

Forum of Accessible Education

Code of Best Practices for Use of Works in Teaching and Research

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A. Introduction

"Fair use" is a legal principle that balances the protection of copyrights with that of users' rights. The use of protected works in the academic setting, which consists primarily of teaching and research, is of the utmost importance; without it we could not rear an educated next generation in Israel.

There is no easy means of determining the fair use of a work. Section 19 of the Copyright Law, 2007 (hereafter: Copyright Law) merely provides a framework for examining the circumstances under which use will be considered fair. The users' rights enshrined in Section 19 of the Copyright Law do not constitute an exhaustive list. It is not possible to create a single and accurate list of all of the rights of users. It is imperative that the principle of fair use be granted flexible interpretation in a manner that reflects the unique needs of Israeli academia.

The best practices outlined in this document reflect the common position among higher education institutions regarding the fairness of use of works for teaching and research purposes. These practices are designed to assist academic institutions in Israel in reaching a decision in a given situation as to whether a particular use is fair and thus allowed according to law.

These best practices are intended to serve as an aid in reducing the uncertainty surrounding the types of permissible uses of works in the context of academic use by clarifying what exactly is permissible and by providing rules of thumb for borderline cases necessitating the exercise of discretion. This set of best practices is not intended to rule out additional situations in which use would also be fair and thus permissible. These best practices do not purport to place a maximum "ceiling" or a minimum "floor" on the license to use works freely. Indeed setting a quantitative rule regarding fair use of works is problematic, as the principle of fair use is flexible by nature and such is its hidden advantage. Nevertheless, the need to implement a complex system of considerations on a daily basis to the immense amount of uses is not practical and thus leads to uncertainty regarding what is permissible. This uncertainty prevents vital use of works and detracts from the realization of the law's goals. Having a quantitative measure assists in providing certainty with respect to permissible use and enables identification of circumstances requiring more complex discretion. Therefore, this measure can assist in accessing the necessary materials for teaching while serving the goals of the law.

These best practices are followed by the academic institutions listed in Appendix A, all of which either took part in the development process or have adopted them. They apply to the activities of academic institutions that are not-for-profit institutions engaging in research and teaching. These participating institutions recognize the paramount importance of the use of works in the advancement of teaching and research, alongside the need to preserve copyrights. The use of works for academic purposes is fundamentally different from all other use of works, whether commercial or not, as it is vital to academic activity. Academic activity is essential to the existence of an enlightened and educated society and for the training of new researchers and creators. Accordingly, the use of works for this objective serves the goals of copyright laws.

These best practices are based on the assumption that the activities of the institutions are conducted in good faith, reasonably, and while taking into account the full set of conditions, needs and requirements in every given situation.

B. Guidelines for Appropriate Interpretation of "Fair Use"

Section 19 of the Copyright Law stipulates that:

"19. Fair Use

- a) Fair use of a work is permitted for purposes such as these: self-study, research, critique, review, news reporting, quotation, or teaching and examination by an educational institution.
- b) In examining the fairness of the use of a work under this section the following will be considered, inter alia:
 - (1) The purpose of the use and its character;
 - (2) The character of the work being used;
 - (3) The extent of the use, in qualitative and quantitative terms, proportionate to the entire work;
 - (4) The impact of the use on the work's value and potential market.
- c) The minister is authorized to establish conditions under which use will be considered fair use."

Section 19 of the Copyright Law outlines the framework for examining the fairness of the use of a work in a given situation. As a more diverse body of case law accumulates, the clarity of the rule increases. In the absence of a guiding Israeli court judgment regarding the implementation of the fair use rule as it pertains to the use of works for teaching and research purposes, the principles of interpretation below reflect the common position among the academic community with respect to the rules of permissible and prohibited uses of works in the academic setting.

1. Purpose of the Use

Section 19(a) of the Copyright Law stipulates that in order to assess whether a particular use of a work is fair one must first examine the purpose of the use. The purpose of the use serves as a type of baseline test to determine whether it is justified to permit the use of the work in a free manner.

In our case, the purpose of the use is for teaching, research and study, within the range of activities of a not-for-profit academic institution. The law wishes to encourage use for these purposes and thus explicitly permits this type of use. Use of works for teaching and research purposes requires the kind of latitude in choosing content that ensures accessibility of materials necessary for students and researchers according to professional considerations alone. Therefore, the starting point in interpreting Section 19 is that fair use for teaching and research needs is permissible, unless the various considerations listed in Section 19(b) clearly tip the scales in favor of preventing the use.

