

In addition, the code refers at several points to providing copyright holders an opportunity to register concerns or complaints about a library's decision to employ fair use. The library community believes that engaging in such a process should not necessarily lead to automatic removal of content. Rather, it would trigger a conversation between the library and the rights holder, which would inform the institution's decision about whether to remove or maintain the material. Welcoming this interaction with a rights holder shows the library's good faith and provides an opportunity to develop voluntary arrangements that benefit all parties.

The fair use doctrine draws no blanket distinctions among different media or among different formats. Librarians felt strongly that except in narrow, specific instances, all kinds of content (e.g., text, image, audiovisual, music) should be subject to the same principles. Likewise, they did not distinguish generally between uses in various media. So, except as otherwise indicated, a digital copy should be considered on the same footing as an analog one for purposes of fair use.

The situations below concern the fair use of copyrighted materials, not the way the user acquires the copy from which she works. When a user's copy was obtained illegally or in bad faith, that fact may negatively affect fair use analysis; similarly, special contractual restrictions (such as conditions on the use of donated material) may circumscribe fair use. The principles therefore assume the library or user has obtained a copy in good faith and that it is not subject to conflicting license or contract restrictions.

While the principles address separate situations, in practice these areas are sure to overlap from time to time; some special collections will need digitizing for both scholarly access and preservation, for example, implicating both the third and fourth principles. Libraries should feel free to consult multiple principles to determine the best fair use rationale to apply to their specific situations.

## **ONE: SUPPORTING TEACHING AND LEARNING WITH ACCESS TO LIBRARY MATERIALS VIA DIGITAL TECHNOLOGIES**

### **DESCRIPTION:**

Academic and research libraries have a long, and largely noncontroversial, history of supporting classroom instruction by providing students with access to reading materials, especially via physical on-site reserves. Teachers, in turn, have depended on libraries to provide this important service. Today, students and teachers alike strongly prefer electronic equivalents (e-reserves for text, streaming for audio and video) to the old-media approaches to course support. Section 110(2) of the Copyright Act provides specific protection for some streaming and other uses, but it does not cover the entire variety of digital uses that are becoming increasingly important to twenty-first-century instruction. Over time, a set of practices has grown up around the related but distinct practice of providing students with physical “course packs,” which typically occurs outside the library setting. The following principle is not intended to address that activity, but rather to focus on emerging digital uses in the library context. Fair use will play an important role in making these uses possible.

There are multiple bases on which these library uses can be considered fair ones. These modes of course support occur in a nonprofit educational environment, can be persuasively analogized to activities specifically authorized by Congress in Section 110 of the Copyright Act, may be supported by a “place-shifting” argument,<sup>12</sup> and are susceptible to a compelling transformativeness rationale. Most of the information objects made available to students, in whatever format, are not originally intended for educational use. For example, works intended for consumption as popular entertainment present a case for transformative repurposing when an instructor uses them (or excerpts from them) as the objects of commentary and criticism, or for purposes of illustration. Amounts of material used for online course support should be tailored to the educational purpose, though it will not infrequently be the case that access to the entire work (e.g., an illustrative song in a class on the history of popular music) will be necessary to fulfill the instructor’s pedagogical purpose. It is also reasonable for works to be posted repeatedly from semester to semester to the

---

12. Space-shifting is a theory of fair use often employed in the context of new technological uses of media. See, e.g., David Hansen, “Why Can’t I Digitize My (Institution’s) Library?,” *Scholarly Communications @ Duke*, July 27, 2011, <http://blogs.library.duke.edu/scholcomm/2011/07/27/why-can-t-i-digitize-my-institution-s-library>.