

# Copyright, Fair Use, and the Library

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## Fair Use at a Glance

- Fair use is a section of the Copyright Act that allows for the use of copyright-protected works for educational purposes.
- There are four factors to consider when determining if a particular use of a copyright-protected work falls under fair use:
  - Purpose and character of the use
  - Nature of the copyrighted work
  - Amount of the copyrighted work used
  - Effect of use on the potential market for the copyrighted work
- The best practices for using copyright-protected works in a course include:
  - Provide a link to the desired resource whenever possible, rather than embedding or sharing a file.
  - Keep copyright-protected works within the username/password protected the learning management system space.
  - Only use as much of a copyright-protected work as is necessary to meet your educational objective.
  - Always provide the appropriate attribution to every copyright-protected work that you use.
  - Use several sources of information rather than one or two sources.
- When using copyright-protected material from AccessMedicine, ClinicalKey, or LWW Health Library, keep in mind that our license agreements prohibit certain uses:
  - AccessMedicine and LWW Health Library do not permit the copying or transmission of their works, nor do they permit the use of their works in course packs.
  - ClinicalKey allows the use of “reasonable portions” of their works in educational materials.
  - The use of images for educational purposes is permitted for all three databases.
- When compiling educational resources, you may also consider open access resources made available for use under a Creative Commons license.

## What is fair use?

Fair use is a section of the Copyright Act that allows for the use of copyright-protected works in certain circumstances.<sup>1</sup> The use of such materials for educational purposes typically falls under fair use. Fair use guidelines are intentionally vague, to allow space for new technologies and permit uses that may develop in the future.<sup>2</sup>

## How do I know if fair use applies to a particular circumstance?

There are four factors to consider when evaluating whether the use of a copyright-protected work falls under fair use:

1. Purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes.<sup>3</sup>

Nonprofit educational purposes are more likely to be fair use than commercial purposes; however, they are not automatically considered fair use based on this factor.<sup>2</sup> In addition, “transformative” uses are more likely to be fair use – in this case, “transformative” uses add something new to the copyrighted work.<sup>2</sup>

Note: While including a scan of a book chapter in an LMS is not obviously transformative, it may still qualify as fair use.<sup>2</sup>

Ask yourself:

- Has the material taken from the copyrighted work been transformed by adding new expression or meaning?<sup>2</sup>
- Was value added to the copyrighted work by creating new information, new aesthetics, new insights, and understandings?<sup>2</sup>

2. Nature of the copyrighted work.<sup>3</sup>

This factor looks at whether a work is published or unpublished, and whether it is factual or creative.<sup>2</sup>

The use of a factual work is more likely to be considered fair use than a creative or imaginative work.<sup>1</sup> The use of a published work is more likely to be fair use than an unpublished work.<sup>1</sup>

3. Amount and substantiality of the portion used in relation to the copyrighted work as a whole.<sup>3</sup>

The use of a small portion of the work copyrighted work is more likely to be fair use than a large portion of the work.<sup>3</sup>

It is best practice to use no more of the work than is necessary to accomplish a teaching objective – this is often referred to as the “Goldilocks rule”.<sup>2</sup>

Uses of a work that are composed of the “heart” of the work are less likely to be considered fair use.<sup>2</sup> However, this reasoning can be very subjective.

4. Effect of the use upon the potential market for the value of the copyrighted work.<sup>3</sup>

If the use of the copyrighted work infringes on the existing or future market for the work, it is less likely to be fair use. If the purpose of the proposed use is to substitute for purchasing the original, this will most likely count against fair use.<sup>2</sup>

If a small portion of the copyrighted work is used, it is more difficult to argue that the use was a substitute for purchase.<sup>2</sup> It is less believable when large portions of scanning works are being used to provide entire readings for a course.<sup>2</sup>

Repeated use of copyrighted material also counts against fair use. If you intend to use copyrighted material over several terms, you may need to consider asking for permission to do so from the publisher.

Keep in mind that these are general guidelines – there are no hard-and-fast rules to define fair use.

Review the Fair Use Checklist at the end of this document to make a determination of fair use for a particular purpose; if there are more checkmarks in the “Favoring Fair Use” column than “Opposing Fair Use” column, then your use is likely covered under fair use.

### **How do these guidelines apply to educational purposes?**

“Educational purposes” include:

- Noncommercial instruction or curriculum-based teaching by educators to students at nonprofit educational institutions.
- Planned noncommercial study or investigation directed toward making a contribution to a field of knowledge.
- Presentation of research findings at noncommercial peer conferences, workshops, or seminars.<sup>4</sup>

If it is possible to link to educational material that is publically available on the Web or available through a database licensed by the WSU Libraries, that is more likely to be considered fair use.<sup>4</sup>

When it is necessary to make a copy of the material, rather than simply linking to it as previously described, permission is not needed if the works are in the public domain or offered freely under a Creative Commons license.<sup>5</sup> Otherwise, perform a fair use evaluation using the four principles outlined above – If fair use is determined not to apply, permission must be obtained.<sup>5</sup>

### **Do I need to think about fair use if I’m using materials from the WSU Libraries collection?**

Even if the copyrighted work comes from the WSU Libraries collection, you still need to consider the fair use guidelines. This is because the library is only providing access to the materials – it does not own the copyright.

