For those of us in higher education, the past year in copyright law has been a significant, and mostly positive, one. There have been a number of important developments in the law – ranging from the seemingly obscure and arcane to the entertaining to the downright "sexy" – that hold out a promise of benefits for our scholarly work:

I. The Internet, Google, and Fair Use

Four current copyright lawsuits involving Google could dramatically reshape the law of copyright as it applies to the Internet, and perhaps the entire doctrine of fair use itself. In Agence France-Presse v. Google, Inc., a case pending in the United States District Court for the District of Columbia, an international news agency is challenging Google News, a service that aggregates headlines, story leads, and photographs from online news services into a searchable index and provides links to the original source. In Perfect 10, Inc. v. Google, Inc., a case on appeal to the Ninth Circuit Court of Appeals, a publisher of "adult" material is challenging the inclusion of its photographs in Google's Image Search, which indexes images on the web and shows thumbnails as a link to the original. And in Authors Guild v. Google, Inc., and McGraw-Hill Companies v. Google, Inc., both pending in the United States District Court for the Southern District of New York, authors and publishers are challenging Google's Library Project, in which Google is attempting to digitize and make searchable the entire contents of several of the world's largest and most "storied" libraries, including those at Harvard, Stanford, and Oxford.
Universities; those at the Universities of California, Michigan, Virginia, and Wisconsin-Madison; and the New York Public Library.

In each of these cases, Google is, unquestionably, reproducing and distributing copyrighted material without the express consent of the copyright owner – in other words, engaging in *prima facie* copyright infringement. On the other hand, what Google is making available to the public in each of these cases is limited to snippets of the original written material and small, low-resolution copies of the original images, together with links to the originals (when they are already on the web elsewhere) or bibliographic information and links to online booksellers and libraries (when they are not). The ultimate question, then, is whether Google's actions qualify as fair use – a question for which there is for now no clear answer.

Google would seem to have some strong arguments in its favor under the traditional fair use test. While it is a commercial enterprise (and a highly successful one at that), its uses of others' material are unquestionably "transformative", in that it is using those materials not for their original purposes, but, rather, to create an index "to organize the world's information and make it universally accessible and useful". Google Mission Statement, available at <http://www.google.com/intl/en/corporate/index.html>. Google does make complete copies of the works that it indexes, so that its index itself will be complete, but it does not provide those copies to the users of its search engine. Moreover, it seems highly unlikely that Google will displace sales of the original materials; indeed, if anything, it seems most likely to *increase* them, by increasing public awareness of them. See generally *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003) ("This case involves more than merely a retransmission of Kelly's images in a different medium. Arriba's use of the images serves a different function than Kelly's use – improving access to information on the internet versus artistic expression. Furthermore, it would
be unlikely that anyone would use Arriba's thumbnails for illustrative or aesthetic purposes because enlarging them sacrifices their clarity. Because Arriba's use is not superseding Kelly's use but, rather, has created a different purpose for the images, Arriba's use is transformative.

Still, a finding in Google's favor would deprive copyright holders of the potentially lucrative opportunity to try to license their materials to Google (and others like it) for such uses.

In the end, however, the decision in each of these cases is likely to turn on the court's view as to whether what Google is doing is, on balance, an overall social good, rather than on a methodical analysis of the technical fair use factors. (Which, to be fair, would not distinguish these cases from many other fair use cases. The factors are highly malleable, and they frequently are used as the justification for an outcome rather than the means of reaching it.) A preliminary ruling in Perfect 10 "reluctantly" found that Google's creation, storage, and display of thumbnail images "likely do not fall within the fair use exception", notwithstanding "the enormous public benefit that search engines such as Google provide", but seemingly only because the court felt constrained by the scant existing precedent on point. Perfect 10, Inc. v. Google, Inc., 416 F. Supp. 2d 828, 851 (C.D. Cal. 2006). The case is now on appeal to the Ninth Circuit, which, as an appellate court, has greater authority to modify and create precedent and likely will be tempted to do so.

