arise.’

Paraphrasing G. Harper of UT-Austin on electronic course-packs.

Being unprotected by the doctrine of “sovereign immunity” (shielding public institutions only), all librarians may be sued & held monetarily liable for copyright infringements they commit within the course & scope of their employments (as may all private institutions) . . .

But for certain “good faith” exemptions, most only partial (but liberally applied) . . . one “complete” (for ILL). 17 USC 504(c)(2) and 108(a) & (g).
Copyright & Fair Use . . .

Copyright: Ownership of “original works of authorship fixed in any tangible medium of expression from which they can be perceived, reproduced, or otherwise communicated,” e.g., literary, musical & dramatic works, motion pictures and sound recordings. 17 USC 102(a).

Fair Use: “The fair use of a copyrighted work, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright.” 17 USC 107.

Neither right is absolute. Each limits & is limited by the other.
Rule: “Fair Use” authorizes librarians, teachers and college/university faculty to make some use of the works of other authors for educational purposes without obtaining those authors’ permission to do so … uses that are essential to teaching-&-learning, scholarship, research and other non-profit “educational purposes.”

Application: Though easily stated, “fair use” is an ancient “equitable rule of reason” that cannot be applied mechanically … its employment requires judicious reflection.
“The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means [or format], for purposes such as criticism, comment, news reporting, teaching (incl., 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 [i.e., less “fair”] or is for nonprofit educational purposes [i.e., more “fair”]; (2) The nature of the copyrighted work [“factual” (+) vs “creative” (-)]; (3) The amount & 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.” 17 USC 107.

Neither the opening “purposes” list nor the following “factors” list is exclusive. There may be other non-infringing uses-&-factors to be considered in any particular case.

E.g., “Parody” has been added to the list of non-infringing uses (as a form of criticism & comment), Campbell Case (USSC, 1994); After 107, 17 USC notes certain specific forms of fair use.
Today’s “Fair Use” Dispute . . .

Course-Packs . . . Prepared and mounted on electronic course-management systems by school, college & university faculty, at times with the assistance of librarians.


Positions Taken –

- “All’s Fair” . . . if for educational purposes.
  Attributed (unfairly?) by Publishers to/in suing Georgia State U (2008- ).

- Assume “Nothing’s Fair” . . . just pay for it!
  Georgia Harper, UT-Austin (Rule of “Risk Avoidance”).

- “Think” . . . follow the “Logic of Fair Use.”
  Pat Aufderheide & Peter Jaszi, American University.
Teachers, college/university faculty, librarians and patrons (adults & children ... students and others) may want to use materials to supplement teaching, research, and learning.

The copying of materials must comply with copyright laws.

‘The fair use of a copyrighted work is not an infringement of copyright.’ 17 USC 107.
What’s Needed . . .

A Bridge between Policy & Practice

A clear, meaningful procedure through which a librarian can determine with reasonable accuracy whether or not an instructional aid or a borrowing request made-or-honored – in-print or on-line – on campus or for distance education – in fact makes “fair use” of any copyrighted material used or requested/ provided.
“Guidelines” Are Available . . .

Guidelines. Rules defining “fair use” in terms of “safe” *minimums* ... Set by single institutions or groups that either do not represent or do not fairly represent the entire creative community affected.

Helpful ... *But* “never” a robust exercise of the Logic of Fair Use.
CONCERNING COURSE-PACKS *

The Issue: Factor 1 vs. Factor 4 . . .
Nonprofit Educational Use vs. Market Effect
If use is “transformative,” use is “fair”

Guidance Is Available ... to suit one’s liking
- A Sound Procedure ... The Logic of Fair Use on following Slides
- A “Guideline” ... Fair Use for Educational Multimedia
  http://www.utsystem.edu/ogc/intellectualproperty/ccmccguid.htm

Three Competing Positions ... "All’s Fair" - "Nothing’s Fair" - "Think"

* Tho an academic issue, applicable rules of law impact all libraries.
Georgia State U … What NOT to Do!

“Policy.” “All nonprofit educational use, no matter how much and no matter how long it’s used, is fair.” Georgia Harper, University of Texas-Austin.

Application: Merely re-use copyright-protected works ... by posting portions of books & articles well in excess of 100 pages each and ‘compilations of material surpassing even the thickest printed coursepack’ ... and provide open web access to the electronically mounted materials.


