

INDIANA UNIVERSITY

Policy on Fair Use of Copyrighted Works for Education and Research

(By action of University Faculty Council: October 14, 1997

Approved by the Board of Trustees: December 5, 1997)

As an institution devoted to the creation, discovery, and dissemination of knowledge to serve the public, Indiana University is committed to complying with all applicable laws regarding intellectual property. That commitment includes the full exercise of the rights accorded to users of copyrighted works under the "Fair-Use" provision of federal copyright law.

It therefore is the policy of Indiana University to facilitate the exercise in good faith of full Fair-Use rights by faculty, librarians, and staff, in furtherance of their teaching, research, and service activities. To that end, the University shall:

1. Inform and educate its faculty, librarians, and staff about their Fair-Use rights and the application of the four factors for determining those rights set forth in 17 U.S.C. Section 107;
2. Develop and make available through the office of the University Counsel, the Copyright Management Center, and other appropriate units, effective resources concerning Fair-Use and intellectual property laws generally and the application of Fair Use in specific situations;
3. Avoid adopting or supporting policies or agreements that would restrict Fair-Use rights; and
4. Defend and indemnify faculty, librarians, and staff in accordance with provisions of the Officers Liability Insurance resolution, dated May 22, 1971, or any successor indemnification policy.

Appendix A

Statement of Supporting Principles

Prepared by the
Institute for the Study of Intellectual Property and Education
IUPUI University Library
755 West Michigan Street
Indianapolis, IN 46202-5195
(317) 274-4400
copyinfo@indiana.edu
<http://www.iupui.edu/it/copyinfo>

June 27, 1997

Accompanying this document is a proposal for a new "Policy on Fair Use of Copyrighted Works for Education and Research" for Indiana University. This proposal is the work of the Advisory

Board of the Institute for the Study of Intellectual Property and Education. The Institute was funded pursuant to the Strategic Directions Charter, and in December 1996 President Myles Brand charged the Institute and its Board with developing a new fair-use policy for Indiana University. The Advisory Board has met regularly beginning in early 1997, and the accompanying proposal is the result of those efforts.

This document explains the underlying principles of this proposed policy, and it will answer some common questions about it. Please note, however, that this document is not intended to be a tutorial about copyright and fair use. Preparing and disseminating such materials will be an important part of implementing the proposed policy, and a comprehensive educational program should follow adoption of this policy.

Principle 1: An appropriate exercise of fair use depends on a case-by-case application and balancing of four factors as set forth in a statute enacted by Congress.

A proper determination of fair use--in daily practice and in the courts--requires applying these four factors to the specific circumstances of the use:

1. The purpose or character of the use;
2. The nature of the copyrighted work being used;
3. The amount and substantiality of the work being used; and
4. The effect of the use on the market for or value of the original.

These factors must be evaluated to determine whether most of them weigh in favor of or against fair use. Explanation of the meaning of these factors is available from the Copyright Management Center at:

<http://www.iupui.edu/it/copyinfo/highered.html>

Principle 2: Nonprofit educational purposes are generally favored in the application of the four factors, and a robust concept of fair use is crucial for advancing education and research.

The educational purpose will usually weigh the first factor strongly in favor of fair use. Keep in mind, however, that a nonprofit educational purpose does not by itself make the use "fair." One must always consider and weigh all four factors together.

Principle 3: Responsible decision making means that individuals within the university must know the fundamentals of fair use and understand how to apply them in typical situations.

To that end, the Copyright Management Center and other university offices will provide information, answer questions, and conduct seminars in an effort to prepare IU faculty, staff, and librarians to resolve fair-use questions in a good-faith and well-informed manner.

Principle 4: *The university is confident that its faculty, staff, and librarians are able to make good-faith decisions about fair use, and that their decisions will best reflect the particular circumstances relevant to the decision.*

Fair use depends on the facts and circumstances of the given situation. Therefore, the person closest to those facts is likely best suited to determine the law's application. The proposed policy consequently does not mandate a particular decision, but instead calls on each member of the university to be responsible for the fair-use determinations with respect to the projects within their authority. The Copyright Management Center and other offices will be available to assist with decisions.