As Perfect 10 demonstrates, the fair use question that these cases raise may not be as easy as it seems, but the answer to it could well have far-reaching implications for the future shape of the Internet – and potentially could also yield clearer and greater protections for "transformative" uses, a category that scholarship epitomizes.¹

¹ Good copyright law (from the academic perspective) frequently develops in unusual and unrelated contexts. For example, in a case involving 2 Live Crew's parody of Roy Orbison's "Pretty Woman", the Supreme Court gave broad definition to protected "criticism": "[P]arody has an obvious claim to
II. Electronic Delivery of Readings and Materials

Over the past several years, the Association of American Publishers has been focusing increased attention on the delivery of readings and other course materials digitally, through electronic reserves, electronic coursepacks, and electronic course management systems. AAP believes, probably with some justification, that such uses frequently exceed what is permitted by the TEACH Act\(^2\) or what is arguable as fair use, and it appears to be looking for a "test case".

transformative value . . . . Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107."\footnote{Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).}

A more recent case, Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006), involved a publisher's use, without permission, of significantly reduced copies of six concert posters and a concert ticket in a 480-page illustrated cultural history of the Grateful Dead. The Second Circuit Court of Appeals, perhaps the most authoritative court in the country with respect to copyright law, found the use to be a "transformative" fair one, noting that "courts have frequently afforded fair use protection to the use of copyrighted material in biographies, recognizing such works as forms of historic scholarship, criticism, and comment that require incorporation of original source material for optimum treatment of their subject".\footnote{Id. at 609. The court also held that the copyright owner's "willingness" to license the images to the publisher, for a fee, was not enough to defeat a claim of fair use; indeed, if it were, it would largely defeat the doctrine of fair use altogether. Id. at 613-15.}

In more mundane circumstances, another district court held, in contrast to the preliminary ruling in Perfect 10, that Google's caching of web pages does constitute fair use. The case involved an attorney (naturally) who, over the course of three days, wrote fifty-one "works", filed copyright registrations for them, posted them to his web site, deliberately did not incorporate the standard "no-archive metatag" that instructs search engine "crawlers" not to index designated web materials, and then waited for Google's crawler to find them, all in order "to manufacture a claim for copyright infringement against Google in the hopes of making money from Google's standard practice". Field v. Google, Inc., 412 F. Supp. 2d 1106, 1113 (D. Nev. 2006). The court found Google's web cache to be "transformative", because it "serves different and socially important purposes in offering access to copyrighted works through 'cached' links and does not merely supersede the objectives of the original creations". Id. at 1119.

By contrast, in Clean Flicks of Colorado, LLC v. Soderbergh, 433 F. Supp. 2d 1236 (D. Colo. 2006), the court held that a company's practice of creating "family-friendly" versions of movies by deleting scenes and dialogue containing sex, profanity, and violence was not a fair use, even though the company acquired a legitimate copy of the original movie for every edited copy that it distributed. In so holding, the court found that the company was neither engaging in true "criticism" nor "add[ing] something new, with a further purpose or different character, altering the first with new expression, meaning, or message", and thus was not engaged in anything "transformative"; rather, it was simply removing content it found objectionable. Id. at 1241 (internal quotation marks and citation omitted). The court further noted that the company's argument that it was creating "more socially acceptable alternatives" "has superficial appeal but it ignores the intrinsic value of the right to control the content of the copyrighted work which is the essence of the law of copyright". Id. at 1240, 1242.

\(^2\) For details on the TEACH Act and its requirements, see "Copyright Basics for Educators", attached at the end of this outline.
After sparring with the University of California-San Diego for some time, but to no conclusion, AAP recently turned its attention to Cornell University. Following a "complaint" and "discussions", Cornell and AAP agreed to a set of "Electronic Course Content Copyright Guidelines" this past September. AAP "hopes that Cornell's actions will set an example for other colleges and universities".

The Cornell guidelines are largely unexceptional in the abstract. They state, for example, the general truism that "[t]he copyright principles that apply to instructional use of copyrighted works in electronic environments are the same as those that apply to such use in paper environments". What the guidelines do not – and realistically cannot – do, however, is to clarify just how those principles apply in either environment, and the danger is that they will be interpreted – or, worse, affirmatively presented – as requiring more than the law does. While Cornell has made considerable additional assistance available, there simply is no clear, definitive guidance or precedent on these issues. Colleges and universities should therefore be careful, as Cornell itself will no doubt be, not to accede to overly restrictive interpretations.