Note: The publishers’ Complaint may well list extremes, not the norm.
Risk Avoidance … Capitulation!

**Rule:** Subscribe to a clearinghouse licensing service, *such as* has been developed by the Copyright Clearance Center (at www.copyright.com/).

**Rationale:** Reliance on fair use always involves some risk & institutions are prone to be risk averse, so use a licensing clearinghouse & avoid all risk, *especially*, now that publishers are threatening to sue & suing universities for alleged copyright infringement.

Georgia Harper, University of Texas at Austin.
Logic of Fair Use … Follow It !!

**Rule:** Prudently employ the principles of “fair use” each time you incorporate another’s work into an instruction aid … “If you are reusing the work for its original purpose, you would be stealing if you didn’t get permission to use it. If you are repurposing the material for a specific purpose and are using only what you need for that purpose, the copyright holder doesn’t have a legal objection to your use.”

**Rationale:** Fair use is a right, the most important tool in copyright for educators, and a common sense “rule of reason” federal courts developed & continue to apply.

Pat Aufderheide & Peter Jaszi, American University.
Logic of Fair Use … Procedure (to begin)

Is Copyright an Issue?
Not if the existing work is yours, out-of-copyright, a U.S. government publication or on the open web (i.e., posted by the owner for all to use, not merely on the Internet without owner’s permission … though it may be linked to, until taken down).

Is Existing Work Simply Being Copied?
Don’t Use It! 17 USC 107 [Factor 4: “Market Effect” very harmful.]

E.g.: A textbook intended for students, such as those in your class (undergraduates or graduates);
An educational software program sold in association with a textbook (in-print or on-line) created for college students;
A DVD created/sold specifically for limited distance ed use.
Logic of Fair Use … Procedure (cont. 2)

Is the Existing Work Being **Repurposed and Transformed** from Its Original Use to a Teaching Use? *

IF for criticism, comment, parody, scholarship, research or **other** educational purpose (e.g., to illustrate a point, stimulate discussion, etc.), **Use It.**

17 USC 107 [Factor 1: “Purpose of Use,” Educational.]

*The essence of Fair Use*:

E.g.: (1) Works of several modern authors; (2) early, mid-life & mature works of a modern artist; (3) articles showing evolution of an hypothesis to fact; (4) current articles showing differing opinions on a contemporary theory … each **for purposes of comparison & comment** as part of an anthology prepared/tailored by you (*i.e.*, not merely a copy of an earlier anthology).

* The essence of Fair Use: Building on current to create new, for *nothing is truly new.*
Logic of Fair Use … Procedure
(cont. 3)

Is only so much of work being employed as is needed for its repurposed use?

There is no set “this amount & no more” rule.

IF pertinent to topic, Use …
“All” is okay, if required satisfactorily to present/illustrate concept, stimulate discussion & the like.

Don’t be over ambitious …
Use only the amount sufficient to present the concept.

17 USC 107 [Factor 3: “Amount & Substantiality of Portion Used.”]

Also: Provide Attribution & Note any Copyright Declaration in Work used …

Courtesy & Intellectual Honesty = Good Faith!
Is Significant Market Harm Possible?

If not, Use the Earlier Work … to educate only.

17 USC 107  [Factor 1 “Nonprofit Educational Use” high; Factor 4 “Market Harm” low to nil].

- **Audience …** If students are not members of the intended audience for a prior work, the work is repurposed when used to educate those students.

  *E.g.*, article in a professional journal targeted for practioners, *such as* biologists, historians, mathematicians, or teachers.

- **Availability …** If prior work is “unavailable” for current use, use it for nfp educational purposes.

  *E.g.*, works out-of-print, orphaned, or on back-order (*only* while so unavailable); but *not* works merely unpublished.

Logic of Fair Use … Procedure (cont. 5)

Are course materials available only to enrolled students?

Must Be, always …
Particular students, not the World, are being educated!

Are course materials removed, reviewed, revised & remounted for next class?

Must Be, each & every Quarter …
It is not “education” if the information is not current!

17 USC 107  [Preamble: Educational Purposes. ]
[Factor 1: Educational Purpose.    ]
[Factor 4: Limited Market Effect.  ]
[Factor 3: Amount Used (reinforcing 1 & 4).]
Non-Print Media … Sight & Sound

Audio, Visual & A-V Formats …
Rights of “display” & “performance” belong to copyright owner. 17 USC 106.

