Fair Use Presentation

Fair Use and copyright policy

Info Graphic

EU Open Access
Notwithstanding the provisions of sections 17 U.S.C. § 106 and 17 U.S.C. § 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.
Definition

Fair use (Section 107 of the U.S. copyright law) is an exception to the rights of copyright owners. Fair use is the right to use copyrighted material without permission or payment under some circumstances, especially when the cultural or social benefits of the use are predominant. This includes purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research. Fair use balances the needs of the public with those of copyright owners and preserves copyright's purpose to promote "science and the useful arts."

Four factors

There are four factors courts use as guidelines when reviewing Fair Use cases:

Factor One: The Purpose and Character of the Use
This factor favors nonprofit, educational uses over commercial uses. Use of copyrighted material is more likely to be fair use under the first factor if it is for teaching (including multiple copies for classroom use), research, scholarship, criticism, comment, or news reporting. It is less likely to be fair if the user profits from the use or if the use is for entertainment purposes. Transformative uses are also favored under the first factor. These are uses in which the work is used in a new manner or context, distinct from the intended uses of the original.

Factor Two: The Nature of the Work
This factor favors fair use for nonfiction works that are factual in nature. Use under factor two is less likely to be fair for creative works such as novels, poetry, plays, art, photography, music, and movies. The second factor is more likely to favor fair use if a work has been published and less likely if it has not, for example the unpublished letters of a historical figure.

Factor Three: The Amount and Substantiality of the Portion Used
The third factor is more likely to favor fair use when an appropriate amount of the copyrighted work is used in relation to the purpose of the use. Use of copyrighted material is more likely to be fair under the third factor when a small quantity is used and when the portion used is not central or significant to the entire work. It is less likely to be fair if a large portion or the whole work is used, and if the portion used is the "heart of the work." This being said, there are instances where courts have ruled in favor of fair use even when the copyrighted work was used in its entirety.

Factor Four: The Effect on the Market
The fourth factor is more likely to favor fair use when the use of the copyrighted work does not harm the market for the work or its value. When a use is transformative, it is less likely that the market for the original work is damaged.
Two Key Fair Use Questions

1. Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?
2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

Use resources with open licenses

There is a growing movement in education to create and use educational materials that are openly available to everyone. These resources are free to access and in most cases free to reuse, modify, and redistribute. The William and Flora Hewlett Foundation defines these Open educational resources (OER) as "teaching, learning, and research resources that reside in the public domain or have been released under an intellectual property license that permits their free use and re-purposing by others. Open educational resources include full courses, course materials, modules, textbooks, streaming videos, tests, software, and any other tools, materials, or techniques used to support access to knowledge."

Using OERs in your courses keeps instructional materials affordable for students, promotes a culture of collaboration and sharing, and eliminates concerns about applying fair use to avoid potential copyright violations.

Each of the example pages in this guide contain links to sites that can help you identify material that is freely available with open licenses.

- Resources for using textual materials in online education
- Resources for using images in online education
- Resources for using video in online education
- Resources for using sound recordings in online education

For more information on the OER movement and open licensing, see the links below.

- Open Educational Resources (UMass Amherst Libraries)
- Comprehensive guide to Open Educational Resources for educators and learners. Includes links to sources of OER content.
- Open Educational Resources (Michigan State University)
- From the Office of Faculty & Organizational Development at Michigan State University, this site provides material introducing OERs and many links to sources of OER content and other content with open licenses.
- Creative Commons Licenses
- "Creative Commons copyright licenses and tools forge a balance inside the traditional 'all rights reserved' setting that copyright law creates. Our tools give everyone from individual creators to large companies and institutions a simple, standardized way to grant copyright permissions to their creative work. The combination of our tools and our users is a vast and growing digital commons, a pool of content that can be copied, distributed, edited, remixed, and built upon, all within the boundaries of copyright law." Because most Open Educational Resources are published under Creative Commons licenses, understanding the licenses will help you make the best use of OER content.
Use resources in the public domain

Works that are not subject to copyright are in the public domain. Public domain works are freely available for use without restriction.

A copyrighted work enters the public domain when the term of copyright protection expires or when its creator chooses to place the work in the public domain (as often indicated by the CC0 license from Creative Commons).

Determining the public domain status of a particular work can be very complicated, but as a general rule of thumb, works published in the United States before 1923 are in the public domain.

For more information, please see these resources:

- **Duration and the Public Domain (Columbia Copyright Advisory Office)**
- Explain the public domain and what works fall within it.
- **Copyright Term and the Public Domain in the United States (Cornell Copyright Information Center)**
- Comprehensive chart from Peter Hirtle of the Cornell University Library to help determine what works have fallen into the public domain as of January 1 of the current year.
- **The Copyright Term Calculator (Public Domain Sherpa)**
- Provide information about a specific work and the Copyright Term Calculator will let you know if it is in the public domain in the United States (and if not, when it will be).
- **Public Domain Calculator (Europeana)**
- The Public Domain Calculators available on this website answer the question of whether a certain work has fallen into the public domain in a given European country.

Seek permission from the rightsholder

If you want to use third-party copyrighted material for online instruction, you believe that your intended use does not qualify as fair use, and you have determined that the University of Rhode Island does not already have a license to use this material for your purpose, then you may seek permission from the rights holder. There is often a fee involved.

In some cases, you may need to research who owns the copyright and make a request to that person or entity directly. In other cases, you may be able to license use of the work through a collective rights agency.

The resources below provide detailed instructions on obtaining permissions for different types of media.

- **Obtaining Copyright Permissions (University of Michigan Library)**
  - This comprehensive guide explains how to obtain copyright permission for using text, photos, fine art images, music, film, and theatre and how to initiate an independent search for a copyright holder if necessary.
- **Permissions (Copyright Advisory Office of Columbia University)**
  - Offers information on finding the copyright owner, complex searches, collective licensing agencies for various types of works, requesting permission (including model forms), and what to do if you cannot find the copyright owner.
Use library-licensed resources

The URI University Libraries purchase and subscribe to electronic resources including online journals, e-books, reference databases, and an image database. These resources are governed by license agreements, most of which allow the licensed material to be used for educational purposes by "authorized users." Authorized users are typically defined as students, faculty, staff, and researchers at URI and walk-in users of the library.