III. Orphan Works

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7 Ironically, one excellent resource on these issues, "Campus Copyright Rights and Responsibilities: A Basic Guide to Policy Considerations", was issued in late 2005 by AAP, in conjunction with the Association of Research Libraries, the Association of American Universities, and the Association of American University Presses. See <http://www.arl.org/info/fm/copy/CampusCopyright05.pdf>. The Association of Research Libraries has also recently begun a "Copyright Education Initiative" to promote awareness of these issues, the centerpieces of which will be a web site and related brochure titled "Know Your Copy Rights". A copy of the forthcoming brochure is attached at the end of this outline and will be distributed at the conference.
One of the most significant problems facing scholars in recent years, particularly as copyright terms have been extended, is that of "orphan works": works whose copyright owner cannot be determined or located or whose copyright status itself cannot be determined. The time and expense necessary to track these things down can be substantial, the attempt is often futile, and the fear of the unknown undoubtedly has unnecessarily constrained legitimate uses.

Last year, the Register of Copyrights issued a report containing a proposal that, if adopted, would ameliorate, if not entirely resolve, this problem. Under that proposal, a user who makes a "good faith" and "reasonably diligent", but unsuccessful search for the copyright owner; proceeds to use the work; and gives attribution "if possible and as appropriate under the circumstances" would be immune from the normal, substantial damages for copyright infringement if the owner subsequently comes forward. The user would, however, remain liable for "reasonable compensation", essentially defined as a fair-market license fee, unless the use was "non-commercial" in nature. In that latter case – which would include most academic uses – the user could avoid monetary liability altogether by ceasing use "expeditiously" upon receiving notice from the copyright owner.

A bill incorporating this proposal was introduced in the last Congress but was not enacted. It is expected to be reintroduced in the new Congress.

IV. Library and Archive Exceptions

One of the lesser known, but crucial, provisions of copyright law, § 108, allows libraries and archives to make, and in some cases to distribute, limited numbers of copies of certain copyrighted works, subject to a series of requirements and restrictions, for purposes of preservation, replacement, inter-library loan, and private study. 17 U.S.C. § 108. Much as with
the "classroom" exception before the TEACH Act, however, the digital revolution has rendered § 108 seriously out of date.

In 2005, the Library of Congress's National Digital Information Infrastructure and Preservation Program convened a "§ 108 Study Group" to consider whether and what changes might be appropriate. The Study Group has been working diligently since then, and its report is due later this year. Among the issues the Study Group is considering are:

- Whether and when to allow digital copies for the permitted purposes and, separately, whether and how to allow digital delivery of digital copies.
- Whether license restrictions should take precedence over § 108 or vice-versa.
- Whether to create a new provision permitting the archiving and preservation of web sites.
- Whether to extend § 108's coverage to museums. (Early indications are that the Study Group will recommend that extension.)
- Whether to extend § 108's coverage more broadly to nontextual materials. (Under current law, the ability of libraries and archives to reproduce images, music, audiovisual materials, and the like is considerably restricted.)

V. New DMCA Exemptions

Since 1998, the Digital Millennium Copyright Act has prohibited the "circumvention" of "technological measures" designed to "control access" to digital materials, thereby giving content owners broad power to "lock up" their materials in ways that were not possible with analog materials. 17 U.S.C. § 1201(a)(1)(A). This provision was tempered, however, by another allowing the Librarian of Congress to grant limited exemptions for users who are "likely to be . . . adversely affected by virtue of such prohibition in their ability to make noninfringing uses of [a] particular class of works". 17 U.S.C. § 1201(a)(1)(B).

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8 See <http://www.copyright.gov/orphan>.
9 See <http://www.loc.gov/section108>.
On November 27, 2006, the Librarian of Congress granted exemptions for several such classes of works, including at least two that may prove useful for teachers and researchers:

- "Audiovisual works included in the educational library of a college or university's film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors." 71 Fed. Reg. 68472, 68473-4 (Nov. 27, 2006). Note, however, that the exemption is limited to uses by "media studies or film professors" and therefore does not authorize circumvention by faculty in other fields or by students.