2. Considerations

1. Purpose and Character of the Use

In examining the fairness of the use its purpose and character must be considered. To this end, each of the following characteristics shall constitute a consideration supporting the fairness of the use:

A. Non-commercial use – One of the central considerations in examining the character of the use is the question of whether the given use is commercial. Non-commercial use of a work supports a determination that it is fair and thus permitted.

Higher education institutions operate on a not-for-profit basis. The mere fact of collecting tuition fees does not render the institution's activities commercial. Even if the tuition is designed to cover expenses, there is no comparison between commercial activity and the activities of academic institutions (see, e.g. the judgment in AA 326/00 Holon Municipality v. N.M.C. Music Ltd. et. al., PD 57 (3) 658 (2003), holding that the collection of membership fees by a public library did not render its activities commercial in nature). Likewise, even if the products of the research are eventually commercialized, the research is first and foremost academic research.

B. Transformative Use – An additional consideration that was emphasized in American case law within the context of examining the character of use is the question of whether the use of the work is "transformative." Transformative use is, for instance, use that alters the work being used by adding new expression, meaning or message (Cambell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579, (1994)); or, use of a work in a different manner or for a different purpose or function than that of the original work (Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007)). The conclusion that the use of a work can be said to be transformative supports a determination that it is fair and thus permitted.

Oftentimes, the use made of a work for teaching and research purposes is different from the purpose for which the work was created, even if no alteration was made to the content of the work itself, which supports the conclusion that the use is fair and therefore permitted. Examples of such transformative use are the insertion of an excerpt from a book that was not intended for teaching purposes into a collection designed for teaching purposes, or the inclusion of a newspaper article in an exam.

C. Use that the Copyright Holder Presumably Would not Oppose – The Fair Use Doctrine was designed, first and foremost, to authorize the use of works in situations in which copyright holders are opposed to such use. Nevertheless, at times the Fair Use Doctrine can serve to legalize the use of works in cases in which it is safe to assume that the copyright holder of the work would not oppose it. Sometimes the costs entailed in obtaining the copyright holder's consent to use her/his work are liable to undermine and effectively prevent the use, even though the substantive considerations relating to teaching and research require the use of the particular work. When it is reasonable to presume that a desired use of work is of a nature to which the copyright holder of a given work would not be opposed, such a conclusion lends support to the determination that the use is fair and thus permissible.

Examples of uses to which it may be assumed that the copyright holder would not be opposed include cases in which the use is nearly de minimus or where only a part of the work is used such that even if it is an essential part, the amount is minimal. An additional example is where the use is consistent with the objective of the work's production, such as academic research, which in its nature is intended for dissemination among the academic community.

II. Character of the Work Used

In assessing the fairness of the use, the character of the work used must be considered. On this matter, each of the characteristics listed below will be considered a factor supporting the conclusion that the use is fair:

A. Works describing facts, processes, data, or those which present scientific research findings; when the work primarily contains materials that are not protected in and of themselves, such as statistical data, charts, historical facts, scientific theses, or exercises, the extent to which use will be permissible will be broader, as long as the work is not a textbook;

B. Works with an academic character, which were written by researchers or lecturers in a higher education institution or similar academic institution outside of Israel;

C. Works that are not available electronically, such as is the case with databases, electronic journals, or other means of commercial dissemination of electronic books;

D. Works that are no longer on the market and that cannot reasonably be obtained;

E. Works that cannot be purchased as textbooks by any reasonable or ordinary means by students in higher education institutions. When examining the use of books, it is important to assess whether the book is a textbook or not. A "textbook" is a book that was written with the primary purpose of serving teaching, while a book that is not a textbook, even if it may very well be used for teaching purposes, was not written with this

declared goal. Regarding non-textbooks, the extent of permissible use of the work will be broader.

III. Extent of the Use (Qualitative and Quantitative) Relative to the Entire Work

Another consideration that must factor into any analysis of whether use is fair is the extent of the use of the work in question. In this regard, each of the following characteristics shall be considered supportive of the conclusion that the use is fair:

A. The extent of the use of the work must be proportionate to what is necessary for the purposes of teaching or research. The decision that the amount of use is proportionate in order to conduct the research or teaching may be made on the basis of a declaration by the person requesting to use the work, such as a professor, lecturer, practitioner, or the like.