Exemptions for Educational Purposes …

- Face-to-Face Instruction … any work may be displayed “during teaching activities” in any “nonprofit educational institution.” 17 USC 110(1).

- Distance/On-line Instruction … in “accredited nonprofit educational institutions” (only), audio-visual & visual works may be displayed only in “reasonable & limited portions;” other works … “in an amount comparable to” that in “a live classroom session.” 17 USC 110(2), i.e., the “TEACH Act.”

And, in each instance must have been “lawfully” made/acquired.
Digital Millennium Copyright Act … Forbids circumvention of copyright protection measures in digital media, *such as* CDs & DVDs, *even if* you own the CD, DVD, *etc.* and your purpose is to make “fair use” of the content. 17 USC 1201(a)(1)(A).

**HOWEVER** … “Short portions” of motion pictures on protected DVDs may be incorporated by “college & university professors” into “new works for the purpose of criticism & comment” to serve “educational uses,” as well as for “documentary filmmaking” & “noncommercial videos.” Librarian of Congress Rule (37 CFR 201.40, 7/27/10) & 17 USC 1201(a)(1)(C)-(D).

**Note:** The DVD must have been “lawfully made & acquired.” The Rule includes “film & media studies students,” *only.* The Rule will expire in 3 years, *unless* renewed (likely).
“Faculty Guide” & “Fair Use Checklist” …
To know what’s safe, **not** to do all one may do.
Copyright Information Center at Cornell University (private/**not** public)
http://www.copyright.cornell.edu/.

Note: Cornell’s “Guidelines” were adopted under threat of lawsuit by the Association of American Publishers.

“Fair Use Guidelines for Educational Multimedia” … **to be** “sure” safe.
From Conference for Fair Use (CONFU) … proposed; **not** adopted

“Fair Use & Copyright” … to follow the “Logic of Fair Use” & “Best Practices.”
Center for Social Media in School of Communication at American U.

**ALA Copyright Slider** … to determine if a work is in-copyright or not. http://librarycopyright.net/digitalslider/.
Permissions . . .

To pay for a work if merely copying it or to avoid all risk:

For Print Rights …

- Copyright Clearance Center

- The Publisher … begin at its WebSite.

For Performance Rights …

- Swank Motion Pictures

- The Distributing Company … or google for info.
Guidance Is Available . . .

- **Section 108** . . . Authorizes inter-library loan, so long as the service does not “substitute for a subscription to or purchase of” the subject work by the borrower.
  
  17 USC 108 (d) & (g)(2).

- **CONTU Guidelines** . . . The well-known, long-used “Rule of 5.” *


* CONTU is an acronym for the 1975-1978 National Commission on New Technological Uses of Copyrighted Works
Fair Use: Section 108 … General

“Except as otherwise provided [in 17 USC or this 108], it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy* or phonorecord of a work … , or to distribute such copy or phonorecord, under the conditions specified by this, Section [108], if –

(1) The reproduction or distribution is made without any purpose of direct or indirect commercial advantage;

(2) The collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and

(3) The reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this Section, or includes a legend stating that the work may be protected by copyright, if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this Section.”

17 USC 108(a).

* ‘1 copy of a work’/user: not copies, but no page limit (e.g., copier use).
Fair Use: Section 108 … Specific

“The rights of reproduction and distribution under this Section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if –

(1) The copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) The library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.”

17 USC 108(d).

* 1 copy/request limited to 1 article or “a small part” of a book [ = ILL-L ].
“The rights of reproduction and distribution under this Section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee –

(1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in [108(d)]: Provided, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.” [ = ILL-B] 17 USC 108(g).
In Sum: The ILL Keys to Fair Use ...

The Rule of Section 108:

Lending libraries may not act as printers/publishers of works under copyright; 17 USC 108(g)(1) & (2).

Borrowing libraries may not use ILL as a substitute for the purchase of a book or a subscription to a journal title. 17 USC 108(g)(2).


Note: The Rule of Section 108 circumscribes the purpose of ILL, i.e., as a co-op alternative to the purchase books & journals. Nancy Eaton, New Challenges for Technical Services (12/96).
In Sum: ILL Keys to Fair Use (cont.)

CONTU Guidelines of 1978 - THE Standard …

Guide Defines: “Systematic reproduction or distribution of copies” & “substitute for a subscription to or purchase of work,” in 108.

