

WHAT IS FAIR USE AND HOW DOES IT RELATE TO ME?

For students, faculty and institutions of higher education, a cardinal portion of the Copyright Act is the Fair Use provision, set forth in 17 USC § 107. Fair Use is a mechanism that is used to balance the exclusive rights of the copyright holder against society's First Amendment interest in the free dissemination of knowledge and information. Generally stated, Fair Use permits the reasonable and limited use of copyrighted materials without obtaining the copyright owner's permission.

There are many misconceptions about Fair Use, however. Contrary to popular belief, Fair Use does not automatically protect all "educational" uses of copyrighted works; nor does the mere act of including a copyright notice or providing other acknowledgement of authorship constitute Fair Use. The Fair Use statute requires that four factors be evaluated and that, in balance, these factors support Fair Use.¹

Typically, whether or not Fair Use exists under a given set of facts cannot be decided with certainty outside of a court of law. That's because Fair Use is not an "exemption"; it merely provides a defense against infringement based on a court's eventual determination of whether the statutory test favors Fair Use. The numerous Fair Use decisions by federal courts are fact-specific and not easy to reconcile. Anyone's prediction, in advance, of whether or not a particular use would qualify for the "Fair Use" defense is a judgment call.

On the other hand, the Copyright Act does shield nonprofit educational institutions, libraries and archives (and their employees) against *damages* for copyright infringement, *provided that* there are reasonable grounds for believing that the Fair Use test has been met. (See 17 U.S.C. § 504(c)(2)). To assist with this analysis, the attached Fair Use Checklist can be used to evaluate the statutory factors as applied to the use you have in mind. This analysis should occur prior to copying, distributing, performing or posting third party-owned materials for which you do not have copyright permission. If the balance weighs against Fair Use then, unless another legal exemption applies, the permission of the copyright owner should be obtained.

It should be noted, however, that this Fair Use shield does not protect against the possibility of an injunction. An "injunction" is a court order requiring that infringing activity immediately be stopped. In some circumstances, an injunction could mean major disruption of teaching, licensing or other activities, and could involve significant inconvenience and expense in revising your materials. These are important practical considerations to take into account before relying on Fair Use.

¹ Section 107 of the 1976 Copyright Act states that "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. 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; (2) 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 fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." 17 USC § 107.