

Fair Use

Copyright law in the United States is made to support teaching, research, and learning. This stems from its Constitutional purpose, which is “to promote the Progress of Science and the useful Arts.”¹ One critical feature of copyright law is fair use,² a flexible users’ right that allows the use of copyrighted works without permission. It accommodates a wide variety of circumstances, including new and rapidly evolving situations. In the words of one of our colleagues, April Hathcock, “fair use is made for just these kinds of contingencies.”

To analyze whether a particular use is fair, courts balance four factors. The “heart of the fair use inquiry” lies in the first factor – the purpose and character of the use.³ Courts favor uses where the purpose is to benefit the public, even when that benefit is not “direct or tangible.”⁴

Even under normal circumstances, courts favor educational uses because of their broad public benefits.⁵ While there are no fair use cases squarely addressing copying to help minimize a public health crisis, the other wide variety of public benefits cited by courts leads us to believe that this purpose would weigh extremely heavily in favor of fair use. For example, in the *Authors Guild v. HathiTrust* case,⁶ the court made it clear that providing access to persons with disabilities was a strong public interest that weighed heavily in the fair use assessment. Similarly, other courts have found that allowing reproduction of the Zapruder film documenting Kennedy’s assassination was in the public interest,⁷ and allowing redistribution of leaked internal memos about problems with electronic voting machines also favored fair use.⁸

The benefit to the public in providing remote coursework is obvious when it enables teaching to continue in the face of social distancing measures or quarantine, or when access to physical library materials is impossible. The public benefit of these measures is without a doubt of at least equal importance as in these cases.

The second factor examines the nature of the work used—is it more factual or creative, published or not? In cases like this, the second factor “has rarely played a significant role in the determination of a fair use dispute.”⁹ For remote teaching in the COVID-19 situation, the analysis should be the same.

The third fair use factor examines the “amount and substantiality” of the work used. Per the Supreme Court, this is a flexible standard that is situation-specific. The third factor is not a

¹ [U.S. Const. art. I, § 8, cl. 8.](#)

² [17 U.S.C. § 107](#)

³ [Blanch v. Koons, 467 F.3d 244, 251 \(2d Cir. 2006\)](#)

⁴ [Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523 \(9th Cir. 1992\), as amended \(Jan. 6, 1993\)](#)

⁵ [Cambridge Univ. Press v. Albert, 906 F.3d 1290 \(11th Cir. 2018\)](#)

⁶ [Authors Guild v. Google, Inc., 804 F.3d 202 \(2d Cir. 2015\)](#)

⁷ [Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 \(S.D.N.Y. 1968\)](#)

⁸ [Online Policy Grp. v. Diebold, Inc., 337 F. Supp. 2d 1195 \(N.D. Cal. 2004\)](#)

⁹ [Authors Guild, 804 F.3d 202 \(2d Cir. 2015\)](#)

mechanical application of a rule such as “no more than 10%” or “1 chapter.”¹⁰ The question is whether “the quantity and value of the materials used ... are reasonable in relation to the purpose of the copying.”¹¹ For copies made to support rapid adoption of remote teaching, users should be thoughtful about this factor, but not agonize over it: a use can be fair as long as it reproduces what is reasonable to serve the purpose.

The fourth factor is “the effect of the use upon the potential market for or value of the copyrighted work.” This factor “requires a balancing of the benefit the public will derive if the use is permitted” versus “the personal gain the copyright owner will receive if the use is denied.”¹² While in normal circumstances there may be licensing markets for some items, the spontaneity of a move to remote teaching under emergency circumstances reduces the importance of this factor. Checking for and relying on licensed alternatives bolsters the case for fair use under the fourth factor, but lack of time to check for licenses should not be a barrier to meeting the needs of our communities.

Campuses can also consider approaches to mitigate potential risk.¹³ Campuses should restrict access to course materials only to students, instructors, or teaching assistants enrolled in the course. Further, they should provide content only for the period of time needed, and excerpt materials when pedagogically appropriate. This limits the possibility of market harm. Ultimately, the purpose of copyright law, “promot[ing] the Progress of Science and useful Arts,” is served by engaging in these time-limited, purpose-specific uses.

It is evident that making materials available and accessible to students in this time of crisis will almost always be a fair use. As long as we are being thoughtful in our analysis and limiting our activities to the specific needs of our patrons during this time of crisis, copyright law supports our uses. The fair use doctrine accommodates the flexibility required by our shared public health crisis, enabling society to function and progress while protecting human life and safety.

We also encourage campuses to begin contemplating the longer-term needs this situation presents. While fair use is absolutely appropriate to support the heightened demands presented by this emergency, if time periods extend further, campuses will need to investigate and adopt solutions tailored for the long-term.

¹⁰ [Cambridge Univ. Press v. Becker](#), 863 F. Supp. 2d 1190 (N.D. Ga. 2012), rev'd sub nom. [Cambridge Univ. Press v. Patton](#), 769 F.3d 1232 (11th Cir. 2014)

¹¹ [Campbell v. Acuff-Rose Music, Inc.](#), 510 U.S. 569 (1994)

¹² [Bill Graham Archives v. Dorling Kindersley Ltd.](#), 448 F.3d 605 (2d Cir. 2006).

¹³ [Authors Guild](#), 804 F.3d 202 (2d Cir. 2015)