Most license agreements allow authorized users to:

- Download, print, and save single copies of items for their personal use
- Incorporate links to items in electronic coursepacks, reserves and course management systems, and instructor websites
- Provide single print or electronic copies of individual items to other authorized users for noncommercial educational purposes (including to each student in a class at URI)
- Provide single print or electronic copies of individual items to third-party colleagues for scholarly, educational, or research use

Using library-licensed resources for online courses avoids the need to perform fair use analyses or to seek permission from rightholders.

When using library-licensed resources, be sure to:

- Use the link to the resource provided in the HELIN Catalog. This will ensure that students who are off-campus can access the material once they follow the instructions for remote access to library online resources.
- Use the materials for courses offered through the University of Rhode Island only.

If you have any questions about licensing terms for a particular resource, please contact Prof. Andrée Rathemacher, Head, Acquisitions.
Tips for using textual materials in online education

To best position yourself to assert a fair use argument when using textual materials, consider doing the following:

- Link to the texts if possible rather than making an electronic copy available to students. Linking to materials is ordinarily not a violation of copyright but rather a technological instruction for locating materials.
- If copying a text, use no more than is needed to serve your purpose.
- Avoid copying materials created and marketed primarily for use in courses such as the one at hand (e.g. a textbook, workbook, or anthology designed for the course). Use of more than a brief excerpt from such works on digital networks is unlikely to be transformative and therefore unlikely to be a fair use.
- Make sure that the texts serve a pedagogical purpose; do not use as entertainment.
- Place the texts in the context of the course, explaining why they were chosen and what they are intended to illustrate. Recontextualize the texts when appropriate through the addition of study questions, commentary, criticism, annotation, and student reactions.
- Limit access to the texts to students enrolled in the course.
- Notify students that the texts are being made available for teaching, study, and research only.
- For each text, provide an acknowledgement of the source, copyright, and publisher.

Tips for using images in online education

To best position yourself to assert a fair use argument when using images, consider doing the following:

- Link to the images if possible rather than making an electronic copy available to students. Linking to materials is ordinarily not a violation of copyright but rather a technological instruction for locating materials.
- If copying an image, use the lowest image resolution possible to achieve your purpose.
- Avoid copying images from materials created and marketed primarily for use in courses such as the one at hand (e.g. from a textbook, workbook, or other instructional materials designed for the course). Use of more than a brief excerpt from such works on digital networks is unlikely to be transformative and therefore unlikely to be a fair use.
- Make sure that the images serve a pedagogical purpose. Avoid using images as "windowdressing," or for aesthetic purposes only.
- Place the images in the context of the course, explaining why they were chosen and what they are intended to illustrate. Recontextualize the images when appropriate through the addition of study questions, commentary, criticism, annotation, and student reactions.
- Limit access to the images to students enrolled in the course.
- Notify students that images are being made available for teaching, study, and research only.
- Provide attributions to known copyright owners of the images and any works depicted in the images.
Tips for using video in online education

To best position yourself to assert a fair use argument when using video, consider doing the following:

- Link to the video if possible rather than making an electronic copy available to students. Linking to materials is ordinarily not a violation of copyright but rather a technological instruction for locating materials.
- If copying a video, do not use any more of the video than the amount needed to serve your purpose.
- Avoid copying videos from materials created and marketed primarily for use in courses such as the one at hand (e.g. from a textbook, workbook, or other instructional materials designed for the course). Use of more than a brief excerpt from such works on digital networks is unlikely to be transformative and therefore unlikely to be a fair use.
- Make sure that the video content serves a pedagogical purpose; do not use as entertainment.
- Place the video in the context of the course, explaining why it was chosen and what it was intended to illustrate. Recontextualize the video when appropriate through the addition of background readings, study questions, commentary, criticism, annotation, and student reactions.
- Limit access to the video to students enrolled in the course.
- Use streaming or other technologies that limit students' ability to download, copy, or redistribute the material.
- Notify students that videos are being made available for teaching, study, and research only.
- Provide attributions to known copyright owners of the videos.

Tips for using sound recordings in online education

To best position yourself to assert a fair use argument when using sound recordings, consider doing the following:

- Link to the sound recording if possible rather than making an electronic copy available to students. Linking to materials is ordinarily not a violation of copyright but rather a technological instruction for locating materials.
- If copying a sound recording, do not use any more of the recording than the amount needed to serve your purpose.
- Avoid copying sound recordings from materials created and marketed primarily for use in courses such as the one at hand (e.g. from a textbook, workbook, or other instructional materials designed for the course). Use of more than a brief excerpt from such works on digital networks is unlikely to be transformative and therefore unlikely to be a fair use.
- Make sure that the sound recording serves a pedagogical purpose; do not use as entertainment.
- Place the sound recording in the context of the course, explaining why it was chosen and what it was intended to illustrate. Recontextualize the sound recording when appropriate through the addition of background readings, study questions, commentary, criticism, annotation, and student reactions.
- Limit access to the sound recording to students enrolled in the course.
- Use streaming or other technologies that limit students' ability to download, copy, or redistribute the material.
- Notify students that sound recordings are being made available for teaching, study, and research only.
- Provide attributions to known copyright owners of the sound recordings.
Professor Kassabian is teaching an online course about global health. For a segment on pandemics, he would like the class to read a chapter from *Spillover: Animal Infections and the Next Human Pandemic* by David Quammen (Norton, 2012). He photocopied the chapter from his copy of the book and asked the library to scan the copy to PDF and place it on e-reserve. The scanned copy of the chapter includes the title and copyright pages of the book, and the course syllabus provides a complete citation for the chapter. Is this fair use?
Texts example #1
Analysis
1. Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?
No, Professor Kassabian's use is not transformative, since he is using the chapter for the same reason as its original purpose—to convey information about the danger of potential pandemics.
2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?
Even though Professor Kassabian's use is not transformative, he is using the material to instruct students at a nonprofit educational institution, a favored purpose for fair use. In addition, the chapter is a work of nonfiction and is factual in nature, which also favors fair use. Professor Kassabian's decision to use only one chapter of the work also favors fair use, as this is not likely replace the sale of the book, especially since the book was not marketed as a textbook. In fact, Professor Kassabian's use of the chapter might improve the market for the book if students decide to purchase copies in order to read further. The fair use argument is strengthened because the chapter was not placed on the open web but limited through the library's e-reserve system to registered borrowers and because the professor clearly acknowledged the source, copyright, and publisher.
Fair use: Yes.
Texts example #2

Professor Hallberg-Smith teaches a hybrid course in econometrics. Instead of using an expensive textbook, she posts course content in Sakai that she herself wrote. During class sessions students work in groups to solve and review problem sets and she takes questions about the readings and the problems. Hallberg-Smith has not had time to create her own problem sets for the course; instead she uses problems from the textbook *Introduction to Econometrics* written by James H. Stock. Aware of the high cost of this book, Professor Hallberg-Smith does not want students to have to buy it just for the problem sets, so she scans the problems to PDF and posts them in Sakai for students to download and use. Is this fair use?
Texts example #2
Analysis

1. Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?

