Yes You Can
Scan that Textbook

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Agenda

- Welcome and introductions
- Fair use fundamentals and purpose
- Fair use and educational materials
- Fair use analysis of scanning textbooks
- Best practices, licensing, and managing risk
- Questions
Fair Use Fundamentals and Purpose

“To promote the Progress of Science”

A rule favoring the public interest

A flexible and responsive right - the factors
“To Promote the Progress of Science”

Article 1, Section 8, Clause 8: Congress’ power to create copyright law

“To-by” structure

“Built-in safety valves”
A Rule Favoring the Public Interest

- “[W]hile I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science.” - Lord Ellenborough
- Fair use “permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster” - Stewart v. Abend
A flexible and responsive right

- Other limitations and exceptions are great, but rigid—
  - Who qualifies
  - Which works
  - What context
  - Result of lobbying

- Fair use is flexible and responsive
  - Created by judges, not congress
  - Context sensitive
  - Decided using 4 factors:
    - Purpose of use
    - Nature of work used
    - Amount + substantiality of use
    - Market effect of use
Fair Use in E-Reserves and Course Management Systems

(generally speaking)
Fair Use as Applied to Education

Courts favor educational use

“Copyright has always been used to promote learning, allowing some leeway for educational fair use furthers the purpose of copyright by providing students and teachers with a means to lawfully access works in order to further their learning in circumstances where it would be unreasonable to require permission.” Cambridge Univ. Pr. v. Patton, 2014.
Four Factors for E-Reserves & Course Management

First Factor: The first factor always favors fair use where the use is for a nonprofit educational purpose for a nonprofit educational institution, even though the use if nontransformative and serves the same overall function as the original work. Cambridge, 2014.

Second Factor: The second factor is neutral in fact-based works, and of relatively little weight.
Four Factors for E-Reserves

Third Factor: The third factor is intertwined with the first factor, since the amount used should be reasonable *in light of the purpose of the use.*

There is no bright-line rule.

*Also consider the impact on the market for the original work under the third factor as it impacts the fourth factor*
Four Factors for E-Reserves

Fourth Factor: Extent of the market harm caused by the use

- Harm to the market to the original work
- Harm to the market for the license for the use
  - Book except
  - Video streaming license
Balance the Factors

- In light of the purpose of copyright
- Fourth factor gets heavy weight, especially when there is significant market demand
- With little weight on the second factor
ARL Code of Best Practices in Fair Use for Academic and Research Libraries:

Principle One: Supporting Teaching and Learning with Access to Library Materials Via Digital Technologies

- Closer scrutiny should be given to content created specifically for courses (textbooks, workbooks)
- Narrow content to fit pedagogical purpose
- Limit availability to when it is needed
- Limit to students in the course.
Scanning Textbooks
“Fair use is made for just these kinds of contingencies.”

https://tinyurl.com/tvnty3a
Purpose and Character

● The “heart of the fair use inquiry”

● General support for education

● Access as a public good
  ○ Accessibility in *Hathi*
  ○ Film of public value in *Time v. Bernard Geis*
  ○ Voting machines in *Diebold*
  ○ . . . and here
Nature of the Original

- Fact-specific

- In cases like this, the second factor “has rarely played a significant role in the determination of a fair use dispute.” (Author’s Guild)

- Let’s move on
Amount and Substantiality

● Flexible based on purpose - no black and white rules

● How much is needed for the pedagogical purpose?