- "Sound recordings, and audiovisual works associated with those sound recordings, distributed in compact disc format and protected by technological protection measures that control access to lawfully purchased works and create or exploit security flaws or vulnerabilities that compromise the security of personal computers, when circumvention is accomplished solely for the purpose of good faith testing, investigating, or correcting such security flaws or vulnerabilities." Id. at 68477. Professor Edward Felten, a Princeton University professor who once was threatened with prosecution for his security research, was one of the primary proponents of this exception.

These exemptions will remain in effect until October 27, 2009, but may be renewed.

Unfortunately, the Librarian also turned down proposals for a number of other exemptions, including ones that would have allowed circumvention for the purposes of engaging in fair use or making archival copies more generally. Id. at 68479.
COPYRIGHT BASICS FOR EDUCATORS

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I. Introduction

Copyright law imposes significant restrictions on our ability to use the copyrighted works of others in our teaching, but it also offers a number of opportunities and "safe harbors". This outline provides a general summary of both the restrictions and our rights. Additional background on these and other copyright issues is available in the list of resources at the end of this outline.

In reading these materials, please keep in mind that they do not constitute, and should not be considered a substitute for, specific legal advice. The resolution of legal issues frequently hinges on slight changes in the facts and circumstances, and your particular situation may well be different from those described in these materials. If you have questions about your situation, consult your institution's copyright expert or counsel.

II. Basic Copyright Principles

A. What Does A Copyright Protect?

Copyright protection, like patent protection, is based on Article I, Section 8, of the U.S. Constitution: "The Congress shall have Power To . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ." Under this provision, as implemented by the Copyright Act of 1976 and subsequent amendments, 17 U.S.C. § 101 et seq., copyright protection has been extended to eight categories of "works of authorship":

1. literary works (including not only books, articles, and other such works, but also software programs and their accompanying documentation);
2. musical works, including any accompanying words;
3. dramatic works, including any accompanying music;
4. pantomimes and choreographic works;
5. pictorial, graphic, and sculptural works;
6. motion pictures and other audiovisual works;
(7) sound recordings; and

(8) architectural works (including not only plans and drawings, which also can be considered pictorial, graphic, and sculptural works, but also buildings themselves).


While these categories are quite broad, they are not all-encompassing. Among other things, copyright protection does not extend to titles, names, slogans, or short phrases; "useful articles", such as clothing, furniture, jewelry, or wallpaper (though, to the extent such items incorporate pictorial, graphic, or sculptural aspects that can be identified separately from their utilitarian functions, those aspects may qualify for protection); works consisting entirely of "common property", such as standard calendars, height and weight charts, tape measures, and the like; and works created by federal officers and employees as part of their official duties, such as presidential speeches, congressional reports, and federal judicial opinions. Moreover, copyright protection extends only to the expression and not to any underlying ideas, facts, concepts, principles, processes and procedures, systems, discoveries, and so forth that the expression may incorporate. 17 U.S.C. § 102(b).

B. What Are The Requirements For Copyright Protection?

To be eligible for copyright protection, a given work of authorship must be both "original" and "fixed in a tangible medium of expression". 17 U.S.C. § 102(a). To be "original", the work need only reflect a minimal degree of creativity and not have been copied. Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 345 (1991) ("To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be."). "A work is 'fixed' . . . when its embodiment . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration" – in other words, when the work is no longer just an idea in the creator's head, but the words have been set forth on paper (or, more likely nowadays, typed into a computer), the brushstrokes have been applied to the canvas, the clay has been molded into an object, and so forth. 17 U.S.C. § 101.

As soon as an original work of authorship has been fixed, copyright protection attaches automatically. At various times in the past, it also was necessary to affix a copyright notice (e.g., © 2006 Steven J. McDonald) to the work, register it with the Copyright Office of the Library of Congress, and publish it, but none of those requirements applies today. Registration is a prerequisite to filing a lawsuit for copyright infringement, but it need not predate the infringement – though there are significant advantages for the copyright owner if it does. Most important, a copyright owner who registers prior to infringement is eligible for statutory damages of as much as $150,000 per infringement and attorney fees, regardless of actual loss, while a copyright owner who registers after infringement may recover only provable actual damages. 17 U.S.C. § 411-12 and 504-05.
C. What Rights Does Copyright Protection Provide?