No, Professor Hallberg-Smith's use is not transformative, since she is using the problem sets for the same reason as their original purpose—to instruct students in concepts and applications in econometrics.

2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

Even though Professor Hallberg-Smith's use is not transformative, she is using the material to instruct students at a nonprofit educational institution, a favored purpose for fair use. In addition, the problem sets are factual in nature, not creative, and this favors fair use. Professor Hallberg-Smith is not using Stock's entire book, but only the problem sets, which would favor fair use, as this is not likely to replace the sale of the book. However, since the market for Stock's text is students taking econometrics courses, the copyright holder could argue that Professor Hallberg-Smith's use damaged the market for the work, since if other instructors were to copy material from the book instead of having students purchase it, the market for the book would be diminished.

According to the Code of Best Practices in Fair Use for Academic and Research Libraries, "Closer scrutiny should be applied to uses of content created and marketed primarily for use in courses such as the one at issue (e.g., a textbook, workbook, or anthology designed for the course). Use of more than a brief excerpt from such works on digital networks is unlikely to be transformative and therefore unlikely to be a fair use." The fair use argument is helped, however, by the fact that the problem sets were placed in Sakai and limited to students enrolled in the course.

Fair use: Probably not.

Possible alternative: Professor Hallberg-Smith might be able to find acceptable problem sets for her class by searching the many sources of Open Educational Resources on the web, or she could create her own.
Texts example #3

Professor O'Leary is teaching a face-to-face course in 20th century American history. He uses Sakai to post his syllabus and some course materials and to allow students to submit assignments and engage in discussion forums. Before he gives his lecture on the Cuban Missile Crisis, he wants students to understand just how frightening this incident was for many people at the time. As primary source material, he plans to assign several articles from newspapers and popular periodicals such as U.S. News & World Report published during the time period. Unfortunately, none of these articles is online, but the library has them on microfilm. He uses the library's new microfilm reader to create digital scans of each of the articles and posts them in Sakai for his students to read. Is this fair use?
Texts example #3
Analysis
1. Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?
Yes, Professor O'Leary's use is transformative, since he is using the articles in a different context from the one in which they originally appeared. The articles' original purpose was to convey news and analysis of the events surrounding the Cuban Missile Crisis as they occurred. Professor O'Leary, on the other hand, has placed the articles within a broader context of 20th century American history. We can presume that this context requires both the professor and the students to discuss and analyze the articles as historical evidence of how people perceived the events at that time. This is a transformative use.

2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?
Professor O'Leary is using the articles for noncommercial educational purposes, and his use is transformative; this favors fair use. Also favoring fair use is the fact that the articles are factual in nature and not creative works. Professor O'Leary used the entire articles, which might weigh against fair use, except that he is using the appropriate amount required for his transformative purpose. Since the articles were published in periodicals over fifty years ago, there is no evidence of market harm caused by Professor O'Leary's use. In addition, the articles are posted in Sakai and available only to students in the class, which demonstrates good-faith behavior on the part of the professor.
Fair use: Yes.
Professor Conley teaches a survey course on American poetry with a focus on the 20th century. Most of the readings are drawn from the student's textbook, *The Oxford Book of American Poetry* (Oxford, 2006), but she wants to supplement the text with some additional material. To do this, she selects individual poems from a variety of poets, scans them, and posts them to the course reading section of the course’s Sakai site. One of the poems she wants students to read is the book-length *The Book of Nightmares* (Mariner, 1973) by Galway Kinnell, so she scans the 88-page book to PDF and uploads it to Sakai. Is this fair use?
Texts example #4

Analysis

1. Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?

Yes, Professor Conley's use is transformative. The original purpose of *The Book of Nightmares* is aesthetic. Professor Conley is using the poem to instruct students in the themes, techniques and development of modern American poetry. She places the work in question in the broader context of the other readings in the course, and we can presume that she will offer critical commentary about the poem and explain its significance within this framework.

2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

Professor Conley's use is transformative, and she is using the work for nonprofit educational purposes, both of which strongly favor fair use. Not favoring fair use, however, is the fact that the work is highly creative and that she reproduced it in its entirety. The book is still in print, thus the rightsholder could make a strong argument that the professor's use (and similar uses, were they to occur) damaged the market for the book. The fair use argument is helped by the fact that the book was placed in Sakai and access was limited to students enrolled in the course. The fact that students can download the file and potentially redistribute it, however, is a liability. Fair use: Probably not.
Texts example #5
Professor Chen is teaching an online course titled Frontiers in Biotechnology. This week's topic concerns the use of genetic information in the context of personalized medicine. Professor Chen would like students to read this article:
Gholson J. Lyon, "Personalized medicine: Bring clinical standards to human-genetics research." Nature 482 (16 February 2012): 300-301. [doi:10.1038/482300a](https://doi.org/10.1038/482300a).
Professor Chen downloads the article PDF and posts it to Sakai for students to read. Is this fair use?
Texts example #5
Analysis
Note: Professor Chen does not need to rely on fair use in this case because the University of Rhode Island has a site license to *Nature* online that allows the university to make the licensed content available to authorized users for the purposes of research, teaching, and private study. This includes the right to reproduce individual articles for distribution to students as course readings and to create hypertext links to the licensed content as long as access is restricted to authorized users. Authorized users are defined as faculty, staff, enrolled students, and walk-in users of the library.
Texts example #6