B. The test that must be applied is whether the amount copied is reasonably necessary for achieving the teaching goal, or whether a smaller amount could have achieved the same goal. For instance, with respect to a photograph or picture, the realization of the teaching goal typically will require copying the work in its entirety. The same is true of a scientific article or a newspaper article. On the other hand, it is clear that an entire book need not be copied for teaching purposes. In this context there is no definitive number of pages, and there are no precise amounts, nor any quantitative formula, that accurately reflect an appropriate proportion. Nonetheless, a quantitative suggestion has been formulated and will be detailed below.

IV. Impact of the Use on the Work's Value and Potential Market

In order to assess whether the use of a work is fair, the impact of the use on the work's value and potential market must be taken into consideration. To this end, each of the characteristics described below will be considered to support a conclusion that the use is fair:

A. Generating copies of a work, where the copies do not constitute a substitute for the original work, is generally considered fair, as this type of use does not harm the market for the original work. Thus, if the use of the work does not meet the demands of the original market for the work, then the use should be considered fair.

B. The existence of financial harm to the copyright holder as a result of the use of the work does not preclude the fairness of the use. The copyright holder's expectation of profit is restricted to uses of the work that do not constitute fair use. Therefore, the nature of the financial harm must be examined in each case individually. For example, an assessment must be made as to whether the financial harm was caused as a result of having provided a substitute for the work, or whether the financial loss was caused by the mere existence of a use not requiring payment. Financial harm of the latter type does not preclude the fairness of the use, as otherwise the Doctrine of Fair Use would be devoid of meaning. Additionally, the extent of the harm must be examined. For instance, a conclusion that the harm is minor and of little value will support a determination that the use is fair.

C. In determining the existence of a potential market for a work, the legitimate expectations of the copyright holder must be assessed vis-à-vis the said new market. Use of a work within the context of teaching and research is likely to fall outside of these expectations. In this context, a technological limitation on the type of users, such as limiting the use to the students of the course for the duration of the course, has the ability to ensure that only those who are authorized to make fair use of the work will be entitled to access the work and that the use of the work will not harm additional markets beyond the arena of teaching and research in academic institutions.

V. Credit – Citation of the Work

An additional consideration in examining the fairness of use of a work, which was formulated by Israeli case law, is adherence to the requirement that credit be given to the creator of the work that was used (see, e.g., the judgment in CA 2790/93 Eisenman v. Cameron, PD 54 (3) 817). Thus, in using a work or a part thereof, it is imperative that credit be given to the creator of the work, to the extent and degree that are customary.

C. Best Practices for Use of Works in Teaching (Not Including Research)

1. Access to Teaching Materials in Digital Form (digitized materials and online syllabi including full texts on course websites)

I. Description of the Use

Students studying in higher education institutions must be able to access materials through digital means. Such access is acquired via various accessibility technologies commonly used in the academic community, such as: the internet, personal computers, media players, and cellular phones (hereafter "digitized materials"). Digital accessibility is provided for teaching purposes and is vital in satisfying the needs of instruction and study in the 21st Century. The system of digitized materials is designed to provide students with access to teaching materials in a format that is efficient for reading and searching, as well as cost-effective and environmentally friendly. Digitization is intended to provide students with access to reading materials necessary for their coursework at any time and from anywhere, during live courses and in long-distance learning.

II. The Rule

1. Access to learning materials in digital form is permissible when needed for the teaching of the course and when conducted to the extent and degree necessary for the purposes of teaching the course.

2. It is recommended that the rule be implemented in each institution via a decision-making mechanism as such: The institution will appoint a person to be responsible for evaluating the permissibility of the use of a protected material. This person will apply the best practice rule detailed below. In cases in which the best practice rule does not produce a clear conclusion, the decision will be transferred to a forum (an appointed person, professional staff, or committee) that will exercise its discretion according to institutional policy.

3. The decision as to whether use is fair requires the examination of the conditions in paragraphs 3 and 4 below:

a. The teaching material is required by an instructor/lecturer for a course taught at the institution (for example, based on the instructor's declaration that the materials are needed for teaching the course).b. Free and legal access to the material is not provided through sources open to the public on the internet (such as a final draft on the home page of the author, or through the databases of the parent institution, or the academic library).c. Access to the material is limited to students of the course and to the administrative and academic staff of the institution, and to the duration of the course and its exams.d. The institution's library has legal access to at least one copy of the book from which the materials were taken.

