

# FAIR USE OF COPYRIGHTED MATERIALS

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## What is fair use?

We would all appreciate a clear, crisp answer to that one, but far from clear and crisp, fair use is better described as a shadowy territory whose boundaries are disputed, more so now that it includes cyberspace than ever before. In a way, it's like a no-man's land. Enter at your own risk.

Why is it like this and does it have to be this way? Is there no alternative to the vagueness of the "four factor fair use analysis," to fear of lawsuits and frustration with uncertainty? Maybe it is reasonable to simply throw up our hands and say, "What's the use?" After all, many legal scholars, politicians, copyright owners and users **and their lawyers** agree that fair use is so hard to understand that it fails to provide effective guidance for the use of others' works today. But the fact is, we really must understand and rely on it.

So wouldn't Guidelines help? Many people who think so recently gathered in Washington to negotiate Guidelines for Educational Uses of Digital Works in a two-year-long [Conference on Fair Use \("CONFU"\)](#). For many, the Guidelines that emerged satisfied the need for clarity; but for some, considerable objections remained. Some CONFU participants and their constituents complained that the Guidelines were too narrow; others that they were too broad; or unfounded in the law; or too premature; or too long; or unclear; and so on. In the minds of many, the Guidelines asked the right questions, but for some, they provided the wrong answers.

We have reviewed all the Guidelines and have decided to take a different approach to protecting our component institutions and our faculty, staff and students from the

dangers of the no-man's land while supporting our exercise of fair use rights. We call our approach "Rules of Thumb" for the Fair Use of Copyrighted Materials. Like the Guidelines from which they are in some cases derived, the Rules of Thumb are tailored to different uses of others' works. But unlike the Guidelines, they are short, concise, and easy to read. And they are part of a [larger strategy](#) to meet our needs for permission when fair use is not enough; to reduce our need for permission in the future by licensing comprehensive access to works; and to take a more active role in the management of the copyrighted works created on our campuses for the benefit of our university community.

Copying, modifying, displaying, performing or distributing another's work beyond the suggestions of the Rules of Thumb may still be a fair use, so we'll use the four-factor fair use test to determine that. If you are part of U.T. System, you may [confer with the Office of General Counsel](#) or [follow our published procedures for making fair use determinations](#). If the use seems risky or is clearly not a fair use, we'll try to make [getting permission](#) as easy as possible.

*Please keep in mind that the information presented here is only general information. True legal advice must be provided in the course of an attorney-client relationship specifically with reference to all the facts of a particular situation. Such is not the case here, so this information must not be relied on as a substitute for obtaining legal advice from a licensed attorney.*

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## Individual liability for infringement

### Basics

Before you throw up your hands and say, "What's the use," consider your own liability for copyright infringement. Individuals are liable for their own actions. Copyright owners have sued and probably will continue to sue individuals. They will probably sue the University too, but that may not insulate the individual who took the allegedly infringing action from the full force of a lawsuit.

The [penalties for infringement are very harsh](#): the court can award up to \$150,000 for each separate act of willful infringement. Willful infringement means that you knew you were infringing and you did it anyway. Ignorance of the law,

though, is no excuse. If you don't know that you are infringing, you still will be liable for damages - only the amount of the award will be affected. Then there are [attorneys' fees](#)...

There is one special provision of the law that allows a court to refuse to award any damages at all if it so chooses, even if the copying at issue was not a fair use. It is called [the good faith fair use defense](#) [17 USC 504(c)(2)]. It only applies if the person who copied material **reasonably** believed that what he or she did was a fair use - as would likely be the case if you followed this Policy! If you qualify for this defense, it makes you a very poor prospect for a lawsuit. On the other hand, if you disregard sound advice about fair use, a court would be free to award the highest level of damages available. This makes someone who ignores policies a handsome target for a lawsuit.

There is another problem if you ignore our advice about fair use: The Texas Constitution and statutes may limit our ability to defend individual employees and students, but to the extent we can, U.T. System will defend you against a charge that your use of another's works is an infringement **so long as** you follow this Policy and abide by the terms of any licenses that affect your rights to use others' works. If your activities violate these conditions, you will be personally responsible for your own defense. In other words, if you do not follow this Policy and any licenses that affect your rights to use others' works, U.T. System will not defend you. You will be on your own.