Professor Mallilo is teaching a small graduate seminar on the topic of transportation in American history. She would like her students to read the book *Railroads and the American People*, by H. Roger Grant (Indiana University Press, 2012). The book is 307 pages long and is comprised of four chapters. Professor Mallilo is pleased to note that the URI Libraries have an e-book version of the book through Project MUSE. She links to the book's main page from her syllabus. For some reason, two students in the class are having trouble accessing the book online. Without taking the time to troubleshoot their access problems, Professor Mallilo downloads each of the chapters in PDF format, attaches them to an email, and sends them to the students in the class. Is this fair use?
Texts example #6

Analysis

Note: Professor Malillo does not need to rely on fair use in this case because a license agreement governs the University of Rhode Island's use of e-books on the Project MUSE platform. The license allows authorized users to distribute a copy of individual e-book chapters in print or electronic form to other authorized users, including the distribution of a copy for noncommercial educational purposes to each individual student in a class offered by URI. The license also allows users to link to e-book chapters for courses. Authorized users are defined as faculty, staff, students, and walk-in users of the library.
Texts example #7
Professor Meghani is teaching an online philosophy course. She is trying to save her students money by putting as much of the reading in Sakai as possible. She wants students to read *The Communist Manifesto* by Karl Marx and Frederick Engels, which was originally published in 1848. She has a copy on her bookshelf that was edited by John E. Toews and published in 1999 by St. Martin's. Since it is not very long, she decides to scan the book and upload it as a PDF file to Sakai. She plans to scan only the text of the *Manifesto*, not the introductory material or "related documents" that are included in the book. Is this fair use?
Texts example #7
Analysis
A fair use analysis is not necessary. *The Communist Manifesto* is in the [public domain](https://creativecommons.org/licenses/by-sa/4.0/), and therefore Professor Meghani is free to use it without restriction. The 1999 compilation by Toews, however, is still under copyright, as is his introduction to the book. As long as Professor Meghani uses only the text of the *Manifesto* itself, she does not have to be concerned with potential copyright infringement.

Note: Professor Meghani is making too much work for herself by scanning the text. Instead, she could direct her students to [Project Gutenberg](https://www.gutenberg.org/), which contains public domain titles available for download in multiple formats. In this case, the [Marxists Internet Archive](https://www.marxists.org/) would also be a good source.
Images example #1
Professor Jones is teaching a MOOC on the relationship between humans and the environment in which anyone is free to enroll. One of the topics she is covering is the 2010 Russian wildfires that broke out due to record temperatures and drought in the region. The smoke from the fires produced smog that affected Moscow and other urban areas. Professor Jones found a newspaper article online about the fires, with an image from the Associated Press of tourists in Red Square wearing face masks to protect themselves from the smog. She wants to use this image in her online lecture notes to show just how bad the smog in Moscow was. Is this fair use?
Images example #1

Analysis
1. Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?

No, Professor Jones's use is not transformative, since she is using the image for the same reason as its original purpose—to show the impact of the fires.

2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

Given that the image is a creative work, that it was used in its entirety, and that the use is not transformative, the material taken is not appropriate in kind and amount.

Fair use: No.

Possible alternative: Professor Jones could substitute an image with an open license that would illustrate the effect on air quality in Moscow of the wildfires. To search for an open-licensed image, she could use Wikimedia Commons, Flickr Creative Commons, or an advanced Google Image Search.
Images example #2

Professor Lee is teaching an online photography course. His colleague Professor Jones had showed him an image from the Associated Press of tourists in Red Square wearing face masks to protect themselves from the smog during the 2010 Russian wildfires. Professor Lee felt that this photograph was a particularly good example of image composition and depth of field. He decided to use the photo in his online lecture notes for the class, which he makes available on his personal website without access restrictions. In the text surrounding the image, Professor Lee clearly stated his purpose in displaying the image, explaining in detail how the image exemplifies the photographic concepts he is discussing. Is this fair use?
Images example #2

Analysis

1. Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?

Yes, Professor Lee's use is transformative. The original purpose of the photo was to illustrate how bad the air quality was in Moscow during the wildfires. Professor Lee's purpose for using the photo is to illustrate concepts and techniques in photography.

2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

Because Professor Lee's use is transformative, and because it is necessary for him to use the entire image in order to illustrate the photographic techniques he is presenting, the material taken is appropriate in kind and amount, even though the image is a creative work.

Fair use: Yes.

Note: The fact that Professor Lee's lecture notes are freely available on his website does not in and of itself undermine his fair use argument. However, his use is more likely to be challenged by the rightsholder than if he had used a course management system like Sakai to limit access to only the students in his class. Access restrictions are not a requirement of fair use, but they demonstrate a good faith intention to limit the use of the image to educational purposes.
Images example #3
Professor Banerjee is teaching a face-to-face management course that has an online component. His lectures are captured on video and then posted in Sakai for students to review. The videos also capture Professor Banerjee's PowerPoint slides. At the end of a lecture on management styles, he included a Dilbert cartoon strip as the final slide. The strip depicts Dilbert wearing Mickey Mouse ears for Halloween and stating that he is dressed up as "someone's management style." Professor Banerjee intended the cartoon to be a bit of comic relief related to the topic. Is this fair use?
Images example #3
Analysis
1. Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?
No, Professor Banerjee's use is not transformative. The original purpose of the comic strip was to amuse the reader, and Professor Banerjee is essentially using the strip for the same purpose—to amuse his students.
2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?
Given that the comic strip is a creative work and that the use is not transformative, the material taken is not appropriate in kind and amount.
Fair use: No.
Note: If Professor Banerjee had displayed the Dilbert strip in the context of a lecture on the depiction of management in contemporary popular culture, explaining why he was using the strip and specifically what the strip illustrated, this would likely be a fair use.
Images example #4

Professor Gottlieb teaches a class in wildlife ecology and management. She has "flipped the classroom," requiring students to read her lecture notes in Sakai ahead of time so that class meetings can be used for active learning exercises, field trips to the nearby forest, discussion, and student presentations. To make her lecture notes more visually appealing, Professor Gottlieb has broken up the monotony of the text by inserting miscellaneous line art drawings of animals that she scanned from a field guide to wildlife published in 1996. Is this fair use?
Images example #4

Analysis

1. Did the use "transform the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?"

No, Professor Gottlieb's use is unlikely to be transformative. The original purpose of the line art drawings is to assist in identifying wildlife, and Professor Gottlieb's use is for aesthetic purposes. While these purposes are different, Professor Gottlieb's use does not serve a broadly beneficial purpose or add value to the drawings; the images serve merely as "window dressing" for her course content.