Resulting “Rule”: No more than 5 excerpts/articles per calendar year from any “title” (book/journal) to any borrower.

Resulting Practice: For items more than 5 years old, no limitation on articles (re Guide & custom) or books (contrary to Guide but customary per confusion with articles).

ED160122 (7/78) at Http://www.eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_&ERICExtSearch_SearchValue_0=ED1601 &ERICExtSearch_SearchType_0=no&accno=ED160122 (4/10).
But Wait, There’s More …

Unavailable Titles …

When a book or journal is out-of-print, “orphaned” or otherwise unavailable,

A library may make copies of all or part of any work in its collection for “private study, scholarship, or research,” if it has “determined, on the basis of a reasonable investigation, that a copy cannot be obtained at a fair price” from common sources.

17 USC 108(e)

Cf., 17 USC 107, Factor 4 [“Market Effect” = No Harm].
And Even More …

Must CONTU’s “Guidelines” be followed indiscriminately without consideration given to the specific borrowing request?

The Logic of Fair Use says “No” …

- Fair use is a right … a common sense rule federal courts developed & continue to apply;

- The CONTU Guidelines are “unofficial” pointers … not “laws” to be mechanically/rigidly applied to transactions the Federal Courts declared long ago are best governed by an equitable “rule of reason” applied on a case-by-case basis.
And Even More … (cont. 2)

Rule: Sensibly employ the principles of “fair use” each time you make an ILL request …

‘If you are using ILL as a substitute for the purchase of a book or a subscription to a journal title, you would be stealing if you didn’t purchase/subscribe to it.’

Paraphrasing Pat Aufderheide & Peter Jaszi, American University.

Section 108 Supplements 107 …

- “Nothing in this Section … in any way affects the right of fair use as provided by Section 107.” 108(f)(4).

- Section 108(g) clarifies “fair use” in the context of InterLibrary Loan: defining more specifically for ILL 107’s Fourth Factor … ‘effect on market for or value of work.’
And Even More … (cont. 3)

Fair Use has no set “this amount & no more” rule … As a borrower, use your sound discretion … neither mechanically applying the CONTU Guidelines, nor being so overly ambitious that you merely substitute ILL for purchase.

Applying the CONTU Guidelines as fair use pointers: A less rigid, more flexible rule of reason might at the least be …

Borrow/lend 5 items 1-3 years old - possible market harm, HI.
Seven & 8 articles * in years 4 & 5, respectively - pmh, LO.

* And book “excerpts” … chapters perhaps; not a whole book.
And Even More … (cont. 4)

Apply the Logic of Fair Use Prudently:

- Avoid the temptation of mere substitution … Rationalizing will not do!

- Use of CONTU has become “customary”… The “Guidelines” have become an ILL community standard by long, ubiquitous use – vary with care!

- Do your Library “policies” or Consortium “rules” permit flexibility? … CONTU requires the borrower to state its request is “in conformity with these Guidelines.”

Rule of Risk Avoidance - Reprise … Reliance on fair use always involves some risk; the “risk averse” can rest easier by mechanically following the CONTU Guidelines & using a licensing clearinghouse service as required (e.g., Copyright Clearance Center, www.copyright.com/). Georgia Harper, UT-Austin.
To Keep in Mind …

Section 108 applies only to books & periodicals … not to audio-visual (incl., movies), musical, graphic, pictorial or sculptural works (other than an “audiovisual work dealing with the news). 17 USC 108(i).

Filling ILL requests from a database is allowed … IF the Library’s license from the provider permits.

Due diligence by borrower & lender is required … incl., borrower’s 3 years of records per CONTU.

In the context of 108, “Library” means … a “library or archives” whose collections are “open to the public,” incl., ‘all with a research interest in a particular specialized collection.’ 17 USC 108(a).
Why Digitize a Collection?
- Preservation
- Access.

Preliminary Question: Does the item (collection) have sufficient value \( \ldots \) \textit{e.g.}, to preserve significant local history or for future research \( \ldots \) to warrant the costs of digitization?

What guidance does the Library’s collection development policy provide?

Observation: Digitization is for everyone forever, unlike class aids & ILL (limited by time & number of users).
Copyright: Ownership of “original works of authorship fixed in any tangible medium of expression from which they can be perceived, reproduced, or otherwise communicated,” e.g., literary, musical & dramatic, audio-visual, and pictorial & graphic works and sound recordings. 17 USC 102(a).