## Using Off-Campus Copyshops

You might think that giving your copying to a commercial (for-profit) copyshop would relieve you of liability for infringement, but it may not: It would depend on

- whether your copying was fair use, and
- whether the copyshop pays royalties.

Consider coursepacks: If you would answer no to both questions above, using our [Rules of Thumb for coursepacks](#) or [the fair use test](#) to decide whether your copying would be fair use, then you could be liable for infringement along with the copyshop! We advise against taking this risk. It would be best to use copyshops that obtain permission and pay fees (i) for any part of a coursepack that exceeds the U.T. System Rules of Thumb (on-campus shops) or (ii) for every part of a coursepack, even if some of it would be fair use under the Rules of Thumb (off-campus shops that comply

with the law as it has been applied to commercial copyshops).

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## First Steps

Answer these three questions to decide whether you need permission to use a copyrighted work.

### 1. Is the work protected?

Copyright does not protect, this Policy does not apply to, and anyone may freely use\*

- Works that lack [originality](#)
  - logical, comprehensive compilations (like the phone book)
  - unoriginal reprints of public domain works
- Works in the [public domain](#)
- Freeware (not shareware, but really, expressly, available free of restrictions-ware -- this may be protected by law, but the author has chosen to make it available without any restrictions)
- [US Government works](#)
- Facts
- [Ideas, processes, methods, and systems described in copyrighted works](#)

The presence or absence of a copyright notice no longer carries the significance it once did because the law no longer requires a notice. Older works published without a notice may be in the [public domain](#), but for works created after March 1, 1989, absence of a notice means virtually nothing.

The rules for determining whether a protected work is in the public domain are set out in chart form by [Lolly Gasaway](#). These rules are complex and somewhat hard to describe, partly because they have changed many, many times during the 20th century. The general rules (excluding anonymous works and works for hire) can be summarized as follows:

- Any work **published** on or before December 31, 1922 is now in the public domain.
- Works **published** between January 1, 1923 and December 31, 1978, inclusive, are protected for a term of 95 years from the date of publication, with the proper notice.

But, if the work was published between 1923 and December 31, 1963, when there used to be a (non-automatic) "renewal term," the copyright owner may not have renewed the work. If he or she did not renew, the original term of protection (28 years) would now be expired and these works will be in the public domain.

- After 1978, the way we measure the term of protection changes. It is no longer related to a date of publication, but rather runs for 70 years from the date the author dies (called, "life of the author" plus 70 years). Further, publication is irrelevant. Works are protected whether they are published or not.
- Finally, those works that were created before December 31, 1978, but never published, are now protected for the longer of life of the author plus 70 years or until December 31, 2002.

**Remember that some works are never protected at all!**

See the information at the beginning of this section for those works.

## **2. If the work is protected, do you wish to exercise one of the [owner's exclusive rights](#)?**

- Make a copy (reproduce)
- Use a work as the basis for a new work (create a derivative work)
- Electronically distribute or publish copies (distribute a work)
- Publicly perform music, prose, poetry, a drama, or play a video or audio tape or a CD-ROM, etc. (publicly perform a work)
- Publicly display an image on a computer screen or otherwise (publicly display a work)

## **3. Is your use exempt or excused from liability for infringement?**

If an exemption does not excuse infringement and eliminate the need to ask permission or pay fees to exercise the owner's rights, [you need permission](#).

- [Fair use](#)
- [Library's special rights](#)
- [Educational performances and displays](#)

\* Even if all or part of a work is not protected by copyright law, it may be protected by other laws. For example, you may need to consider rights of privacy and publicity, ask permission to use a trade or service mark,

or get a license to practice a patented process or system, but discussion of these rights and interests is beyond the scope of this Policy statement.