Once copyright protection exists for a work, its owner has five principal exclusive rights, which, in general, no one may exercise without the owner's permission:

1. the right to reproduce the work, in whole or in part;

2. the right to make derivative works, such as translations, dramatizations, musical arrangements, sound recordings, and other such adaptations, based on the work;

3. the right to distribute copies of the work to the public by means of sale, lease, loan, gift, or any other form of transfer;

4. with respect to works capable of being performed (such as plays, movies, music, or books (which can be read aloud)), the right to perform the work in a public place or any other place where a substantial number of persons other than family members and friends are gathered; and

5. with respect to works capable of being displayed (such as paintings, sculptures, photographs, and the individual frames of a movie), the right to display the work in a public place or any other place where a substantial number of persons other than family members and friends are gathered.

17 U.S.C. § 106. These rights are quite broad and include, for example, photocopying an article; handing out copies of that article to the students in a class; adapting a book or play into a movie; showing a video, playing a CD, or singing a song to an audience; uploading an image, text, or sound recording to the web; or even just forwarding an e-mail message to a friend or listserv.

D. How Long Does Copyright Protection Last?

Under current law, these rights generally exist from the moment of the work's creation until 70 years after the creator's death. 17 U.S.C. § 302. If the work is either a "work for hire" (meaning it was created by an employee in the scope of employment or by an independent contractor who expressly assigns ownership to another party) or an anonymous or pseudonymous work, the copyright protection is valid for a set term of 95 years from publication or 120 years from creation, whichever expires first. Id.

Once the applicable term has expired, a work is considered to be in the "public domain", meaning that it may be used freely by anyone, in any way, and for any purpose (at least insofar as copyright law is concerned). Because copyright terms and requirements have varied over the years, because current copyright terms depend in part on the vagaries of human life, and because there is no central registry keeping track, however, it can be quite difficult to tell whether any given work has "passed into the public domain", with one exception: under any set of circumstances, a work that was first published before 1923 is definitely now in the public domain under U.S. law. In addition, as noted above, all works created by employees of the federal government acting within the scope of their employment automatically go into the public
domain; the federal government does not claim copyright to its works. Note also that the fact that works are publicly and readily available does not necessarily mean that they are in the public domain. The availability of a work on the Internet is no more indicative of an absence of copyright protection than its availability in a library or music store.

For details on how to determine the status of other works, see "When Works Pass into the Public Domain" in the resources listed at the end of this outline.

E. How Can Copyright Rights Be Transferred Or Shared?

The exclusive rights are freely transferable. The owner of a copyright may sell, give, or otherwise transfer ownership of, and/or grant permissions or licenses to use, the rights as a whole, one or more of the rights separately, or even a portion of one of the separate rights. 17 U.S.C. § 201(d). Thus, for example, a book author might sell the copyright to a publishing company, or (at least theoretically) might instead license the publishing company the right to reproduce and distribute the book, a motion picture studio the right to make a derivative work based on the book, a given theater the exclusive right to perform the movie in a specified geographical area for a specified time, and other theaters the nonexclusive right to perform the movie in that same geographical area after that specified time. Transfers of ownership and exclusive licenses must be in writing to be enforceable, 17 U.S.C. § 204(a), but the owner's ability to carve up and exploit the rights is otherwise limited largely only by the imagination.

Note also that copyright rights in a given work exist independently of the work itself and that they therefore can be – and normally are – transferred separately. The acquisition of a copyrighted work does not include the acquisition of the copyright to that work unless the copyright owner expressly transfers the copyright in a signed writing. 17 U.S.C. § 202. Thus, for example, libraries generally do not acquire copyright to the books that they purchase or the papers that they are given, and art museums rarely own the copyrights to the paintings that hang on their walls. Similarly, under the "first sale doctrine", the copyright owner's right to control the distribution of any given copy of a work ends with the initial distribution of that copy. 17 U.S.C. § 109(a). Thus, the purchaser of a book, painting, sculpture, video, or other work normally does not acquire any of the copyright rights to that work, and therefore cannot reproduce, publicly perform, or make derivative works based on that work, but nevertheless is perfectly free to sell, lend, rent (except in the case of computer software and sound recordings), give away, or otherwise distribute the copy that he or she acquired. (It is for this reason that libraries are able to lend books without engaging in copyright infringement.) Moreover, notwithstanding the copyright owner's general right to control public displays, the owner of a lawful copy of a work is free to display that copy "to viewers present at the place where the copy is located". 17 U.S.C. § 109(c). (It is this principle that allows art museums to operate.)