A Bundle of Rights [17 USC 106 & 201(d)], including …
- To reproduce the work in any format;
- To prepare derivative works based on work;
- To sell, lease or otherwise distribute copies of the work to the public in any format;
- To display/perform the work publically in any format.
Ownership:

- **Copyright** … “Copyright in a work protected under this title vests initially in the author(s) of the work,” except that “works made for hire” belong to the employer. 17 USC 201(a) & (b).

- **Item** … “Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object,” and vice versa. 17 USC 202.
Basic Principles (cont. 3)

Out-of-Copyright …

- If the copyright to an item in its collection has expired, any Library is free to preserve and provide access to that object as it may in its sole discretion choose. 17 USC 302-304.

- Copyright in a work expires …

  IF created on/after 1/1/78: for the life of the author, plus 70 years ... 17 USC 302(a).

  IF created before 1978: 70 yrs from author death +/- 17 USC 303-304.

  See, ALA Copyright Slider … to find out if work is out-of-copyright. http://librarycopyright.net/digitalslider/ .
Preservation: As Owner of Item only –

“It is not an infringement of copyright for a library (or archives), or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work [in copyright] * … if [per 17 USC 108(a)] –

(1) The reproduction or distribution is made without any purpose of direct or indirect commercial advantage;

(2) The collections of the library or archives are open to the public ** … ; and

(3) The reproduction of the work includes [any] notice of copyright that appears on the copy that is [so] reproduced …’’

And so long as [per 17USC 108(b)-(c)] …
- The work is in the Library’s collection;
- If published, a copy cannot, on the basis of a reasonable investigation, be obtained at a fair price from common sources;
- If digitized, the copies (up to 3 allowed) are not made available to the public “outside the premises of the library.”

* “Work” includes only “literary works” (books, periodicals, manuscripts, etc.), “sound recordings,” and ‘audiovisual works dealing with the news.’ 17 USC 108(i) and 101.

** “Public” includes collections closed to the general public, so long as they are ‘available not only to researchers affiliated with the library, or with the institution of which it is a part, but also to other persons doing research in that specialized field.’
Preservation: as Owner of Item & Its Copyright –

It’s the Library’s item to preserve as the Library pleases!
17 USC 106.

Unless the memorandum of copyright transfer limits preservation of the object of the copyright … which is unlikely.
17 USC 201(d).
Digitization for Access . . .

If Library Owns Item & Copyright …
It’s the Library’s item to do with as it pleases

[17 USC 106] . . . So long as –
- The transfer was made to the Library by a written document signed by the copyright owner,* and
- The transfer/“permission” did not limit access to the item, e.g., no public display for 25 years or display limited to in-library only. 17 USC 201(d) & 204.

If Library Owns only the Item and …
- Work is out-of-copyright … Do as Please.
- Work is in-copyright … What access is desired?

* Or other formal transfer document, e.g., judicial decree per owner’s will.
Digitization for Access: Own Only Item In-Copyright …

**In-Library Presentation … Permitted.**

17 USC 109(c) … “no more than one image at a time” = as slides, not a film.

**On-Line Presentation … Need Permission from copyright owner (or, if dead, her/his family)!

**On-Line Index … “Fair Use” may permit, if use “thumbnails”**

Per “Logic of Fair Use,” 17 USC 107 (Preamble & 4-Factor Test):

- Have “non-profit educational purpose”

- Have repurposed/transformed the original work and are using only the amount needed with minimal impact on the work’s market value. *Campbell Case* (1994).
Digitization for Access: Own Only Item In-Copyright (cont.) …

What if Work Is “Unavailable” … the work is out-of-print or the author (or family)/publisher cannot be found (work is “orphaned”) for permission.

- Fair Use may permit your Library to digitize the work and use it on-line …

  = 107 nonprofit educational purpose is high [Factor 1]; possible market harm is low [Factor 4];
  = Cf., 108(d) permits “public” libraries to copy a work in its collection for “private study, scholarship, or research,” if on the basis of a reasonable investigation, the work cannot be obtained at a fair price from common sources.

Why Worry …

- Monetary penalties possible … “good faith” minimizes.
- Who’s going to sue … esp., without take-down notice first.