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.
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.