

Fair Use Basics

Objectives

As an instructor at GSU, whenever you request that the E-Reserve or iCollege/D2L systems include a copy of a portion of a copyrighted work without permission from the rights-holder, you will be expected to do a thoughtful fair use analysis, and affirm that you found the use you are requesting to be a fair use.

By applying some basics of doing a rigorous fair use analysis, you not only will be showing respect for the interests of other authors, but you will also be helping comply with the law and preserve our ability to offer reserve services and provide copyrighted instructional content online. Moreover, you will also be helping the university community maintain a responsible standard of fair use that can support our teaching.

Copyright Law

Copyright law provides the creators of original works of authorship with a set of limited exclusive rights, including the right to copy, distribute, and perform their works. The law balances the private interests of copyright owners with the public interest and is intended, in the words of the Constitution, “to promote the Progress of Science and useful Arts, by securing for a limited Time to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Thus, the law provides limited exceptions to the copyright owner’s exclusive rights to the original work. One such exception is the right to make a “fair use” of a copyrighted work.

The fair use analysis is a means to determine whether reliance on the fair use exception is justified, or in other words, whether an unlicensed use of a copyrighted work is legally permissible.

Basics of Fair Use

Fair use is an important aspect of the copyright law of the United States, and it allows you to make limited uses of copyrighted works without permission from the owner or other rightsholder. When you scan and share readings in a course, for example, you are often exercising fair use. However, not all such educational uses are within fair use.

A determination of whether your use is a fair use depends on whether the four factors in the statute weigh in favor of or against fair use. The four fair use factors are:

- Factor 1: The purpose and character of the use.
- Factor 2: The nature of the copyrighted work.
- Factor 3: The amount and substantiality of the portion used.
- Factor 4: The effect of the use on the potential market for or value of the original.

A critical ruling was handed down by the Eleventh Circuit Court of Appeals in *Cambridge University Press v. Albert*, 906 F.3d 1290 (11th Cir. 2018) and the District Court in

Cambridge University Press v. Becker, No. 08-CV-1425-ODE (N.D. Ga. Sept. 30, 2020). These cases provide specific guidance regarding the nature and amounts of excerpts from books and other works that are likely to be fair use in the non-profit educational context:

Factor 1 considers both the nonprofit educational purpose of the use and whether the use is transformative (e.g., you adapted the work to a new purpose) or non-transformative (e.g., mirror-image copying). The court uniformly weighed this factor in favor of fair use, because all uses were strictly of a nonprofit educational character or for the sole purpose of teaching students in classes at a nonprofit educational institution, even though the uses were not transformative.

Factor 2 generally favors fair use for non-fiction and fact-based works. Many of the works we use in teaching fit that description. However, the court also ruled that this factor can weigh against fair use if the book or other work principally comprises evaluative, analytical, or subjectively descriptive material that surpasses the bare facts necessary to communicate information, or derives from the author's experiences or opinions. Other conditions that tend to favor fair use with regard to this factor include whether the work is published (e.g., not a manuscript or personal letter), whether it is a non-consumable work (e.g., not a workbook or exam form).

Factor 3 generally looks to the amount of the original work used. The court rejected any bright-line rule, such as exact counts of words, pages, or chapters. This factor can weigh in favor of fair use if the excerpts are decidedly small and generally fill a legitimate purpose in the course curriculum and are narrowly tailored to accomplish that purpose. The lengthier the excerpt, the more the use could potentially harm the market for the work. Generally, use of a single chapter or less of a work is more likely to be a fair use than a use of multiple chapters of that work. However, the outcome of Factor 3 will vary based on the effect of the favored nonprofit educational purpose of the use under Factor 1, plus the impact of the disfavored market substitution as recognized under Factor 4.

In evaluating current or potential market harm, *Factor 4* considers the effect of the use on the entire market for the work, if the specific use were to become widespread. In this case, the court identified the entire market to include any market for sales of the full books and any market for licensing excerpts of the work for electronic reserves. The court reached different conclusions about different works, depending on whether the excerpts were available for sale or licensing. For example, where the court found no indication that a specific work was available for licensing for electronic reserves, Factor 4 tended to weigh in favor of fair use. When there is a high demand for excerpts of the work, use of even a very small amount of the work may not be a fair use as exemplified by the below summaries of the District Court's reasoning in finding no fair use under Factor 4:

- Use of 2.8% of Sage Handbook of Qualitative Research 2nd Ed. was not a fair use. Factor 3 was in favor of fair use and adjusted further to favor fair use. However, Factor 4 was in favor of no fair use and weighed more heavily because the court found there was a "strong demand" for excerpts of the book.
- Use of 1.58% of Sage Handbook of Qualitative Research 2nd Ed. was not a fair use. Factor 3 was in favor of fair use and adjusted further to favor fair use. However, Factor 4 was in

favor of no fair use and weighed more heavily because the court found there was a “strong demand” for excerpts of the book.

- Use of 8.14% of *The Slave Community, Plantation Life in the Antebellum South* was not a fair use. Factor 3 was in favor of fair use, but was mitigated in favor of no fair use because 8.14%/35 pages bordered on being excessive. Factor 4 was in favor of no fair use, and weighed more heavily following a review of the permissions income of the publisher for this work. The court found that there was a “market of substance for permissions.”

The four factors are weighed and balanced together to determine whether the use is within fair use or is an infringement. However, the four factors do not carry equal weight. Factor four carries the most weight but not so much weight that it is outcome determinative. Further, when the works are published, non-consumable and non-fictional works, factor two carries little weight.