2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

Given that the images are creative works and that the use is not transformative, the material taken is not appropriate in kind and amount.

Fair use: Probably not.

Possible alternative: From a pedagogical standpoint, Professor Gottlieb could reconsider her use of images for a purely aesthetic purpose and instead use Wikimedia Commons, Flickr Creative Commons, or an advanced Google Image search to identify open-licensed visual content that would be directly relevant to the content of her notes. If she were determined to use images solely for aesthetic purposes, a search for open-licensed content would reveal that the U.S. Fish and Wildlife Service has a collection of line art drawings of animals that are in the public domain and therefore free of copyright restrictions (as are all federal government publications).
Images example #5

Professor Klein is a tech-savvy art history professor who is a big believer in Open Educational Resources. This semester, he is teaching a large lecture class on 20th century sculpture. He records each lecture on video and posts the videos on YouTube for his students to refer to, as well as for anyone else who might be interested in the topic. During each lecture he uses photographs of modern sculptures that he took himself in museums and public spaces around the world. As he displays each photograph, he places the sculpture in historical context and discusses the themes evoked by the artwork as well as the techniques used by the artist. He often highlights similarities and differences between works. The photographs of the sculptures are captured, along with his commentary, in the lecture videos. In addition to the lecture videos on YouTube, Professor Klein has created a number of sets on Flickr to which he has uploaded his sculpture photographs in order for students and others to conveniently view them. Is this fair use?
Images example #5
Analysis
Before beginning a fair use analysis, it is important to note that while Professor Klein owns the copyright in his photographs, copyright in the sculptures themselves is held by the sculptors. (Since these sculptures were created in the 20th century, most of them will still be under copyright.)

1. Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?

Professor Klein's use of the sculptures in his lectures is transformative. The original purpose of the sculptures is aesthetic, and Professor Klein is displaying them for educational purposes, and his lectures place each sculpture into a broader context of 20th century sculpture. The professor's fair use argument would be strengthened if he limited his lecture videos to students enrolled in the course, but it is by no means invalidated by the availability of the videos on YouTube.

Professor Klein's posting of the photographs on Flickr is not transformative because the images are no longer in the context of his course lecture. The images appear on Flickr as aesthetic objects, essentially serving the same purpose as the original sculptures.

2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

Because Professor Klein's use of the images in his lectures is transformative, and because it is necessary for him to show the entire sculpture in order to discuss it, the material taken is appropriate in kind and amount, even though the sculptures are creative works.

Given that the sculptures are creative works and that posting photographs of them on Flickr is not transformative, the material taken is not appropriate in kind and amount.

Fair use: Yes for the lecture videos on YouTube; No for the images on Flickr.

Note: The URI Libraries are considering a subscription to ARTstor Shared Shelf, a product that allows faculty members to curate their own collections of images and limit viewing of the images to particular classes or to the broader URI community only. This would be a good alternative to Flickr in this instance.
Professor McCullough is preparing to teach an online course on Impressionist painting in which she plans to assign students to view numerous images of paintings from that period. While she was able to find most of the images she will need by using the institution’s subscription to ARTstor, there were a handful of paintings that weren't available there. She searched Flickr and found straightforward photographs of some of the missing paintings, but the permissions were set to "all rights reserved." She downloaded the images anyway and placed them in a folder on the Sakai site for the course, figuring students can view them from there. Is this fair use?
Images example #6

Analysis

A fair use analysis is not necessary. The paintings themselves are in the public domain, because they were painted in the 19th century, and the photographs of the paintings are not eligible for copyright. In 1999, a federal court ruled that a direct, accurate photographic reproduction of a two-dimensional work of art does not have enough originality to qualify for copyright protection. The underlying work of art may be protected by copyright, but not the photograph (Bridgeman Art Library, Ltd. v. Corel Corporation, 36 F.Supp.2d 191). Professor McCullough is free to use the photographs she found on Flickr without seeking permission from the photographer or relying on fair use.

Note: If Professor McCullough sought to use Flickr content that was legitimately protected by copyright without making a case for fair use, she could have included links to the images on Flickr in her course materials rather than copying the images by downloading them.
Sound recordings example #1

Professor Grunow is teaching an online Survey of Music course that covers representative composers, genres, and works from the Medieval to the Postmodern eras of music history. In addition to surveying representative compositions, the goal of the course is to supply students with analytical and critical tools to develop a historically informed appreciation of music. Instead of using a standard textbook, Professor Grunow has posted online lesson narratives to Sakai and plans to use the university’s streaming media server to provide students with access to the assigned music. Each week, students must participate in structured online forum discussions in which they discuss and analyze the assigned music using musical concepts learned in the course.

Professor Grunow heads to the library to discuss whether or not it is okay to stream the full-length recordings of the compositions she has selected for the course. She presents three of her choices to the music librarian:

- Wolfgang Amadeus Mozart (1756-1791) — Piano Concerto No. 21 in C Major (K.467), performed by Murray Perahia and the Chamber Orchestra of Europe, recorded in 1991
- Ludwig von Beethoven (1770-1827) — Piano Sonata No. 32 in C minor (Op.111), performed by Claudio Arrau, recorded some time in the 1960s

The streamed recordings will be available to students through Sakai for the duration of the semester only. Only students registered for the course will be able to access the recordings, and students will not be able to download or copy them. Is this fair use?
Sound recordings example #1

Analysis

1. Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?

   Yes, Professor Grunow's use is transformative, since she is using recordings originally produced for aesthetic purposes to educate students about music history and theory. The professor and the students are analyzing the recordings within their historical and musicological frameworks in a noncommercial educational context.

2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

   These compositions are creative works, and they were used in their entirety, which would tend to weigh against fair use. However, given that the use is transformative and takes place for educational purposes, the use is more likely to be fair.

   Fair use: Yes.

   Note: The transformative and educational nature of Professor Grunow's use of the recordings and the fact that access was limited to students enrolled in her class and that students could not copy or download the music support a fair use argument. This does not mean, however, that the copying of music to university servers in order to stream it to students will not be challenged by rightsholders.

   UCLA faculty produced a strong statement of principles on the use of streaming videos and other educational content, asserting that "streaming technologies serve the purpose of time-shifting for students and faculty alike." They believe that "if it would be lawful for a teacher to show a particular piece of multimedia to students enrolled in a class that meets in a physical classroom, it should be fair use to permit the viewing or hearing of that multimedia, through time-shifting technologies, in a virtual classroom that restricts access to those same enrolled students."