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## Fair Use Rules of Thumb

UT System has established Rules of Thumb for the following uses of copyrighted works:

- [Coursepacks](#)
- [Distance learning](#) (performing others' works for distance learners)
- [Image archives](#) (like the Art History slide collection)
- [Multimedia works](#) (incorporating others' works in a multimedia work)
- [Music](#)
- [Research copies](#)
- [Reserves](#)

Try to stay within the Rules of Thumb. Interpret them conservatively. If you need to make a more extensive use of another's work than suggested by the appropriate Rule of Thumb, or if there isn't an appropriate Rule of Thumb, use the [four factor fair use test](#) to determine whether the use is fair or requires permission.

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## Other Exemptions

### Library's Special Rights

Our libraries are authorized to exercise special rights in addition to fair use. These rights are described in [Section 108](#) of the copyright law and include:

- [archiving lost, stolen, damaged or deteriorating works](#)
- [making copies for library patrons](#)
- [making copies for other libraries' patrons \(interlibrary loan\)](#)

### Performances and Displays in Face-to-Face Teaching and Distance Education

Educational institutions and governmental agencies are also authorized by a separate copyright statute to publicly display and perform others' works in the course of face-to-face

teaching activities, and to a lesser degree, in digital distance education. These rights are described in [Sections 110](#) (1) and (2), respectively, of the Copyright Act. More information about the recent expansion of Section 110(2)'s rights for digital distance education may be found in [The TEACH Act](#).

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## **RULES OF THUMB FOR COURSEPACKS**

The [Classroom Guidelines](#) that were negotiated in 1976 can provide helpful guidance and we recommend that you read them.

### **1. Limit coursepack materials to**

- single chapters
- single articles from a journal issue
- several charts, graphs or illustrations
- other similarly small parts of a work.

### **2. Include**

- any copyright notice on the original
- appropriate citations and attributions to the source.

### **3. [Obtain permission](#) for materials that will be used repeatedly by the same instructor for the same class.**

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## **RULES OF THUMB FOR DISPLAYING AND PERFORMING OTHERS' WORKS IN DISTANCE LEARNING**

These Rules of Thumb are different from the others. For the most part, Rules of Thumb address making and distributing copies. Distance Learning raises these concerns too, but "public performance" is the focus of these Rules of Thumb. [Section 110](#) of the copyright law authorizes educational performances and displays of entire works (like poems, plays, musical works and movies), but it significantly



distinguishes between what can be performed in the classroom and what can be transmitted. This results in a "gap" in legal authority to perform certain works for distance learners. The CONFU [Educational Fair Use Guidelines for Distance Learning](#) apply fair use to fill this gap.

But the [Distance Learning Guidelines](#) only tackle fair use to perform and display others' works in two contexts:

- Live interactive distance learning classes
- Delayed transmission of faculty instruction.

They do not cover fair use of (performance of) others' works in online course materials. CONFU participants felt that these uses were so new that it was hard to even describe them, let alone describe fair use in this context. Nevertheless, the [Guidelines](#) can provide helpful guidance and we recommend that you read them.

Check [Sections 110\(1\) and \(2\)](#) before proceeding since they authorize considerable performance activity without any need to refer to these Rules of Thumb or the Guidelines. Also check any licenses acquired with materials purchased specifically for distance learning; they should include all the rights you will need to utilize them for that purpose, with no need to refer to these Rules of Thumb or the Guidelines. If they don't, and you need to rely on these Rules of Thumb in any distance learning context, remember: ***small parts, limited times and limited access are the keys to fair use.***

## 1. Incorporate performances of others' works

- sparingly
- only if a faculty member or the institution possesses a legal copy of the work (i.e., by purchase, license, fair use, interlibrary loan, etc.).

## 2. Include

- any copyright notice on the original
- appropriate citations and attributions to the source
- a [Section 108\(f\)\(1\)](#) notice.

## 3. Limit access to students enrolled in the class and administrative staff as needed. Terminate access at the end of the class term.