III. Use Of Copyrighted Materials In Teaching Activities

While the rights of copyright owners are quite broad, there are, fortunately, a number of exceptions. For purposes of higher education, the most important of those exceptions are as follows:
A. **Performance And Display Of Copyrighted Works In The Classroom**

Under 17 U.S.C. § 110(1), faculty and students may perform or display any copyrighted work in the course of face-to-face teaching activities in a classroom, without seeking permission. For purposes of this exception, to "perform" a work means to show a film or video, play music, recite a poem, act out a play, and so forth, while to "display" a work means to show a copy of it either directly or by means of a projection or similar system. Note that, under the "MPAA exception" to this exception, the person performing a film or other audiovisual work must not know or have reason to know that the copy to be performed was made unlawfully; no such limitation applies in the case of other types of works. Note also that this exception does not include the right to make or distribute copies of, or to make derivative works based on, the works that are performed or displayed.

B. **Performance And Display Of Copyrighted Works In Distance Education**

The Technology, Education, and Copyright Harmonization Act of 2002 (the "TEACH Act"), codified at 17 U.S.C. § 110(2), provides similar rights in the context of distance education, including both traditional satellite-based distance education and newer web-based programs. However, because of the greater risks for the copyright owner in the digital classroom (think Napster), the TEACH Act imposes a number of additional restrictions and requirements, including, among others:

- A work may be *displayed* only in "an amount comparable to that which is typically displayed in the course of a live classroom session", which, depending on the nature of the work, may not include the entire thing. (Thus, the TEACH Act would *not* permit the posting of lengthy readings that typically would be studied outside of class and is not a justification for the creation of "electronic coursepacks".)

- Nondramatic literary and musical works may be *performed* in their entirety, but other works may be performed only in "reasonable and limited portions". (Thus, for example, the TEACH Act would *not* permit a film to be shown in its entirety in distance education, although it may still constitute "fair use" to do so.)

- "To the extent technologically feasible", the institution must limit access to the works used to students officially enrolled in the relevant course. (Most current "courseware" packages, such as Blackboard and WebCT, do this automatically.)

- The institution must implement "technological measures that reasonably prevent" those students from retaining copies of the materials on their own computers or distributing them to others. (Examples include using streaming video rather than downloadable MPEG files and "locking" PDF files so that the "save" function is disabled.)

- The "MPAA exception" applies to all works used in distance education and extends to the institution's knowledge rather than just the individual's.
• The institution must adopt a copyright policy and educate its faculty, students, and relevant staff about copyright law.

A more detailed explication of the TEACH Act's many restrictions and requirements is set forth in the chart at the end of this outline

C. Fair Use

For institutions of higher education, the most important exception to copyright is, undoubtedly, the "fair use" doctrine. Under § 107 of the Copyright Act, "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", by definition, "not an infringement of copyright". Determining just what is a fair use, however, can be a complicated question, requiring a detailed, case-by-case evaluation and balancing of four subjective factors:

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.


Note that, under this standard, not every "educational" use is automatically, for that reason alone, a fair one. While the fact that a particular use is educational in nature certainly is favorable, all four factors must be considered and balanced in every case. Moreover, the final factor, the effect of the use on the potential market, has become increasingly important in recent cases.

