

Copyright & Intellectual Property; the Fair Use of Someone Else's Work

Presenter:
Mary Ellen Michael
Center for Educational Technologies

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Purpose of Fair Use

Higher education's legitimate right to use
copyrighted works must be protected:

- To advance & disseminate knowledge
- To do so without unreasonable copyright restrictions
- To explore, analyze, & exchange information
- To make creative & balanced fair use of copyrighted works
- Free of burden of many negotiated transactions

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The Legal Framework of Fair Use

- In Section 107 of the U.S. Copyright Act – exempts limited use of materials from infringement liabilities
- Applicable to teaching, research & scholarship

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Four Statutory Factors for Fair Use

- Purpose and character of use
- Nature (characteristics of use)
- Amount of fair use
- Effect on the market

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Four Statutory Factors for Fair Use

- These four factors are open to diverse interpretations.
- The law offers virtually no details for determining which activities may be safely allowed.
- The law's flexibility is an opportunity & a challenge.

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1. Purpose & Character of Use

- Purposes such as:
 - criticism
 - comment
 - news reporting
 - teaching (including multiple copies for classroom use)
 - scholarship, or research

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2. Nature (Characteristics of Use)

- Commercial audiovisual works receive less fair use than do printed works.
- Courts favor use of nonfiction more than fiction.
- Consumable workbooks are subject to less fair use than a printed social science text.
- Courts are split on out-of-print works, whether they should receive special treatment.

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3. Amount of Fair Use

Quantity is evaluated relative to the length of the entire original.

- Motion pictures are a problem; even short clips may borrow the most creative or extraordinary elements.
- One may also reproduce only a small portion of a work but still take "the heart of the work".
- The "substantiality" concept is a qualitative measure that may weigh against fair use.

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4. Effect on the Market

"Effect" is closely linked to "purpose". If your purpose is research or scholarship, market effect may be difficult to prove.

If your purpose is commercial, then effect is presumed.

Occasional quotes or photocopies may have no adverse market effects, but reproductions of software & videotapes can make direct inroads on the potential markets for those works.

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Weighing & Balancing the 4 Factors

People differ on interpreting fair use but you can do a reasoned analysis.

If most factors lean in favor of fair use, the activity is allowed.

If most factors lean in the opposite direction, the action will not fit the fair-use exception and may require permission from the copyright owner.

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Examples of Fair-Use Cases

Few court cases are directly related to higher education. However, many cases offer guidance for the meaning of fair use.

Here are some examples of such cases with an indication of how the courts apply the four factors of fair use.

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Example 1

Basic Books Inc. v. Kinko's

- Kinko's was held to be infringing copyrights when it photocopied book chapters as course packs for students.

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The Court's Ruling

- **Purpose** – Kinko's copied for commercial purposes and not for educational purposes
- **Nature** – most of the works were factual – a factor in favor of fair use
- **Amount** – court said 5% – 25% of a work was excessive.
- **Effect** – direct effect on the market, competing with sales of original books

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Example 2

- **Maxtone-Graham v. Burtchaell**

The plaintiff wrote a book based on interviews with women about their own pregnancies and abortions.

The defendant wrote his own book on the same subject and sought permission to use lengthy excerpts from the plaintiff's work.

The plaintiff refused permission, and the defendant proceeded to publish his work with the unpermitted excerpts.

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The Court's Ruling

- **Purpose** – although commercial, purpose was to educate public about abortion & author's views
- **Nature** – the interviews were largely factual
- **Amount** – quoting 4.3% not excessive & verbatim passages were not central to market
- **Effect** – work was out of print and not likely to appeal to the plaintiff's market

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Example 3

- **Encyclopaedia Britannica v. Crooks**

For-profit producers of educational videos sued a consortium of public school districts, which was systematically recording programs as they were broadcast on public TV stations and providing copies to member schools.

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The Court's Ruling

- **Purpose** – Court was sympathetic with the educational purpose
- **Nature** – Although the films had educational content, they were commercial products for sale to schools
- **Amount** – Defendant was copying entire work and retaining copies for as long as 10 years
- **Effect** – Copying directly competed with the selling of copies. Court concluded that this was **not** fair use

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Example 4

- **American Geophysical Union v. Texaco**

The Court ruled that photocopying of individual journal articles by a Texaco scientist for his own research needs was not fair use. The Court amended its opinion to limit the ruling to "systematic" copying that may advance the profit goals of the larger organization.

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The Court's Ruling

- **Purpose** – Research is fine but purpose was to increase Texaco's corporate profits.
- **Nature** – The articles were factual which weighs in favor of fair use.
- **Amount** – An article is an independent work, so copying the article is copying the entire work
- **Effect** – Should have paid license fee, use CCC to obtain permission; 3 of 4 factors weighed against fair use

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Now it's your turn to decide what is fair use.

- 1. Form into groups of 4 .
- 2. Select a person to report your findings for each scenario.
- 3. Because the solutions are not obvious, report the pros and cons of your decisions about fair use.
- 4. Applying the four factors, come up with the most reasonable solution as you see it.
- 5. Open up the solution. Defend your position about the strengths and weaknesses of the official solution.

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