   In the 1984 case Sony Corp. v. Universal City Studios, Inc., the Supreme Court held that time shifting was fair use in connection to the noncommercial home recording of television shows for delayed viewing because it did not deprive the copyright owners of revenue.

   An Issue Brief from the Library Copyright Alliance on the streaming of films for educational purposes presents an argument that could also apply to the streaming of sound recordings. The brief suggests that "courts are likely to treat as fair use many instances of streaming video to students logged in to class sites." The brief's authors write, "Courts likely would treat educational uses of entertainment products, such as uploading a feature film to a course website so that students could stream it for purposes of analysis, as repurposing" [i.e. as transformative use]. The brief goes on to suggest that "educators could buttress their fair use claim by recontextualizing works on course websites through selection and arrangement and the addition of background readings, study questions, commentary, criticism, annotation, and student reactions."

   With regard to music, it is further worth noting that multiple copyrights apply: copyright in the composition itself and copyright in the sound recording. Sound recordings first gained federal copyright protection in 1972. In the examples above, the compositions by Mozart and Beethoven are in the public domain and are not protected by copyright; the composition by John Cage is protected. The Mozart and Cage recordings, both made after 1972 are also protected; the Beethoven recording, made in the 1960s, is probably in the public domain, unless the original recording was "remastered" in which case the producers of the remastered recording could assert copyright in this new version.
Sound recordings example #2
Professor Beretsky is teaching an online course about copyright. He wants to illustrate the provision of copyright law that pertains to compulsory cover licenses of music by demonstrating how cover versions may differ noticeably from original recordings. He extracted a 30 second clip from the recording of "Little Wing" by Jimi Hendrix and then about 15 seconds of the same song by Santana featuring Joe Cocker. He inserted the sound clips into his online lecture notes for the class, which he makes available on his personal website without access restrictions. In the text surrounding each sound clip, Professor Beretsky clearly states his purpose for including the song, explaining in detail the musical differences between the two pieces and what the significance of this is in relation to compulsory licensing. It is possible for students to download the clips. Is this fair use?
Sound recordings example #2

Analysis

1. Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?

Yes, Professor Beretsky's uses are transformative. The original purpose of the music was aesthetic and to entertain; Professor Beretsky's purpose for using the sound clips was to illustrate a concept in copyright law. The critical commentary in the professor's notes that surrounds each song clip helps to establish the transformative nature of the use.

2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

Because Professor Lee's use is transformative and he used only a small portion of each song—the amount necessary to illustrate his point—the material taken is appropriate in kind and amount, even though the songs are creative works.

Fair use: Yes.

Note: The fact that Professor Beretsky's lecture notes are freely available on his website does not in and of itself undermine his fair use argument. However, his use is more likely to be challenged by the rightsholder than if he had used a course management system like Sakai to limit access to only the students in his class. Access restrictions are not a requirement of fair use, but they demonstrate a good faith intention to limit the use of the copyrighted material to educational purposes.
Sound recordings example #3

Professor Conley teaches a survey course on American poetry with a focus on the 20th century. Most of the readings are drawn from the course textbook, *The Oxford Book of American Poetry* (Oxford, 2006), but she wants to supplement the required text with some additional material. She feels that it is important to hear poetry read aloud to get a full sense of its meaning and the poetic devices employed by the poet. She rips two poems from the audio CD *The Voice of the Poet: Robert Frost* (Random House Audio, 2003) and uploads the files on the course's Sakai site for students to access. Students are able to download the files to listen to them. As a homework assignment, she asks students to first read the poems in their textbook and then to listen to the poet reading his poems. Students must then write a few paragraphs about how the experience of listening to the poems differed from reading them. Professor Conley plans to have students discuss their experiences in the next class period. Is this fair use?
Sound recordings example #3

Analysis

1. Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?

Yes, Professor Conley's use is transformative. The original purpose of the poems was aesthetic; Professor Conley's purpose is educational: to have students compare and contrast their aesthetic experiences of reading and hearing the poems. The fact that students are asked to analyze the aesthetic experience of hearing the poems being read helps establish the transformative nature of the use.

2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

The fact that the poems are creative and were used in their entirety weighs against fair use. But because Professor Conley's use was transformative, and because listening to the entire poem was necessary for the purposes of the assignment, the material taken is appropriate in kind and amount.

Fair use: Yes.

Note: Professor Conley's case for fair use would be stronger if she employed technological measures (e.g. streaming technology) to ensure that students could not copy and redistribute the digital file that she uploaded. This would demonstrate her good faith intention to limit the use of the copyrighted material to educational purposes.
Sound recordings example #4

Professor Schmidt teaches an ornithology class that meets twice a week. The course covers identification, field study techniques, habitats, and the basic biology of birds. The professor uses Sakai to post the course syllabus, lecture notes, and grades and to allow students to hand in assignments. One of the texts for the course is the National Audubon Society Field Guide to North American Birds: Eastern Region, Revised Edition (1994). This book will help students identify birds by sight, but not by sound. To help them learn to recognize bird calls, he copies short clips of bird calls from the Stokes Field Guide to Bird Songs: Eastern Region, an audio CD, and uploads the sound clips into his lecture notes in Sakai. Each clip is introduced by a narrator who states the name of the species after which a variety of the bird's songs and calls are presented. While the CD includes recordings of the calls of 372 species of birds, Professor Schmidt only copies the calls of 25 species, or under 7%. Is this fair use?
Sound recordings example #4
Analysis
1. Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?
No, Professor Schmidt's intended use is not transformative. The original purpose of the CD is to teach people to recognize specific bird calls, and Professor Schmidt is using the CD for the same purpose.
2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?
This CD is a work of nonfiction, which favors fair use. However, since Professor Schmidt's use is not transformative, a fair use argument would be more difficult to sustain. The publisher of the CD could conceivably show market harm by arguing that Professor Schmidt could have asked students to purchase a copy of the CD just as he had asked them to purchase the field guide.
Fair use: Probably not.
Notes: This example raises the question of what can be copyrighted. In order for a work to be copyrightable, it must be original, which implies a "minimum amount of creativity." It is likely that recordings of bird songs themselves cannot be copyrighted. The CD in question, however, is certainly eligible for copyright, since the authors compiled, organized, and introduced the bird songs and provided accompanying printed material explaining each type of bird call and its function. Instead of copying this material, Professor Schmidt could have linked to similar content freely available on the web, for example the Cornell Lab of Ornithology's site All About Birds. The recordings on the All About Birds site are accompanied by a copyright statement, but by linking to the site instead of copying the content, Professor Schmidt avoids the issue of copyright altogether.
Regarding the fact that Professor Schmidt used only 7% of the CD, as explained in the Code of Best Practices in Fair Use for OpenCourseWare, "'Bright line' tests and 'rules of thumb' are not appropriate to fair use analysis, which requires case by-case determinations made through reasoning about how and why a new use recontextualizes existing material." Thus, while amount used is an important factor in whether any use is fair, fair use cannot be decided by relying on the specific percentage of a work used or similar guidelines.
Sound recordings example #5