You also need to consider the license agreements for the database providing access to the materials. Some license agreements will allow for a greater number of authorized uses than others.

The most commonly used databases in the ESFCOM are ClinicalKey, AccessMedicine, and LWW Health Library. The authorized uses for these databases are listed below:

The WSU Libraries' license with **ClinicalKey** allows for:

- Accessing, searching, browsing, and viewing subscription items
- Incorporating links to the learning management system and in electronic course packs and reserves.
- Using a reasonable portion of the subscription items in the preparation of course packs or other educational materials
- Pulling figures, images, and tables from ClinicalKey into the ClinicalKey Presentation Maker for use in the creation of presentations and for training purposes

The WSU Libraries' license with **AccessMedicine** allows for:

- Accessing, searching, browsing, and viewing subscription items
- Incorporating links to the learning management system and reserves
- Using images in presentations for educational purposes

The WSU Libraries' license with **LWW Health Library** allows for:

- Accessing, searching, browsing, and viewing subscription items
- Incorporating links to the learning management system and reserves

**The AccessMedicine and LWW Health Library licenses prohibit the use of subscription items in course packs.** Instead, you may direct students to a particular chapter with an embedded link.

### **How can I use the PDF and HTML files from electronic journals?**

Most publishers do not allow:

- Distributing a copy of the file of the journal article to students
- Posting the PDF or HTML file on a public or private website

- Creating databases of journal articles for more than one person to use
- Distributing files through Internet discussion groups<sup>3</sup>

Library subscriptions to ejournals and databases have already paid for the right for faculty, staff, and students to have access to the articles and to make personal copies for themselves.<sup>3</sup> Most subscriptions do allow:

- Individual copies for personal use by anyone in the institution
- Links to the journal articles for electronic reserves and class Web pages
- Repeated linking to the articles from class to class or semester to semester<sup>3</sup>

### **Can I use images under fair use?**

Yes, you can use images for educational purposes under fair use. Here are some best practices for using images:

- Restrict access to educational materials to the learning management system
- Use only a few images from one source
- Provide links to images and other materials

AccessMedicine, ClinicalKey, and LWW Health Library permit the use of images for educational purposes.

### **What can I do to ensure that the materials I use in my course are covered by fair use?**

Here are some best practice guidelines from the Duke University Medical Center Library & Archives<sup>3</sup>:

- Use a variety of sources of information, rather than pulling your information from just one or two sources
- Give attribution to every item used – see the AMA Style Guide for information on how to do this
- Provide links to articles, books, or book chapters within the learning management system
- If sharing websites, check for statements about restriction on use
- Provide links to websites instead of copying the content

- Check to see if there is a copyright statement already on the material you are copying
- If there is not a statement, add the copyright statement “This work may be protected by copyright” to at least the first page
- Never download or distribute e-journal files unless you have permission from the publisher

### **What if my proposed use of a copyrighted item does not fall under fair use guidelines?**

If you determine that your proposed use does not fall under fair use, then you will need to either:

- Consider a different method of providing the material to students – you can always provide links to articles and ebooks within the learning management system.
- Consider using a different source of material, like open access material or items covered under a Creative Commons license.
- Request permission to use the copyrighted material from the publisher. Keep in mind that there may be a fee involved in this option.

### **How do I request permission from a publisher to use copyrighted material?**

When permission is determined to be necessary, you must contact the publisher to obtain the permission in writing. Keep in mind that a fee may be required to obtain permission.

To request permission for material from AccessMedicine (McGraw-Hill):

- Go to <https://www.mheducation.com/permissions.html>
- Determine whether your proposed use is: photocopying for educational use; for republication; for electronic education purposes; for electronic republication; or for a digital file for a print-disabled student.
- Select the appropriate option and complete the online form – be as specific about your proposed use as possible.

To request permission for material from LWW Health Library (Wolters Kluwer):

- Go to <https://shop.lww.com/permission-nursing>



- Select the Books option
- Follow the instructions on the page.

### **Can I use Open Access works in my educational materials?**

Open access works are digital, available online, free of charge, and most importantly, free of most copyright and licensing restrictions. An example of open access works are articles indexed in PubMed Central. You may use these as educational materials with appropriate attribution.

Open access works that are specifically designed for education are called “open educational resources”, or OERs.<sup>6</sup> Many OERs are under Creative Commons licenses (see below). You can learn more about OERs from this guide created by WSU librarians: <http://libguides.libraries.wsu.edu/affordablelearning/home>

### **What is a Creative Commons license?**

A Creative Commons license allows content creators to control how their works are used by others.<sup>7</sup> It allows content creators to retain the copyright to their work while allowing other people to make use of it.<sup>7</sup> There are actually several types of Creative Commons licenses:

- Attribution – CC BY  
This license lets others distribute and transform your work as long as they provide proper attribution to the original creator.
- Attribution-ShareAlike – CC BY-SA  
This license lets others distribute and transform your work as long as they provide proper attribution to the original creator and license their new creations under the same terms.
- Attribution-NoDerivs – CC BY-ND  
This license allows for redistribution of content, as long as it is not transformed and is attributed to the original creator.
- Attribution-NonCommercial – CC BY-NC  
This license lets others alter your work non-commercially and with attribution to the original creator.
- Attribution-NonCommercial-ShareAlike – CC BY-NC-SA  
This license lets others alter your work non-commercially, with attribution to the original creator, and new creations are licensed under the same terms.