In very general terms, then, a use is "fair" if it is for educational or other noncommercial purposes, draws more on the facts and ideas expressed in the underlying work than on its creative elements, involves only a relatively small portion of that work, and is unlikely to interfere significantly with the copyright owner's ability to market that work. The classic example of fair use is quoting a few sentences or paragraphs of a book in an article or paper, though it certainly extends well beyond that. On the other hand, uses as extensive as coursepacks are much more difficult to justify, particularly when the same materials are reproduced for more than one term. See, e.g., Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381 (6th Cir. 1996), cert. denied, 520 U.S. 1156 (1997).
D. Single Copies For Use In Teaching And Research

Because of the uncertainties inherent in the general fair use analysis, there have been a number of efforts over the years to develop more concrete guidelines for specific common situations. Under one such set of guidelines negotiated by representatives from higher education and the publishing industry, it is generally accepted that faculty may make single copies of the following for use in their scholarly research, teaching, or preparation for teaching:

- A chapter from a book
- An article from a periodical or newspaper
- A short story, short essay, or short poem
- A chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper

Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with respect to Books and Periodicals, reprinted in Reproduction of Copyrighted Works by Educators and Librarians (available at www.copyright.gov/circs/circ21.pdf). Keep in mind that these guidelines are intended to create a "safe harbor" and therefore represent the minimum of what is permissible, not the outer limits of fair use. Copying in excess of these guidelines may be a fair use if it meets the fair use test described above, but it will fall into a "gray area". Also keep in mind that, while these guidelines do not specifically discuss copying by students, it generally has been assumed that they have comparable rights under fair use.

E. Multiple Copies For Classroom Distribution And Use

Under a similar set of negotiated guidelines, and with the same "safe harbor" caveat, it also is generally considered to be fair use for faculty to make copies of copyrighted material and distribute them to their students for classroom use and discussion under the following conditions:

- The number of copies made of any given work may not exceed the number of students in the course.
- The copies must be made "at the instance and inspiration of the individual teacher".
- The inspiration to use the work and "the moment of maximum teaching effectiveness" with respect to that work must be "so close in time that it would be unreasonable to expect a timely reply to a request for permission".
- Each copy must include a notice of copyright.
- Any charge to the students may not exceed the actual cost of the copying.
- The amount copied from any given work may not exceed the following:
  - Poetry: (a) a complete poem if less than 250 words and if printed on not more than two pages or (b) an excerpt of not more than 250 words from a longer poem (though either limit may be expanded to permit the completion of an unfinished line)
• Prose: (a) a complete article, story, or essay consisting of less than 2,500 words or (b) an excerpt of not more than 1,000 words or 10% of any other prose work, whichever is less, but in any event a minimum of 500 words (though either limit may be expanded to permit the completion of an unfinished paragraph)

• Illustration: a single chart, graph, diagram, drawing, cartoon, or picture per book or per periodical issue

• "Special" works combining words and illustrations and consisting of fewer than 2,500 words in their entirety: an excerpt of up to two pages, but no more than 10% of the words

• The copying of any given item must be for only a single course and may not be repeated by the same teacher from term to term.

• The copying must be limited to one short poem, article, story, or essay or two excerpts from the same author and three from the same collective work or periodical volume (other than current news periodicals and newspapers) during one class term.

• No more than nine items in total may be copied for one course during one class term.

• "Consumables" such as workbooks, exercises, and tests may not be copied.

• Copying may not be used to create or substitute for anthologies, compilations, or other such collective works.

_Id._
USEFUL COPYRIGHT LAW RESOURCES ON THE INTERNET

A Crash Course in Copyright

An extensive collection of practical advice, a "crash tutorial", and other useful, plain English materials on copyright issues, focusing primarily on the academic setting

Copyright Management Center
http://www.copyright.iupui.edu/index.htm

Another extensive collection of materials on copyright in academe, including a "copyright quickguide"

Center for Intellectual Property and Copyright in the Digital Environment
http://www.umuc.edu/distance/odell/cip

Materials, online workshops, and other resources on digital copyright issues, including an interactive "©Primer" and "Digital©Primer"

TEACH Act Toolkit
http://www.lib.ncsu.edu/scc/legislative/teachkit

"An online resource for understanding copyright and distance education"

©opyown and ©opyfair
http://www.nethics.umd.edu/copyown
http://www.nethics.umd.edu/copyfair

A wealth of sample policies and other resources on the issues of copyright ownership and fair use in higher education