Professor Lazarus is teaching an online course in the history of jazz. He wants his students to listen to the jazz standard "Tiger Rag" by Louis Armstrong as an example of Dixieland jazz. He copies the song from a CD of Armstrong's recordings that was released on Delta Records in 2002 and loads it onto the university's streaming media server. The streamed recording will be available to students through Sakai for the duration of the semester only. Only students registered for the course will be able to access the recordings, and students will not be able to download or copy them. Is this fair use?
Sound recordings example #5
Analysis
A fair use analysis is probably not necessary. "Tiger Rag" by Louis Armstrong is listed on a number of websites as being in the public domain. If this is the case, Professor Lazarus is free to use it without restriction. (Though if the version on the Delta CD had been remastered from the original, copyright might apply to the sound recording.)
Note: Determining whether a work is in the public domain can be difficult and time-consuming. For more information, see the "Use resources in the public domain" box on this guide.
Professor Lazarus need not bother to upload his copy to the streaming server. The piece is freely available online in multiple locations, for example in the Internet Archive.
Video example #1
Professor Wang is teaching an online Introduction to Film Studies course. Her face-to-face version of the class meets Mondays, Wednesdays, and Fridays for 50 minutes, with three-hour film screening sessions on Tuesday evenings. Students in the class learn about formal analysis, genre studies, film history, and theory. Through class lectures and readings, watching films, and several short papers, students gain the basic critical tools necessary for understanding and analyzing the language of motion pictures. The films studied in the course are: Casablanca (1942, Michael Curtiz), Touch of Evil (1958, Orson Welles), Breathless (1960, Jean-Luc Godard), The Virgin Suicides (1999, Sofia Coppola), The Bicycle Thieves (1948, Vittorio De Sica), and Walk Hard (2007, Jake Kasdan).

The online course is being offered over the summer. Many students are working full time or have moved home, therefore they are not able to go to the Media Resources Center in the university library to watch the films there. So that students can view the assigned movies, Professor Wang asks the library to upload their DVD copies of the films to the university's streaming server. The streamed films will be available to students through Sakai for the duration of the summer semester only. Only students registered for the course will be able to access the films, and students will not be able to download or copy the films. Is this fair use?
**Video example #1**

**Analysis**

1. Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?

Yes, Professor Wang's use is transformative, since she is using films originally produced for entertainment purposes to educate students about film history and theory. The professor and the students are subjecting the films to critical commentary and detailed analysis in a noncommercial educational context.

2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

These films are creative works, and they were used in their entirety, which would tend to weigh against fair use. However, given that the use is transformative and takes place for educational purposes, the use is more likely to be fair. Students are not normally expected to purchase copies of films as course materials; rather they rely on the copy acquired by the university library. In this way, Professor Wang's streaming of the films did not cause market harm to the copyright owners.

Fair use: Yes.

Note: The transformative and educational nature of Professor Wang's use of the films and the facts that access was limited to students enrolled in her class and that students could not copy or download the films support a fair use argument. This does not mean, however, that the copying of video content to university servers in order to stream it to students will not be challenged by rightsholders. In fact, the Association for Information Media recently sued the University of California Los Angeles for copyright infringement for doing exactly this. The case was dismissed on procedural grounds, so no decision was rendered on the legality of streaming.

UCLA faculty produced a strong statement of principles on the use of streaming videos and other educational content, asserting that "streaming video is an essential type of content for instruction" that "must be available in the virtual classroom," and that "streaming technologies serve the purpose of time-shifting for students and faculty alike." They believe that "if it would be lawful for a teacher to show a particular piece of multimedia to students enrolled in a class that meets in a physical classroom, it should be fair use to permit the viewing or hearing of that multimedia, through time-shifting technologies, in a virtual classroom that restricts access to those same enrolled students."

In the 1984 case Sony Corp. v. Universal City Studios, Inc., the Supreme Court held that time shifting was fair use in connection to the noncommercial home recording of television shows for delayed viewing because it did not deprive the copyright owners of revenue.

An Issue Brief from the Library Copyright Alliance on the streaming of films for educational purposes suggests that "courts are likely to treat as fair use many instances of streaming video to students logged in to class sites." The brief's authors write, "Courts likely would treat educational uses of entertainment products, such as uploading a feature film to a course website so that students could stream it for purposes of analysis, as repurposing" [i.e. as transformative use]. The brief goes on to suggest that "educators could buttress their fair use claim by recontextualizing works on course websites through selection and arrangement and the addition of background readings, study questions, commentary, criticism, annotation, and student reactions."

**Video example #2**

Professor Soleway is teaching an online course on the depiction of divorce in popular culture. His course notes are posted online in Sakai along with background readings and other course content. For a segment on divorce
in popular film, Professor Soleway digitizes short clips from each of three movies: *Divorce American Style* (1967, Bud Yorkin), *Kramer vs. Kramer* (1979, Robert Benton), and *The Squid and the Whale* (2005, Noah Baumbach). He uploads the clips to the university's streaming server and embeds them in his course notes in Sakai.

Professor Soleway's course notes set the context for each clip by prefacing it with an explanation of what he wants students to watch for. After each clip, he elaborates on what he thinks it illustrates about the popular representation of divorce. After viewing the clips, students are given a list of questions that require them to critically reflect on the content of the clips. Students post their responses in the discussion section of the course site. Is this fair use?
Video example #2

Analysis

1. Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?

