Fair Use in Academic and Research Libraries

**Scenario 1:** Professor Kurtz wants you, an instructional technologist, to digitize and stream an interview with a German author taped off-air some years ago. This is for her advanced German literature class. Is that OK? She needs it by Wednesday.

**Scenario 2:** The word has come down: All dissertations and master’s theses, as well as all faculty work where possible, are to be housed in digital form in the university’s institutional repository (IR), to be available to anyone. This is part of the university’s commitment to open educational resources. You are writing the IR committee report. What should you do about work that quotes or excerpts copyrighted material?

**Scenario 3:** The podcasts of Professor Waller’s engineering lectures are going to be made available through open courseware, on the open web. But they are laced with snatches of popular songs the professor uses to demonstrate the capacities of different kinds of equipment. Do these songs have to be stripped out? Or can the professor be persuaded to find some public domain or Creative Commons examples to use instead?

Hmmm. With every new digital opportunity in higher education come new copyright challenges. Now that work can be shared and showcased more widely and easily than ever before, even common analog practices are coming under unprecedented scrutiny.

It has never been more important to understand how fair use applies to higher education. Fair use is the right to use copyrighted material—if it is used transformatively and in the appropriate amounts to the transformative use. **Transformative**, a term commonly used in judicial decisions around fair use, means reuse with a new purpose.

Many uses of copyrighted material in higher education are slam-dunk transformative uses. For instance, a professor showing a clip from the movie *Citizen Kane* to discuss depth of field is clearly a transformative purpose; no one will refuse to rent *Citizen Kane* because they’ve examined a scene from it in class. Other, perhaps less obvious uses are transformative as well: most course reading materials (excluding texts designed for certain course topics) was not intended for student or scholarly study; archived 1930s corporate correspondence wasn’t written in order to be analyzed for the history of the Great Depression. In any case, the transformative logic of fair use is a natural for higher education.

Fair use was not always such an urgently necessary part of the higher ed toolkit. Before 1976, much more of the world was copyright-free. But that was before copyright term extension, default copyright, and the expansion of derivative rights (i.e., the making of nonidentical copies, such as a movie based on a book). Now, most of the higher ed environment is copyrighted.

Fair use also was not always so easy to use. But two things have changed the landscape dramatically. First, since 1990 and a seminal legal journal article, judicial decisions have increasingly evaluated fair use according to the transformative standard. That makes for great consistency in interpretation.

Second, many communities of practice—filmmakers, teachers, professors, makers of open courseware, archivists, poets—have asserted consensus about how to apply fair use to get their work done, utilizing codes of best practices in fair use. Several of these codes of best practices are helpful to the work of higher education more generally. Both film scholars and communication scholars use their codes to understand how fair use can help them get their jobs done—for instance, when it is permissible to quote commercial films for conference presentations, or what to consider when employing examples of sitcoms in an experimental study. Their examples are useful to scholars with neighboring practices. Open courseware designers figured out how to let fair use fill out the “skeletonized” courses they had been posting to the web. Their decisions can help others who have to decide how to incorporate copyrighted material into curricula. Poets have assessed when and how fair use applies to anthologies of poetry and to public performances. Literature professors everywhere should heave a sigh of relief.

Academic and research librarians have also created their own code of best practices in fair use, through the Association of Research Libraries (http://www.arl.org/fairuse). This may be the single most valuable addition to fair use knowledge in higher education yet. The librarians’ code deals with the following situations:

- Digitizing materials for teaching and learning (e-reserves and beyond)
- Showcasing copyrighted material in digital and F2F exhibits
- Digitizing at-risk items (like that ¾-inch tape from the defunct distributor) for preservation
- Digitizing archival/special collections (even when one of the items is, say, a letter from Frank Sinatra or a front page of a newspaper on D-Day)
general principles): use is a case-by-case decision, grounded in all the scenarios posed at the beginning of this article (like all free-speech rights, fair uses. If so, they’re fair in the open courseware too.

You will also be helped, in all these situations, by the introductory material in the academic and research librarians’ code of best practices in fair use, which provides a general backgrounder in fair use. Understanding fair use as an affirmative, free-speech right—which it assuredly is—helps everyone in higher education avoid one of the worst traps in this area: fact-free risk analysis. Until the codes of best practices emerged, professionals were too often trying to decide how to stay out of trouble without knowing whether they were even likely to get into trouble. And that meant the danger of delaying, paying an unnecessarily high cost, or even failing to meet their mission. Codes of best practices provide, entirely uncontroversially to date, a guide to reasoning that makes it possible to ground a case-by-case analysis in general principles. They reduce friction on the way to making sound decisions that help higher ed professionals get to work.

Reproducing copyrighted material for disabled users
Managing copyright in institutional repositories
Enabling nonconsumptive research (e.g., searching a database for frequency of keywords rather than reading the articles)
Collecting copyrighted material generated on the web.

The ARL document can serve as a guide for making the fair-use judgments needed in all the scenarios posed at the beginning of this article (like all free-speech rights, fair use is a case-by-case decision, grounded in general principles):

The German interview: You might ask Professor Kurtz to explain why the interview is relevant to the class. If it is relevant, she has a clear fair-use reason, and the code of best practices can help you tailor the use so as to stay in the comfortable safe harbor of the code.

The IR committee report: Your IR decisions will be made knowing that the integrity of the scholarship to be showcased is core to the university’s mission and that fair use assists in making that happen. Again, the code’s limitations and enhancements lend a high degree of comfort. When students and faculty want to know “how much is too much?” or “can I do this?” the code will help you explain their rights to unlicensed use of copyrighted material.

Professor Waller’s podcasts: You really don’t want to go back and tell Professor Waller to find new audio, do you? The code of best practices in open courseware will give you plenty of help in deciding if his uses in the classroom are fair uses. If so, they’re fair in the open courseware too.

By PATRICIA AUFDERHEIDE

Note
1. The legal scholar Peter Jaszi and I facilitated several of these, all of which are on the Center for Social Media website: <http://www.centerforsocialmedia.org/fair-use/best-practices>. The process is described in our book, Reclaiming Fair Use: How to Put Balance Back in Copyright (Chicago: University of Chicago Press, 2011).

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