● Be reasonable but don’t agonize
Market Harm

- Spontaneous/exigent circumstances
- Limit access to enrolled students during the course
- Use excerpts where reasonable
- Check for and rely on licenses where they are available
“The fair use doctrine accommodates the flexibility required by our shared public health crisis, enabling society to function and progress while protecting human life and safety.”

https://tinyurl.com/tvnty3a
Best practices and managing risk--Ways to proceed

- Most important risk to manage is the risk to people’s health and safety
- As always--work with your wider library and campus community
- Keep the first and fourth fair use factors in mind. What needs to be reproduced so that faculty can teach the rest of the semester?
- Restrict access to the students and classes that need it. Learning management system, e-reserves system
- Consider the safety of staff who are scanning. Faculty may need to do their own scanning
- May need to relax some of the control you usually exert
Best practices and managing risk--Leverage existing licenses & special emergency offers

- Take stock of what you already license that students & faculty can use
- What can you license quickly for multi-user access?
- Many vendors lifting their paywalls temporarily
- Lists available at [https://tinyurl.com/vendorsupportedaccess](https://tinyurl.com/vendorsupportedaccess) and elsewhere
- Some have had some success with approaching rights holders directly
- UNC example *du jour*: Texts for anthropology class
Best practices and managing risk--We’re all distance educators now

- For once, the TEACH Act (17 USC 110 (2)) may be your friend
- Applies when a copyrighted work is transmitted in order to be performed or displayed
- Take a look at LSU’s TEACH Act Toolkit (h/t Peggy Hoon) https://www.lib.lsu.edu/services/copyright/teach/index
- TEACH Act has lots of moving parts. See the checklists that are part of the toolkit for a rundown of all of them
- TEACH Act doesn’t cover everything we do, but it will be applicable to some of our present dilemmas
Best practices and managing risk--Use open resources

- Open textbooks:
  - Open Textbook Library https://open.umn.edu/opentextbooks/
  - Merlot https://www.merlot.org/merlot/index.htm
  - OER Commons https://www.oercommons.org/
- Directory of Open Access Journals https://doaj.org/
- Public domain material online
  - Internet Archive, Gutenberg Project, Hathi Trust, Librivox...
(Evolving!) Practices at UVA

A cover page accompanies each scan made as part of our COVID-19 coping efforts, with this short message:

“This scan is being provided as part of the University of Virginia‘s effort to prevent the spread of the COVID 19 virus. It is for your personal use only, and is only intended for use during the time when University public health measures prevent access to your personal copy or a copy on physical reserve at the Library. Please discard this copy once you have access to your personal copy or to the physical copy at the Library, and do not share it.”
This guidance has been added to our Instruction Scanning Request form online:

**Scanning Policy Changes During University Response to COVID-19:**

As part of the University of Virginia’s effort to prevent the spread of COVID-19, the Library is fulfilling scanning requests that exceed what might be reasonable under normal circumstances. As explained in the Public Statement of Library Copyright Specialists: Fair Use & Emergency Remote Teaching & Research (LINK), fair use can permit more extensive scanning as part of a legitimate response to a public health emergency such as this one. (cont’d)
“Note, however, that we must still ensure that our scanning is reasonable in relation to these extraordinary circumstances. Please only request materials where an electronic copy is not available from the Library (and note that the Library may be able to purchase electronic access if it does not currently provide it). Please also limit your request to the portions of a given work that are needed for full participation in the course for the duration of the students’ dislocation. Scans made during this time may include a special cover page with important information for students about how to use and dispose of the scan; please include the cover page when you share the scan with students. Please only distribute these scans to students using your course site on Collab to ensure that access is limited to those enrolled in the course.”
“Finally, note that some textbook publishers and other academic vendors are making resources freely available to institutions affected by COVID-19 closures. Information about which vendors are making these offers is being collected here (LINK) and may also be found on the vendors’ websites or social media. Please do not request scans of material that is being made freely available by a vendor unless there is a compelling reason (e.g., the free version lacks important content, or requires students to acquiesce to problematic terms of use).”
Empowering faculty to scan for themselves

At UVA, pondering adding this language (still in conversation with GC):

“If your request is for materials that will be used by persons needing accommodation for print disabilities, please submit that request here and we will work with SDAC to deliver an appropriately formatted version. If you have no students needing accommodation and you are able to scan this material yourself and share it with your class through Collab, we’d welcome that. If you need us to scan it, please use this form and we’ll get it to you and your students as quickly as we can.”
Thank You and Stay Safe!

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