



Fair Use FAQ for Professors

What is copyright? How is it different from using proper attribution and avoiding plagiarism?

Copyright is actually a limited bundle of rights that the government grants to authors of original works such as novels, plays, essays, and movies. For a limited time (currently the life of the author plus 70 years, in most cases), copyright gives the author control over who can copy, distribute, publicly perform or display, or create derivative works (such as sequels or translations) based on their work. Authors (and musicians, screenwriters, and so on) often sell or license this right to larger copyright aggregators, such as publishers, movie studios, and record labels. The purpose of copyright is to encourage the creation and dissemination of new works for the benefit of the public.

Copyright is therefore much broader than the norms against plagiarism. Plagiarism is the presentation of someone else's work as one's own; copyright infringement can take place even where the user is honest about the work's true author. As long as you use proper attribution, plagiarism should not be a worry for you. Copyright is somewhat more complex: unless your use satisfies one of the exceptions or limitations described in the Copyright Act, you cannot use copyright protected material without permission. Fair use is one of the most important limitations to copyright.

What is fair use?

Fair use is a part of copyright law that allows certain uses of copyrighted works, such as making and distributing copies of protected material, without permission. It evolved over time as judges made case-by-case exceptions to copyright to accommodate uses that seemed legitimate and justifiable regardless of the copyright holder's apparent rights. Typical early fair uses involved criticism, commentary, and uses in an educational or scholarly context. In 1978, fair use became part of the text of the Copyright Act - it's codified at [Section 107](#). In recent years, fair use has been a valuable way to accommodate innovative new uses that involve technology, such as the VCR, Internet search engines, reverse engineering of software, and the like.

As you can see from the text of Section 107, fair use is not a specific exception with clearly defined borders. It continues to evolve as judges consider and apply the four statutory factors to new cases. In every case, however, judges must consider the four factors - the purpose of the use, the nature of the work used, the amount and substantiality of the original work used, and the effect on the market for the original, as well as the overall purposes of copyright. In recent decades, however, fair use decisions have placed a strong emphasis on whether a use is "transformative," a concept first described by Judge Pierre N. Leval in a seminal [law review article](#) published in 1990. A [recent article](#) by UCLA scholar Neil Netanel concludes that transformativeness has come to dominate fair use decision making in the intervening decades. This form of analysis synthesizes the four statutory factors into two key questions:

- 1) Did you use the work in a different manner or for a different purpose than the original, in Leval's words: "as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings"?
- 2) If so, did you use an amount of the original work that is appropriate to your new, transformative purpose?

Illustrative quotations, excerpts, images, and other material used in scholarly writing and teaching can present a very powerful case for transformative use. A [recent memo](#) from the US Patent and Trademark Office shows that even copying and distributing entire scholarly articles can be transformative in the right context.

What about creative commons materials? Licensed materials (as opposed to books the library owns)? Does fair use always apply the same way to everything?

As part of her copyrights, a copyright holder can license her work for whatever specific uses she likes. [Creative Commons](#) licensing provides a way for authors to announce publicly that their work is available for certain broad types of uses without specific permission, with certain conditions. Works under a CC license can be used in whatever ways and on whatever terms the license specifies, in addition to the uses available under fair use. On the other end of the spectrum, a license can also limit a user's fair use rights; libraries need to be vigilant as they consider which materials to license and on what terms, and users need to be more careful in using materials governed by a license, such as electronic journal articles.

I always use proper attribution in my scholarship and in the materials I share with students, and I never plagiarize in my scholarship. Doesn't that insulate me from worry about copyright?

Unfortunately, no. While using proper attribution can certainly be helpful in showing your good faith, it is not enough on its own to inoculate you against copyright concerns. If your use isn't fair and isn't covered by one of the other exceptions and limitations to copyright, a copyright holder can prevent you from reproducing protected works even when you give her credit, and even when you don't reproduce the entire work. That's why it's important to know how to take advantage of fair use, which allows you to use copyright protected material without seeking permission.

Why do I need fair use for my teaching? Aren't there exemptions from copyright law specifically for teaching?

It's true that the law includes specific exceptions that benefit teachers and their students. In particular, [Section 110](#) gives teachers special rights to use some works in the classroom and online without asking permission. These provisions can be extraordinarily helpful where they apply, and they apply in some very important situations. They do not cover every situation,

however. Indeed, critics have long argued that these specific exceptions are too limited and do not adequately serve the needs of their intended beneficiaries. Fair use is a broad, general, flexible doctrine that can fill important gaps in these specific exceptions, enabling important activities that might fall just beyond the limits of other exceptions. Fair use also allows for important new technological uses that could not have been foreseen by the drafters of the Copyright Act, such as Internet search.

But don't the exemptions for teaching preempt fair use?

Not at all. Uses not explicitly covered by other exceptions can still be covered by fair use. Indeed, legislative history [shows](#) that congress specifically intended for fair use to be available to cover 'near-miss' cases when it wrote specific exceptions like Section 110(2), also known as the TEACH Act. Indeed, as copyright attorney Jonathan Band argues in his article, "[The Impact of Substantial Compliance with Copyright Exceptions on Fair Use](#)," these "near miss" situations should be subject to a kind of 'gravitational pull' that makes a finding of fair use *more* likely.