Yes, Professor Soleway's use is transformative, since he is using films originally produced for entertainment purposes to examine cultural representations of divorce. The fact that he surrounds each film clip with commentary that places the clip in the context of his broader argument and that students are required to critically analyze the clips' contents strengthens the transformative nature of his use, as does the fact that his use takes place in a noncommercial educational context.

2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

These films are creative works, but limited portions of each were used, just enough to convey how the film treated the topic of divorce. Given that limited portions of each film were used, that Professor Soleway's use is transformative, and that the use took place in a noncommercial educational setting, the use is likely to be fair.

Fair use: Yes.
Video example #3
Professor Mercer is preparing to teach a face-to-face nursing class. She plans to use Sakai to post the course syllabus and grades and to allow students to hand in assignments. As she's working on her syllabus, she receives in the mail an examination copy of Mosby's Nursing Video Skills - Student Version DVD, 4th Edition (Elsevier, 2013). She reads the description on the back of the DVD: "With high-definition videos demonstrating how to perform nursing procedures, Mosby's Nursing Video Skills provides up-to-date, step-by-step instructions for the most important nursing skills. Printable procedure checklists and interactive screens of required equipment make it easier to learn and remember skills, and new animations show what's happening inside the patient's body. For each skill, NCLEX exam-style review questions help you assess your knowledge." Noting that five of the procedures she will be covering in class are included on the DVD, she asks the library to copy these segments and upload them to the university's streaming server so that she can embed them in Sakai for students to view. Since there are a total of 130 procedures on the DVD, she's using less than 5% of the content. Is this fair use?
Video example #3
Analysis

1. Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?

No, Professor Mercer's intended use is not transformative. The original purpose of the DVD is to instruct nursing students in how to perform certain skills, and Professor Mercer wants to use the video for the same purpose.

2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

This video is a work of nonfiction, which favors fair use. However, the DVD is marketed for nursing students. It is likely that Professor Mercer's intended use of the video (and other uses like hers, were they to occur) would damage the market for the DVD, since students would rely on the streaming content instead of purchasing their own copies of the DVD. Thus the amount she wants to use, though a small part of the total, is not appropriate.

Fair use: No.

Note: According to the Code of Best Practices in Fair Use for Academic and Research Libraries, "Closer scrutiny should be applied to uses of content created and marketed primarily for use in courses such as the one at issue (e.g., a textbook, workbook, or anthology designed for the course). Use of more than a brief excerpt from such works on digital networks is unlikely to be transformative and therefore unlikely to be a fair use." The fair use argument is helped, however, by the fact that the videos were placed in Sakai and limited to students enrolled in the course.

As explained in the Code of Best Practices in Fair Use for OpenCourseWare, "'Bright line' tests and 'rules of thumb' are not appropriate to fair use analysis, which requires case by-case determinations made through reasoning about how and why a new use recontextualizes existing material." Thus, while amount used is an important factor in whether any use is fair, fair use cannot be decided by relying on the specific percentage of a work used or similar guidelines.
Video example #4
Professor White is teaching an online women's studies course. Week three covers the depiction of women in advertising. Professor White plans to assign students two articles and one book chapter as required reading and to have them watch the documentary *Killing Us Softly 4: Advertising's Image of Women* (2010, Jean Kilbourne). Students will be required to answer questions and share their reactions about the readings and the film through the discussion section of the course website on Sakai. Professor White will then facilitate a real-time class discussion through Sakai's web meeting function.

Since the class is fully online, Professor White hopes to load the documentary film on the university's streaming media server. She speaks with the Media Resources librarian, who confirms that the university library has purchased the DVD at the college and university rate of $295. The librarian does some more investigation and learns that the distributor of the film, the Media Education Foundation, offers a 1-year streaming subscription to the video for $150 and a 3-year streaming option for $295. Their streaming videos can easily be embedded in learning management systems like Moodle, Blackboard, and Sakai. But since the library has already purchased a copy of the film, the librarian proceeds to upload it to the university's streaming server for Professor White. Is this fair use?
Video example #3

Analysis

1. Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?

No, Professor White's intended use is not transformative. She is using the documentary for the same purpose as it was intended: to educate students about the depiction of women in advertising. Indeed, she is using the film to convey the content of the course to the students instead of, for example, compiling her own examples of women in advertisements and incorporating them into lecture notes that she herself wrote.

2. Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

This video is a work of nonfiction, which favors fair use. However, the DVD is marketed as an educational tool, thus its use for in an educational context is not transformative.

An argument for fair use could nonetheless be made on two grounds:

- Because the DVD is marketed to institutions, not individual students, to stream the university's lawfully-purchased copy to students causes no market harm to the rightsholder through the loss of DVD sales and is therefore an educational fair use.
- UCLA faculty have argued that "streaming technologies serve the purpose of time-shifting for students and faculty alike." In the 1984 case *Sony Corp. v. Universal City Studios, Inc.*, the Supreme Court held that time shifting was fair use in connection to the noncommercial home recording of television shows for delayed viewing because it did not deprive the copyright owners of revenue. (See video example #1 above.)

The fact that the Media Education Foundation offers a streaming option, though, would weaken this argument for fair use since they could show market harm through the loss of streaming revenue.

Fair use: Probably not.
Professor Peterson is teaching an online English seminar that examines discourses surrounding anti-drug messaging. In the course, he and his students will critically evaluate public service announcements, anti-drug campaign material from government agencies and non-profit advocacy groups such as the Partnership for a Drug-Free America, and selected articles from newspapers and popular magazines warning of the dangers of drug use. He plans to begin the course by examining one of the earliest pieces of anti-drug propaganda, the 1936 anti-marijuana film *Reefer Madness*. Fortunately, the university library owns a copy of this cult-classic. Professor Peterson asks the media librarian to upload the video to the university's streaming media server so that the students in his online class can access it. Is this fair use?
Video example #5
Analysis
A fair use analysis is probably not necessary. *Reefer Madness* is listed on a number of websites as being in the public domain. If this is the case, Professor Peterson is free to use it without restriction.
Note: Determining whether a work is in the public domain can be difficult and time-consuming. For more information, see the "Use resources in the public domain" box on this guide.
Professor Peterson need not bother to ask the library to upload its copy to the streaming server. The film is freely available online in multiple locations, including the Internet Archive, Amazon.com, and YouTube.