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You're Suing Me? Best Fair Use & Copyright Practices

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You’re Suing Me?
Best Fair Use & Copyright Practices

Do you teach?  Do you publish?
Do you know how to exercise your fair use rights?

Green Library – Panel Discussion – 2/24/16

Libguides.fiu.edu/FairUse
Panel Members

- **Stephanie Brenenson**
  Graduate Studies/Scholarly Communication Librarian

- **Sarah J. Hammill**
  Business & Online Learning Librarian

- **Valerie Boulos**
  Head, Collection Development and Resource Access

- **Jamie Rogers**
  Assistant Director, Digital Collections Center

- **Tom Moore**
  Head, Sound and Image Department

- **Brandie Thomas**
  Electronic Thesis and Dissertation Coordinator, University Graduate School
Step by Step

- Use unprotected works
- Use licensed materials to exercise Fair Use
  - FIU Libraries
  - Creative Commons
  - Web (implied license, unless otherwise stated)
- Seek a license; ask for permission
- Back to Fair use

Adapted from the Copyright Crash Course from the University of Texas Libraries
Copyright* is a bundle of exclusive rights of the creator or copyright holder:

- **To Reproduce**
  The Reproduction right is the right to make copies of a protected work (e.g. as photocopies or online)

- **To Distribute**
  The Distribution right is the right to sell or distribute copies of the work to the public

- **Prepare Derivative Works or Adaptations**
  The right to create adaptations (called derivative works, e.g. translations), the right to prepare new works based on the protected work

- **Display or Perform the Work Publicly**
  The rights to perform a protected work (such as a stage play) or to display a work in public

- **Authorize Others to Exercise Any of These Rights**
  This bundle of rights allows a copyright owner to be flexible when deciding how to realize commercial gain from the underlying work; the owner may sell or license any of the rights.

*Granted by the Copyright Act of 1976*
Section 107. Limitation on exclusive rights: Fair Use

- Fair use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances.

- The fair use of a copyrighted 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.

- Four factors – are considered in determining whether the use made of a work in any particular case is a fair use.
Four Factors

1. Purpose and Character of the Use
2. Nature of the Copyrighted Work
3. Amount or Substantiality of the Portion Used
4. Effect of the Use on the Potential Market for or Value of the Work

Utilize a Four Factors Checklist – a tool, a roadmap
## Fair Use Checklist

<table>
<thead>
<tr>
<th>Project</th>
<th>Prepared by</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name</td>
<td>Campus</td>
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**Purpose**
- Teaching (including multiple copies for classroom use)
- Research
- Scholarship
- Nonprofit educational institution
- Criticism
- Comment
- News reporting
- Parody
- Transformative or productive use (changes the work for new utility)
- Restricted access (to students or other appropriate group)
- Commercial Activity
- Profiling from use
- Entertainment
- Bad-faith behavior
- Denying credit to original author

**Nature**
- Published work
- Factual or nonfiction based
- Important to favored educational objectives
- Unpublished work
- Highly creative work (art, music, novel, film, play)
- Fiction

**Amount**
- Small quantity
- Portion used is not central or significant to entire work
- Amount is appropriate for favored educational purpose
- Large portion or whole work used
- Portion used is central to or “heart of” the work

**Effect**
- User owns lawfully purchased/acquired copy of original work
- One or few copies made
- No significant effect on the market or potential market for copyrighted work
- No similar product marketed by the copyright holder
- Lack of licensing mechanism
- Could replace sale of copyrighted work
- Significantly impairs market or potential market for copyrighted work or derivative
- Reasonably available licensing mechanism for use of the copyrighted work
- Affordable permission available for using work
- Numerous copies made
- You made it accessible on the Web or in other public forum
- Repeated or long-term use
Best Practices Statements

Center for Social Media and Washington School of Law at American University

• Is the use you want to make of another’s work transformative?
  • Does it add value to and repurpose the work for a new audience?

• Is the amount of material you want to use appropriate to achieve your transformative purpose?

Transformative uses that repurpose no more of a work than is needed to make the point, or achieve the purpose, are generally fair use.
Sarah J. Hammill

Business & Online Learning Librarian
TEACH Act

- Technology, Education And Copyright Harmonization (TEACH) Act
- Expands the scope of educators' rights to perform and display works and to make the copies integral to such performances and displays for distance education.
- Doesn’t completely eliminate the gap between f-2-f and distance learning
- Allows:
  - Performance of non-dramatic literary or musical work
  - Performance of any other work (dramatic & audiovisual) in “reasonable and limited portions”
  - Display in an amount comparable to f-2-f (i.e. images)
- Extension of Copyright / Not a replacement for Fair Use
Blackboard Ethics

- Link Not Copy
- Performance & Displays / Part of mediated instruction
- Limit access / Time limits
- Prevent copying of copyrighted works / No tampering
- When needed, get copyright permission – include documentation
- Take the rights of other’s seriously
  - Show a reasonable, logical effort to comply with Fair Use and/or the TEACH Act
- If in doubt, contact your library subject specialist!
Can this material be digitized?