There are lots of guidelines on how much we can use under fair use. The 1976 Classroom Guidelines, for example, look very official. I can't exceed those rules, can I? How do I navigate the sea of guidelines and "rules of thumb" for fair use that I find online?

First, it's important to know that the only binding authority on the limits of fair use comes from the text of Section 107, where fair use is codified in the law (though the text was never really intended to do more than guide judges as they continued to evolve the doctrine, not bind them to a particular vision of it), and the court cases applying that text to particular facts. Guidelines like the ones created in 1976 do not have the force of law and were never intended to serve as outer boundaries that users would have to obey. Guidelines that give a numerical boundary, like "no more than 10% or 1000 words," are especially dubious, as courts have expressly abandoned such limits, looking instead to the interplay of the four statutory factors and the overarching purposes of copyright. Recent cases have found fair use where entire works were used in highly transformative contexts.

Second, it's important to look at the individuals and groups who sponsor the guidelines, FAQs, and websites about fair use as you try to determine how useful or trustworthy they are. Like its predecessors, the Code of Best Practices for Academic and Research Libraries is based on research into the challenges that libraries face and the fair use solutions that librarians themselves favor; it is grounded in two years of interviews and small group discussions with librarians, plus a round of review by a panel of copyright experts. As a statement of community practice, the Code adds a powerful new tool to the existing guidance available to librarians and library users with questions about fair use. Teachers can also look to codes developed by [media literacy educators](#), [open courseware designers](#), [poets](#), and [online video makers](#) for guidance.

How do I know if the material I put on e-reserves or CMS is a fair use?

Principle One in the Code of Best Practices in Fair Use for Academic and Research Libraries states that "It is fair use to make appropriately tailored course-related content available to enrolled students via digital networks." There are several enhancements and limitations that modify the principle, but the principle itself includes some key guidance.

First, material should be "appropriately tailored" - meaning instructors should choose works or portions of works that serve your pedagogical purpose, and should not post material that is superfluous. This doesn't mean you must use the least possible amount of material to minimally achieve your teaching goals, or that you can never post entire works when that is the amount that would best serve your teaching. It just means you should be thoughtful as you decide how much to use.

Second, the material should be "course-related." E-reserves and CMS are not copyright-free zones for sharing anything you'd like with students. They are resources for teaching a course, an extension of the physical classroom and the physical reserves desk in the library; therefore, material posted to CMS and e-reserves systems should serve a legitimate pedagogical purpose related to the course.

Third, material posted to these sites should only be accessible to "enrolled students" in a relevant course or program of study. This helps to ensure that posted material is being used in

a transformative way, e.g., to produce new insights, aesthetics, information, and understanding.

You can also consult pages 9 and 10 of the Code for more Limitations and Enhancements that help further describe how these digital resources can be used consistent with librarians' views of fair use. And, of course, your own library and IT professionals will be able to help you learn more about policies and best practices at your own institution.

I'm a writer, myself. I don't want others exploiting my work. Is fair use a threat to my own copyrights?

Absolutely not. Fair use is only available in situations where authors do not have a legitimate claim to demand permission or payment. Fair use will allow people to use your writings to illustrate a larger trend or idea, or to comment on or criticize your work, or to teach students about your work and how it fits into the history of ideas. It will not let them sell copies of your work without permission, or make any other use that displaces a market you should be able to exploit.

You should welcome fair uses of your work, as they are critical and normal parts of the scholarly enterprise, and they expose your work to new audiences and new analyses that would not otherwise be available. And, equally important, fair use is likely to be an important part of your own scholarship, your own teaching, or both. Making your works available for these kinds of uses is part of the bargain you strike with other authors, who make their own works available to you in the same way.

Imagine a world where you had to ask permission to quote an author in a book review, or to include an excerpt from a letter to illustrate a historical narrative. In addition to the rights you exercise directly under fair use, you benefit from the work that libraries do under the fair use doctrine, including preservation, digitization, operating e-reserves, and serving disabled scholars and students. It's a tremendous bargain, ultimately, to support a doctrine that costs you nothing in terms of legitimate revenue while providing you access to powerful analytical and pedagogical tools, free of charge.

My library subscribes to a lot of commercial databases. Can I use material I find there in the same way I'd use material I find in hard-copies that the library owns?

It depends. For most electronic materials, such as Lexis-Nexis or digital journal subscriptions, the terms of access to the materials are described in a contract between the library and the service provider. These terms can limit what users can do with electronic materials. Using automated programs to retrieve large numbers of articles from commercial databases could be prohibited, for example, even though such use might be fair if a contract weren't involved. You should check with a librarian to see what limitations might exist before making unusual new uses of licensed materials. If you want to use such databases in a way that the license terms do not permit, please alert your librarians to this fact. They may be able to renegotiate a contract or get more appropriate terms the next licensing round.