

Some librarians express concern that employing one's fair use rights in good faith may inadvertently make material available for potential misuse by others. But—just as they must now—all future users will have to engage in fair use analysis for themselves and in their own context. Libraries should of course be prepared to assist students and others who have questions about how to exercise their own rights with regard to library materials, but the ultimate responsibility will lie with the user, not the library. But—just as they do now—libraries that employ fair use responsibly to make material available to students, to researchers, or even to public view are unlikely to have legal liability for uninvited and inappropriate downstream uses.

Perfect safety and absolute certainty are extremely rare in copyright law, as in many areas of law, and of life. Rather than sit idle until risk is reduced to zero, institutions often employ “risk management,” a healthy approach to policy making that seeks to enable important projects to go forward despite inevitable uncertainty by identifying possible risks (legal and otherwise) and reducing them to acceptable levels. This code of best practices should be of great assistance in arriving at rational risk management strategies, as it provides a more accurate picture of the risk (or lack thereof) associated with exercising legitimate fair use rights. Indeed, simply by articulating their consensus on this subject, academic and research librarians have already lowered the risk associated with these activities.¹¹

11. The law bars statutory damages for unauthorized reproduction of copyrighted works where employees of nonprofit educational institutions or libraries have “reasonable grounds for belief” that their use was fair, even if the court ultimately decides the use was not fair. See 17 U.S.C. 504(c)(2).

CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES

GENERAL POINTS ABOUT THE PRINCIPLES

This code of best practices identifies eight sets of common current practices in the use of copyrighted materials in and around academic and research libraries, to which the doctrine of fair use can be applied. It articulates **principles** describing generally how and why fair use applies to each such practice or situation. Each principle is accompanied by a list of considerations that the library community believes should inform or qualify it: **limitations** that should be observed to assure that the case for fair use is strong, and **enhancements** that could further strengthen that case. Please note that enhancements represent what the community believes are additional practices that demonstrate “above and beyond” efforts to add value to existing material or accommodate the interests of other stakeholders; such measures are laudable when they will not cause undue hardship but are not prerequisite to support a strong fair use rationale.

Some of the limitations and suggested enhancements involve the use of technical protection measures (TPMs) to help ensure that material intended for a particular institutional audience is confined to that audience. In some circumstances, the use of TPMs may be a meaningful demonstration of “good faith” on the part of the library in question. However, TPMs come in many varieties; for a library’s purposes, less obtrusive ones (password protection or watermarking) may be as or more appropriate than, for example, encryption.

Because, in the opinion of some courts, fair use is sensitive to whether a use is undertaken in good faith, some of the principles include limitations or enhancements that address broader ethical concerns. While issues such as respecting privacy and including proper attribution may seem unrelated to copyright at first, they show good faith and serve the same overarching goals of responsible stewardship of library collections. These values are central to academic and research libraries, of course, but it is worth noting that by doing what comes naturally, libraries are also strengthening their fair use case.