START HERE!

Is the original...
- an off-air recording?
  - No
  - Yes

Do not digitize without permission!

- No
- Yes

Purchase

- No
- Yes

Can you purchase digital copy?

- No
- Yes

Is there copy protection?

- No
- Yes

Digitize up to 10% for Bb or iTunes U usage*

- Unknown
- Yes

Refer to librarian for research

- Yes
- No

Link to the database file directly

- Yes
- No

Request consultation & consider fair use

- Yes
- No

Text or image for display in digital system?

- No
- Yes

Digitize face-to-face amount*

- Yes
- No

Digitize limited & reasonable portions

- Yes
- No

Digitize as needed for Bb / iTunes U usage*

- Yes
- No

Are the materials in video format?

- No
- Yes

Are the materials in audio format?

- No
- Yes

Are the materials integral to instruction?

- No
- Yes

Is it a dramatic performance?

- No
- Yes

Is 10% sufficient?

- No
- Yes

General rules for using this chart when considering digitization:

* Make content available via password-protected course space
* Content should be streamed whenever possible
* Include a standard copyright warning notice

TEACH ACT Guidelines

Guidelines
References

- Copyright Guide: http://libguides.fiu.edu/copyright
- TEACH Act Flowchart: http://libguides.fiu.edu/copyright/TEACHAct
- TEACH Act Checklist: http://libguides.fiu.edu/copyright/TEACHAct
Valerie Boulos
Collection Development and Resource Access, Head
Fair Use and Licensing

- Most electronic resources have a license
  - Software = shrinkwrap license (non-negotiable)
  - Electronic devices (Kindle, iPad) = shrinkwrap license
  - Most library resources = contract and usage terms
License terms may restrict or expand certain uses, including Fair Use and Copyright.
License Example 1

- **Authorized Uses.** Licensee and its Authorized Users may access and use the Licensed Products only for scholarly and research purposes and only as follows: (1) access, search, browse and view the Licensed Products; (2) download and print individual Articles and make a reasonable number of photocopies of a printed Article; (3) print a reasonable number of pages from an eBook and make a reasonable number of photocopies of those printed pages; (4) forward links to individual Articles and eBooks to Authorized Users and others; (5) post up to twenty-five (25) Articles or eBooks per semester, per course in PDF or HTML format for the purposes of electronic course reserves on Licensee’s internal, secured computer network accessible only to Authorized Users.

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3. USAGE RIGHTS

(a) You, subject to clause 4 below, may:

(i) Allow Authorised Users to have access to the Online Product(s) from the Server via the Secure Network;

(ii) Access, search and view the Online Product(s) for the purpose of internal marketing or testing or for training Authorised Users or groups of Authorised Users;

(iv) incorporate parts of the Online Product(s) in Course Packs and/or Electronic Reserves to be used by Authorised Users in the course of instruction (but not for Commercial Use) at Your institution and hosted on a Secure Network. Each such item shall be subject to any limits detailed in clause 3(b) below, and shall carry appropriate acknowledgement of the source, listing title and author of the extract, title and author of the work, copyright notice, and the Publisher. Copies of such items shall be deleted by You when they are no longer used for such purpose. Course packs in non-electronic non-print perceptible form, such as audio or Braille, may also be offered to Authorised Users who, in Your reasonable opinion, are visually impaired;
Electronic Books – License Variety at Its Best
E-book Platform Differences

- Format differences
  - Pdf, epub, reader application

- Some download by chapter, others the entire book

- Limits to number of pages you can print

- Limits to number of simultaneous users
The E-Book User Scale

- 1-user: only 1 user can access or download at a time
  - Cheapest
  - Typically fine for research level material, definitely not for course-required readings!

- 3-user: up to 3 users can access or have downloaded at a time
  - “non-linear lending”: can be used simultaneous, up to a certain amount of uses per year

- Unlimited access
  - Most expensive
  - Needed for course required readings
How can I tell the number of users?

- 3 E’s
  - **EBSCO** and **Ebrary** typically have a limited number of users
  - **EBL** is usually non-linear lending (sufficient for class)

- Others are typically unlimited users
  - Oxford University Press may or may not be unlimited (depends on the resource)

- Check with your liaison
Video Rights are even messier
Rights can vary from film to film…

- **Educational Use**
  - Typically allows use of a film for classroom instruction
  - May or may not include non-classroom use (i.e., organizations or clubs)
  - Often exclude the ability to stream in an online course

- **Public Performance Rights**
  - Needed for most organization showings
  - Definitely needed for showings which include non-FIU members (public)
Streaming Videos

- Whereas a DVD is bought once and can be used for many years, streaming video licenses are typically 1-3 year subscriptions.