Copyright Law & Graduate Research
http://www.umi.com/umi/dissertations/copyright

An overview of the copyright rights and responsibilities of dissertation authors

10 Big Myths About Copyright Explained
http://www.templetons.com/brad/copymyths.html

A primer on copyright law and the Internet
The United States Copyright Office
http://www.copyright.gov

Information, copyright registration forms, and more from the people in charge; in particular, see "Reproduction of Works by Educators and Librarians", an information circular available at <http://www.copyright.gov/circs/circ21.pdf>; and "Copyright Search", a tool for identifying the copyright owner of a given work, at <http://www.copyright.gov/records>

Stanford University Libraries' Fair Use Site
http://fairuse.stanford.edu

A virtual law library of copyright-related materials

When Works Pass into the Public Domain
http://www.unc.edu/~unclng/public-d.htm
http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm
http://www.librarylaw.com/DigitizationTable.htm

Three handy reference charts on this surprisingly thorny issue

Copyright Clearance Center
http://www.copyright.com

Online access to the rights organization of the same name

CNI-COPYRIGHT

A copyright-related listserv from the Coalition for Networked Information – to subscribe, send the following message to listproc@gni.org:
subscribe cni-copyright Firstname Lastname
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<tr>
<td>Applies to nonprofit educational institutions</td>
<td>Applied to nonprofit educational institutions</td>
<td>Applies to accredited nonprofit educational institutions</td>
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<td>Permits the display of any work</td>
<td>Permitted the display of any work</td>
<td>Permits the display of any work in an amount comparable to that which is typically displayed in the course of a live classroom session</td>
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<tr>
<td>Permits the performance of any work</td>
<td>Permitted the performance of non-dramatic literary and musical works</td>
<td>Permits the performance of non-dramatic literary and musical works and reasonable and limited portions of any other works</td>
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<td>(No similar provision)</td>
<td>(No similar provision)</td>
<td>Excludes the performance and display of works produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks</td>
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<td>The performance or display of a motion picture or other audiovisual work cannot be made by means of a copy that was made unlawfully if the person responsible for the performance or display knows or has reason to believe that the copy was made unlawfully</td>
<td>(No similar provision)</td>
<td>The performance or display cannot be made by means of a copy that was made or acquired unlawfully if the institution knows or has reason to believe that the copy was made or acquired unlawfully **</td>
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<td>The performance or display must be made in the course of face-to-face teaching activities in a classroom or similar place normally devoted to instruction</td>
<td>The performance or display had to be by or in the course of a transmission made primarily for reception in classrooms or similar places normally devoted to instruction</td>
<td>The performance or display must be by or in the course of a transmission made solely for, and to the extent technologically feasible reception of which is limited to, students officially enrolled in the course for which the transmission is made</td>
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<td>The performance or display must be made by an instructor or pupil</td>
<td>(No similar provision)</td>
<td>The performance or display must be made by, at the direction of, or under the actual supervision of an instructor</td>
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| (No similar provision) | The performance or display had to be:  
• directly related and of material assistance to the teaching content of the transmission  
• a regular part of the systematic instructional activities of the institution | The performance or display must be:  
• directly related and of material assistance to the teaching content of the transmission  
• an integral part of a class session offered as a regular part of the systematic mediated instructional activities of the institution |
| (No similar provision) | (No similar provision) | The transmitting institution must:  
• institute policies regarding copyright  
• provide faculty, students, and relevant staff with informational materials that accurately describe and promote compliance with copyright law  
• provide notice to students that materials used in connection with the course may be subject to copyright protection |
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<th>In the case of digital transmissions, the transmitting institution:</th>
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<td>• must employ technological measures that reasonably prevent recipients from retaining the work in accessible form for longer than the class session and further disseminating the work to others without authorization</td>
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<td>• must not interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination</td>
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* The term "mediated instructional activities" means activities that are an integral part of the class experience, that are controlled by or under the actual supervision of the instructor, and that are analogous to the type of activities that would take place in a live classroom setting, other than activities that use works such as textbooks, course packs, and similar materials in any media that typically are purchased by students for their independent use and retention.

** Note that the TEACH Act authorizes the institution to convert a print or other analog material into digital format, in order to conduct TEACH-authorized displays and performances, if "no digital version of the work is available to the institution" or "the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use" for such TEACH-authorized activities.