4. Fair use is proportionate use for teaching and research purposes. There is no "algorithm" into which data can be entered and a result generated; rather, various considerations must be examined together in order to decide the extent of permissible use.

It should be emphasized: the extent of use described below is the minimum extent permitted and is designed to serve as a "rule of thumb" for quick identification on its face of permitted use. In many cases, more extensive use than that described below would also constitute fair use. The determination in a case of that sort requires the exercise of discretion, given the totality of considerations described above, and the determination should be made by s/he who is authorized within the institution.

In determining the extent of use that is fair use, the following considerations must be taken into account:

- The use of approximately one-fifth of a book constitutes fair use. The test is not only quantitative but also qualitative.
- Without detracting from the right to scan a whole book according to the provisions of Section 30(a) of the Copyright Law, it is permissible to scan a whole book even when the library's collection does not contain a copy, where the book is out of print.
- The use of an article from a journal or from a book that is a collection of articles, in its entirety, constitutes fair use. In a case in which several articles are needed for the same course from one booklet, edition, or volume of a journal, or from one book that is a collection of articles, the fairness of the use must be examined in light of all of the considerations outlined above.
- The use of a work that cannot be divided into parts (such as a picture, photograph, chart, graph, or poem) constitutes fair use.

5. Uses beyond the extent described above, or which do not meet the conditions mentioned above, will be fair use in many cases; however, they require the exercise of discretion regarding the full set of standards.

2. Access to Teaching Materials in Print Form

I. Description of the Use

Alongside the need for accessibility of works in digital form in the context of teaching in higher education institutions, it is also necessary that access to teaching materials be available in the traditional print form. Course readers are a print collection of articles, excerpts from books, or other documents included in the course reading list. The purpose of print is to facilitate student reading and review of the course material based on the pedagogical needs and academic freedom of each instructor.

II. The Rule

Given that course readers are actually a printed version of materials to which students can have access through digital means, the best practices discussed above regarding digitized materials apply, *mutatis mutandis*, to printed readers as well.

1. The decision as to whether use is fair requires the examination of the conditions in paragraphs 1 and 2 below:

a. The teaching material included in the reader is required by the instructor for the course being taught at the institution (for example, by declaration by the instructor that the materials are required for teaching the course).
b. The readers are to be printed only for students enrolled in the specific course and will be provided to students of the course alone.
c. The institution's library has legal access to at least one copy of the book from which the materials were taken.
d. The price of the readers reflects the cost of their production.

2. The extent of use of protected material. Fair use is the proportionate use of a work for teaching and research purposes. The permissible extent of use of protected works in the context of printed readers must be determined according to the rules that apply to digitized materials, in other words:

- The use of approximately one-fifth of a book constitutes fair use. The test is not only quantitative but also qualitative.
- The use of an article from a journal or from a book that is a collection of articles, in its entirety, constitutes fair use. In a case in which several articles are needed for the same course from one booklet, edition, or volume of a journal, or from one book that is a collection of articles, the fairness of the use must be examined in light of all of the considerations outlined above.
- The use of a work that cannot be divided into parts (such as a picture, photograph, chart, graph, or poem) constitutes fair use.

3. Uses that do not meet the conditions described above or that are beyond the extent described above will constitute fair use in many cases; however, they require the exercise of discretion regarding the full set of standards.

Appendix A

The higher education institutions that took part in formulating these best practices and/or have adopted them:

University of Haifa
The College of Management Academic Studies
Bar-Ilan University
Ben-Gurion University
The Hebrew University of Jerusalem
The Open University
Tel Aviv University
The Technion (Technical College)
The Weizmann Institute of Science
The Ariel University Center
Beit-Berl Academic College
Gordon College
Holon Institute of Technology (HIT) College
The Interdisciplinary Center (IDC) Herzliya
Kibbutzim College of Education Technology and Arts
Natanya Academic College
Oranim Academic College
Orot Israel College
Ort Braude College
Tel Hai Academic College
Western Galilee College
Safed Academic College
Academic College of Emek Yezreel
The Academic College of Tel Aviv
Sha'arei Mishpat College