#### **4. [Obtain permission](#) for materials that will be used repeatedly by the same instructor for the same class.**

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### **RULES OF THUMB FOR DIGITIZING AND USING IMAGES FOR EDUCATIONAL PURPOSES**

The CONFU [Educational Fair Use Guidelines for Digital Images](#) suggest that fair use requires our libraries to request permission to use images at the same time they are digitized. Our Rules of Thumb take a different approach, but in other respects, the [Guidelines](#) can provide helpful guidance and we recommend that you read them. For more information about digitizing images and other non-text media, see [Advanced Topics in Copyright Law](#). The third section addresses issues that typically arise in the College of Fine Arts.

#### **1. Is the image you wish to digitize readily available online or for sale or license at a fair price?**

- **If YES: Point to, purchase or license the image. Do not digitize it unless you are in the process of negotiating a license. If you have a "contract pending," digitize and use the image in accordance with these Rules of Thumb until the license is finalized and you have received the licensed digital image.**
- **If NO: Digitize and use the image in accordance with the following limitations:**

**Limit access to all images except small, low resolution "thumbnails" to students enrolled in the class and administrative staff as needed. Terminate access at the end of the class term.**

**Faculty members also may use images at peer conferences.**

**Students may download, transmit and print out images for personal study and for use in the preparation of academic course assignments and other requirements for degrees, may publicly display images in**

**works prepared for course assignments etc., and may keep works containing images in their portfolios.**

**2. Periodically review digital availability. If a previously unavailable image becomes available online or for sale or license at a fair price, point to or acquire it.**

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## **RULES OF THUMB FOR DIGITIZING AND USING OTHERS' WORKS IN MULTIMEDIA MATERIALS FOR EDUCATIONAL PURPOSES**

The CONFU [Fair Use Guidelines for Educational Multimedia](#) suggest that fair use requires adherence to specific numerical portion limits, that copies of the multimedia work that includes the works of others should be strictly controlled, and that fair use "expires" after 2 years. Our Rules of Thumb acknowledge that these are important considerations, but the [Guidelines](#) numbers do not describe the outer limits of fair use. Despite their tightly controlled approach, the [Guidelines](#) can provide helpful guidance and we recommend that you read them.

Please keep in mind that the rights described here are rights to ***create*** unique works, but ***not to make multiple copies and give them out (distribute them)***.

### **1. Students, faculty and staff may**

- **incorporate others' works into a multimedia work**
- **display and perform a multimedia work**

### **in connection with or creation of**

- **class assignments**
- **curriculum materials**
- **remote instruction**
- **examinations**
- **student portfolios**

- professional symposia.

**2. Be conservative. Use only small amounts of other's works.**

**3. Don't make any unnecessary copies of the multimedia work.**

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## **RULES OF THUMB FOR MUSIC**

The [Guidelines for Educational Uses of Music](#) negotiated in 1976 can provide helpful guidance and we recommend that you read them.

### **1. Limit copying as follows:**

- sheet music, entire works: only for performances and only in emergencies
- sheet music, performable units (movements, sections, arias, etc.): only if out of print
- student performances: record only for teacher or institutional evaluation or student's portfolio
- sound recordings: one copy for classroom or reserve room use

### **2. Include**

- any copyright notice on the original
- appropriate citations and attributions to the source.

**3. Replace emergency copies with purchased originals if available.**

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## **RULES OF THUMB FOR RESEARCH COPIES**

### **Limit research copies to**

- single chapters

- single articles from a journal issue
- several charts, graphs, illustrations
- other similarly small parts of a work.

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## **RULES OF THUMB FOR DIGITIZING AND USING OTHERS' WORKS IN ELECTRONIC RESERVES**

The [Fair Use Guidelines for Electronic Reserve Systems](#) describe general limitations on the scope of materials that should be included, citation and notice requirements and access, use, storage and reuse of reserve materials. These Rules of Thumb are an abbreviated summary of the [Guidelines](#) terms which provide helpful guidance that we recommend you review.

You may also wish to review the [Fair Use in the Development of E-Reserve Systems](#) published by a group of library organizations.

### **1. Limit reserve materials to**

- single articles or chapters; several charts, graphs or illustrations; or other small parts of a work
- a small part of the materials required for the course
- copies of materials that a faculty member or the library already possesses legally (i.e., by purchase, license, fair use, interlibrary loan, etc.).