- Attribution-NonCommercial-NoDerivs – CC BY-NC-ND  
This license lets others download and share your works, with attribution to the original creator, and they cannot be changed or used commercially.<sup>7</sup>

You may come across works or images that you would like to use in your educational materials that have a Creative Commons license. This use is permitted by all six Creative Commons licenses. If you choose to use such material, be sure that properly cite the original creator.

### **Additional Resources**

The following resources will provide more in-depth information about copyright and fair use:

- Copyright LibGuide from Duke University Medical Center Library & Archives. <http://guides.mclibrary.duke.edu/copyright/intro>.
- US Copyright Office. <https://www.copyright.gov/>
- Code of Best Practices in Fair Use for Academic and Research Libraries. <http://www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices>
- Copyright Crash Course from the University of Texas Libraries. <http://copyright.lib.utexas.edu/>
- *Know Your Copy Rights: What You Can Do* from the Association of Research Libraries. <http://www.knowyourcopyrights.org/storage/documents/kycrbrochure.pdf>
- *Using Electronic Reserves* from the Copyright Clearance Center. <http://www.copyright.com/wp-content/uploads/2015/01/Using-Electronic-Reserves.pdf>
- Open Educational Resources (OERs): Tools for Affordable Learning LibGuide from Washington State University Libraries. <http://libguides.libraries.wsu.edu/affordablelearning/home>.

## References

1. Stanford University Libraries. Measuring Fair Use: The Four Factors. Copyright & Fair Use. <https://fairuse.stanford.edu/overview/fair-use/four-factors/>. Published 2005. Accessed November 27, 2017.
2. Smith KL. Owning and using scholarship: An IP handbook for teachers and researchers. Association of College and Research Libraries. 2014. [http://www.ala.org/acrl/sites/ala.org.acrl/files/content/publications/booksanddigitalresources/digital/9780838987483\\_copyright\\_OA.pdf](http://www.ala.org/acrl/sites/ala.org.acrl/files/content/publications/booksanddigitalresources/digital/9780838987483_copyright_OA.pdf). Accessed November 27, 2017.
3. Duke University Medical Center Library & Archives. Copyright. <http://guides.mclibrary.duke.edu/copyright/intro>. Updated July 17, 2017. Accessed November 27, 2017.
4. Stanford University Libraries. Educational Uses of Non-coursepack Materials. Copyright & Fair Use. <https://fairuse.stanford.edu/overview/academic-and-educational-permissions/non-coursepack/>. Published 2015. Accessed November 27, 2017.
5. Duke University Copyright Guidelines for Electronic Course Content. <https://library.duke.edu/sites/default/files/dul/about/scholcomm/copyright-and-fair-use.pdf>
6. Open Education. Sparc. <https://sparcopen.org/open-education/>. Published 2007. Accessed November 29, 2017.
7. About the Licenses. Creative Commons. <https://creativecommons.org/licenses/>. Accessed November 28, 2017.

## CHECKLIST FOR FAIR USE

*Please complete and retain a copy of this form in connection with each possible "fair use" of a copyrighted work for your project*

Name: \_\_\_\_\_ Date: \_\_\_\_\_ Project: \_\_\_\_\_

Item Description: \_\_\_\_\_

Institution: \_\_\_\_\_ Prepared by: \_\_\_\_\_

### PURPOSE

#### *Favoring Fair Use*

- Teaching (including multiple copies for classroom use)
- Research
- Scholarship
- Nonprofit Educational Institution
- Criticism
- Comment
- News reporting
- Transformative or Productive use (changes the work for new utility)
- Restricted access (to students or other appropriate group)
- Parody

#### *Opposing Fair Use*

- Commercial activity
- Profiting from the use
- Entertainment
- Bad-faith behavior
- Denying credit to original author

### NATURE

#### *Favoring Fair Use*

- Published work
- Factual or nonfiction based
- Important to favored educational objectives

#### *Opposing Fair Use*

- Unpublished work
- Highly creative work (art, music, novels, films, plays)
- Fiction

### AMOUNT

#### *Favoring Fair Use*

- Small quantity
- Portion used is not central or significant to entire work
- Amount is appropriate for favored educational purpose

#### *Opposing Fair Use*

- Large portion or whole work used
- Portion used is central to work or "heart of the work"

### EFFECT

#### *Favoring Fair Use*

- User owns lawfully acquired or purchased 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

#### *Opposing Fair Use*

- 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 Web or in other public forum
- Repeated or long-term use