- Rights may vary based on where we purchase the film and what rights were requested at the time of purchase.
  - i.e., class use versus generally added to the collection.
Jamie Rogers
Digital Collections Center,
Assistant Director
Digitized & Born Digital

What are “digital collections” and how do they differ from electronic resources (subscription based journals/databases)?

- Digitized special collections and archives of published and unpublished materials
  - Photographs, rare books, ephemera, oral histories, maps, letters, etc.

- Open access institutionally created content
  - Journals, white papers, conferences, theses and dissertations

- Generally free and open to university community or worldwide
Already online = free to use?

- The rules of fair use apply to digital collections in the same way they apply to all other types of materials.

- Just because an item is made available online through fair use does not mean that fair use will apply to your use.
Digital Content is...special

- You may have a difficult time establishing copyright due to lack of date and/or creator information.

- The work may be considered “orphaned.”

- Something may be out of copyright, but the owning institution may want to license the use of the digitized material.

- It is best practice to cite the owning institution, in addition to the actual copyright holder (if one is identified).
Tom Moore

Sound and Image Department,
Head
Copyright, fair use, and media, 1

- Terms
- Formats
- Best practices/Fair use
- Specific cases
Terms

History of copyright terms in the USA

1790  14 years, renewable for 14 years
1831  28 years, renewable for 14
1909  28 years, renewable for 28
1978  life of author, plus 50
1989  US adheres to Berne Convention
1998  Sonny Bono Extension = life plus 70
Formats

1831  Music protected against unauthorized printing
1856  Dramatic compositions protected
1865  Photographs and negatives protected
1870  Works of art protected
1870  Some derivative works protected, including translations and dramatizations
1897  Public performance of music protected
1912  Motion pictures protected
1953  Recording/performing rights for non-dramatic literary works
1972  Copyright protection for sound recordings (!)
ARL Best Practices in Fair Use, 2012

Was NOT negotiated with rights holders. (Sec1:3)

No group of institutions, no matter how important their cultural function, is immune from the operation of copyright law….they get no “free pass” simply because their function is to support education. (Sec1:5)

...specific exceptions contained in Sections 108, 110, and 121 of the Copyright Act and the special protections granted by Section 504(c)(2).

Two questions:

Is the use “transformative”?

Is “the material taken appropriate in kind and amount”?
Specific examples analyzed:

1. Making course content available via digital networks
2. Using selections for publicity, or for physical/virtual exhibitions
3. Digitizing for preservation of at-risk items
4. Digital collections of archival/spec. coll. Materials
5. Material for use by differently-abled users
6. plus three more
Brandie Thomas

Electronic Thesis and Dissertation Coordinator,
University Graduate School
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- Four Factors:
  - Purpose (Commercial vs. **Non-Profit**)
  - Nature (Unpublished vs. **Published**)
  - Amount (Whole Work vs. **Portion**)
  - Effect on the Original Work (Market Harm vs. **Undisturbed Market**)

- Courts look at the intent behind the use—they look at whether the user acted in good faith when using copyrighted work.

- Reproduction of images in theses and dissertations is generally considered fair use.
## Fair Use, Images, and ETDs

<table>
<thead>
<tr>
<th>If…</th>
<th>Then…</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 factors favor fair use</td>
<td>Fair use</td>
</tr>
<tr>
<td>3 factors favor fair use</td>
<td>More than likely fair use</td>
</tr>
<tr>
<td>2 to 2 tie. You have to assess the risk</td>
<td>May be fair use</td>
</tr>
<tr>
<td>1 factor favors fair use</td>
<td>Not fair use</td>
</tr>
</tbody>
</table>
Fair Use, Images, and ETDs

- If you perform a fair use analysis, and you don’t have a strong case for fair use, you could seek permission from the image owner or find an alternate image that is public domain or has an open license.

- Attribute all images that you will be using, regardless of whether the images appear courtesy of a license or via fair use.

- List any copyright permissions that you have obtained on the copyright page in your manuscript.

- It is the duty of the student, the advisor, and the committee to ensure that no content within the manuscript violates copyright law. The University Graduate School does not check manuscripts for this.
References

http://libguides.fiu.edu/FairUse

These direct links are in the above guide, too.

- Copyright Guide: http://libguides.fiu.edu/copyright
- TEACH Act Flowchart: http://libguides.fiu.edu/copyright/TEACHAct
- TEACH Act Checklist: http://libguides.fiu.edu/copyright/TEACHAct