### **2. Include**

- any copyright notice on the original
- appropriate citations and attributions to the source
- a [Section 108\(f\)\(1\)](#) notice.

**3. Limit access to students enrolled in the class and administrative staff as needed. Terminate access at the end of the class term.**

**4. [Obtain permission](#) for materials that will be**

**used repeatedly by the same instructor for the same class.**

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## Using the Four Factor Fair Use Test

The Rules of Thumb do not describe the outer limits of fair use; they describe a "safe harbor" within the bounds of fair use. So, a use that exceeds the suggestions of the Rules of Thumb may still be fair.

Most people think that the fair use test is difficult. Actually, it's not so much difficult as it is uncertain - susceptible to multiple interpretations. Two people can review the same facts about a proposed use and come to different conclusions about its fairness. That's because one must make many judgments in the course of weighing and balancing the facts.

Attorneys read the "judgments of judges" to learn how to make judgments ourselves, but judges see things differently (one from another) too. Because "reasonable minds can disagree" about fair use, perhaps it is unrealistic to try to predict what a judge would think about a proposed use. But that's just what this test is about.

### Here's how it works:

With a particular use in mind,

- Read each question and the comments about it
- Answer each question about your use
- See how the balance tips with each answer
- Make a judgment about the final balance: overall does the balance tip in favor of fair use or in favor of getting permission?

### The four fair use factors:

1. **What is the character of the use?**
2. **What is the nature of the work to be used?**
3. **How much of the work will you use?**
4. **What effect would this use have on the market for the original or for permissions if the use were widespread?**

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## FACTOR 1: What is the character of the use?

- Nonprofit
- Educational
- Personal
- Criticism
- Commentary
- Newsreporting
- Parody
- Otherwise  
"transformative"  
use
- Commercial

Uses on the left tend to tip the balance in favor of fair use. The use on the right tends to tip the balance in favor of the copyright owner - in favor of seeking permission. The uses in the middle, if they apply, are very beneficial: they add weight to the tipping force of uses on the left; they subtract weight from the tipping force of a use on the right.

Imagine that you could assign a numerical weight to each use. A nonprofit educational use *other than the middle uses*, for example, making a copy of a journal article for a university class, might weigh 5 in favor of fair use. But a nonprofit educational use that is also criticism, for example, the inclusion by a faculty member of a quote from another's work in a scholarly critique, would weigh even more in favor of fair use: about 6 or 7. That's because the uses in the middle are "core" fair uses; the ones most dearly protected.

Even if they are for-profit, the core fair uses weigh in favor of fair use: that's why they subtract from the weight against fair use of a commercial use. A commercial duplication of an article from a journal might weigh 5 against fair use. But a commercial commentary or quotation would barely tip the scale, if at all.

This is not to suggest that fair use can be precisely quantitatively analyzed. Numbers are just a tool to illustrate how the facts interact and affect each other. Actually, numbers wouldn't make the analysis any easier: copyright owners and users would have just as much trouble agreeing on weights as we have agreeing on any other judgment about fair use.

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## FACTOR 2: What is the nature of the work to be used?

- Fact
- Published
- A mixture of fact and imaginative
- Imaginative
- Unpublished

Again, uses on the left tip the balance in favor of fair use. Uses on the right tip the balance in favor of seeking permission. But here, uses in the middle tend to have little effect on the balance.

Which way is your balance tipping after assessing the first two factors?

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### **FACTOR 3: How much of the work will you use?**

- Small amount
- More than a small amount

This factor has its own peculiarities. The general rule holds true (uses on the left tip the balance in favor of fair use; uses on the right tip the balance in favor of asking for permission), but if the first factor weighed in favor of fair use, you can use more of a work than if it weighed in favor of seeking permission. A nonprofit use of a whole work will weigh somewhat against fair use. A commercial use of a whole work would weigh significantly against fair use.

For example, a nonprofit educational institution may copy an entire article from a journal for students in a class as a fair use; but a commercial copyshop would need permission for the same copying. Similarly, commercial publishers have stringent limitations on the length of quotations, while a student writing a paper for a class assignment could reasonably expect to include lengthier quotes.

Which way does your balance tip after assessing the first three factors? The answer to this question will be important in the analysis of the fourth factor!

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### **FACTOR 4: If this kind of use were widespread, what effect would it have on the market for the original or for permissions?**

- After evaluation
- Original is out of print or
- Competes with (takes



of the first three factors, the proposed use is tipping towards fair use

otherwise unavailable

- No ready market for permission
- Copyright owner is unidentifiable

away sales from) the original

- Avoids payment for permission (royalties) in an established permissions market

This factor is a chameleon. Under some circumstances, it weighs more than all the others put together. Under other circumstances, it weighs nothing! It depends on what happened with the first three factors.

Here's why:

This factor asks, "If the use were widespread, would the copyright owner be losing money?" Well, actually, it asks, "If the use were widespread, **and the use were not fair**, would the copyright owner be losing money?" After all, if the use were fair, the copyright owner would not be entitled to any money at all, so he couldn't "lose" what he never would have had to begin with.

When you include in your assumptions the very conclusion that you are trying to reach (you **assume** a use is not fair in the process of trying to figure out **whether it is** fair), you violate a principle of logic - you engage in "circular reasoning."

Courts deal with this propensity of the fourth factor to encourage circular reasoning by looking at the first three factors before evaluating the fourth. If the first three factors indicate that the use is likely fair, courts will not permit the fourth factor to convert an otherwise fair use to an infringing one. On the other hand, if the first three factors indicate that the use is likely not fair, courts are willing to consider lost revenues under the fourth factor. In this case they do not have to assume the conclusion in order to reach it. They reach the conclusion based on good evidence that the use is not fair. This means that if a use is tipping the balance in favor of fair use after the first three factors, the fourth factor should not affect the results, even if there is a market for permissions, even if the owner would lose money because

of the use.

On the other hand, if a use is tipping the balance in favor of asking for permission one need not "assume" it's not fair, the first 3 factors show that it's not. Add to that an active permissions market and the fourth factor will decisively tip the balance. Forget fair use. Get permission.

The facts in the middle illustrate circumstances that also supports fair use, as they indicate a lack of harm to the owner's economic incentive.

Does the balance for your use tip in favor of fair use or in favor of getting permission after consideration of all four factors?

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\* A Note About Time Limits - Although the statutory fair use analysis does not address time limits, many of our Rules of Thumb and all the Guidelines contain time limits on fair use. Many people do not understand this and wonder why a use that is fair today would cease to be fair at the end of a semester. This is hard to explain because it does not seem to have a basis in statutory requirements or case law. But there the limits are: in the [Classroom Guidelines \(1976\)](#); the CONFU Proposed [Distance Learning Guidelines](#), [Multimedia Guidelines](#) and [Image Guidelines](#) (all 1996); and even in the [Electronic Reserve Guidelines](#) (1996, non-CONFU). I have discussed this with other attorneys within the university community and have not heard a satisfactory legal explanation. Nevertheless, I have concluded that there may be two reasons we seem to agree to time limits anyway:

- 1) publishers clearly believe fair use has time limits;

- 2) courts seem increasingly willing to let the fourth factor of the fair use analysis trump all the other factors so that where there is a market for permissions, "fair use is negated." This was the position articulated by the majority in the recent [MDS](#) decision.

Under this strictly economic analysis, in those circumstances where a ready market for permissions exists, such as permission for coursepacks, fair use shrinks - perhaps in time as well as in other dimensions. But the opposite is true, too. Where the permissions market is dysfunctional, fair use expands, both in the amount one may use and in time. For

more information about this, see [Advanced Topics in Copyright Law](#), the third section addressing issues in a College of Fine Arts.

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## [Need Permission?](#)

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If you are associated with the University of Texas System as faculty, staff or student and have questions about the application of the Rules of Thumb or the four factor fair use test, please [let me know](#).

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Need more information? The [Copyright Crash Course](#) contains detailed materials on fair use and many other copyright issues.

[Top](#) | [Mailto](#)

Comments to [intellectualproperty@utsystem.edu](mailto:intellectualproperty@utsystem.edu)  
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