Principle 5: *Reasonable people--including judges and legislators--can and will differ in their understanding of fair use.*

Copyright law rarely offers a definitive meaning of fair use for any specific application. Thus, the real meaning of fair use depends on a reasoned and responsible application of the four factors. One person's judgment and situation may not match the next, and the differences may be based on variations in facts and circumstances.

Principle 6: *Because of the flexible and interpretive nature of fair use, Congress provided significant protection for educators.*

Not only does the law apply particularly to educational purposes, but it also limits the monetary liability that educators may potentially face, as long they hold a reasonable and good-faith belief that their activities are fair use in light of the four factors.

Principle 7: *Through educational efforts, the university should move over time toward common understandings of fair use for local needs, but such detailed interpretations ought not be part of a formal policy statement.*

By keeping the policy itself concise, the university preserves the flexibility inherent in fair-use law and preserves the opportunity to respond to a changing law and the changing demands of education and research.

Principle 8: *Fair use is not determined by "guidelines" that purport to quantify the boundaries of fair use.*

In an attempt to clarify the meaning of fair use for common situations, various private parties have negotiated "guidelines," but those externally developed guidelines are often inappropriate for the realistic application of fair use to higher education. Such guidelines are too often an unduly narrow or rigid definition of fair use, and they usually impose additional restrictions and conditions that are not part of the law. No such guideline has been read into the law by Congress or the courts, and the guidelines are not binding. Fair use must be determined according to the circumstances of each situation.

Principle 9: *If a member of the IU community acts in good faith and consistent with his or her university duties, the IU indemnification policy will also likely offer protection in the event of an infringement allegation.*

Good faith increases the likelihood that activities are in fact fair use. Good faith reduces the risks of liability in the event of infringement. Good faith is also one important prerequisite to having the benefit of university assistance and support in the event that its faculty, staff, and librarians may face infringement allegations. Ultimately, good faith is best manifested through knowledge of, and reasonable application of, the four factors.

Prepared by:

IU Institute for the Study of Intellectual Property and Education

Advisory Board:

Fred H. Cate, Professor of Law
Kenneth D. Crews, Associate Professor and Institute Director
Jeremy Dunning, Professor of Geological Sciences
William Farquhar, Assistant Vice President for Research
J.T. Forbes, Coordinator of Federal and Community Relations
Michael Klein, Associate University Counsel
Arlen Langvardt, Associate Professor of Business Law
Christopher Peebles, Information Technology
Suzanne Thorin, University Dean of University Libraries
Julie Watson, Vice President of Technology Transfer

Coordinator of the Institute:

Dwayne K. Buttler, J.D.

Appendix B

Frequently Asked Questions About the Proposed Policy

Prepared by the
Institute for the Study of Intellectual Property and Education
IUPUI University Library
755 West Michigan Street
Indianapolis, IN 46202-5195
(317) 274-4400
copyinfo@indiana.edu
<http://www.iupui.edu/it/copyinfo>
Revised: September 16, 1997

1. Why do we need a fair-use policy?

Copyright law increasingly affects scholarly pursuits. Not only are members of the university community creating new works that have copyright protection, but the routine conduct of research and teaching regularly touches the set of rights that the law grants to the copyright owners of a vast range of protected works. The range of protected works encompasses text, images, software, video, Internet sites, and other media that instructors and researchers commonly deploy in furtherance of their academic objectives. The set of rights belonging to the copyright owner of each of those works includes the right to make copies, to distribute copies, to make "derivative works," and to perform or display the work publicly. Such uses of protected works are common in the university setting, but they will not be unlawful "infringements" if they are fair use. Some of those uses also will be allowed under highly specific exemptions in the copyright law, but those exemptions are not technically "fair use" and will be addressed outside this policy.

2. What are the origins of this policy?

The genesis of this policy occurred in a meeting of various officials of Indiana University with President Myles Brand on December 19, 1996, in which President Brand expressed a desire for a fair-use policy for Indiana University and a standard of fair use that was not unduly restrictive on the university's essential teaching and research activities. He assigned the task of drafting the policy to the Institute for the Study of Intellectual Property and Education and its Advisory Board, which comprises diverse members of the IU community who share a strong interest in and knowledge of copyright. The Institute had been recently established pursuant to the Strategic Directions Charter of Indiana University.

3. What are the purposes and effects of this policy?

The central purpose of this policy is to assist members of the IU community with the use of copyrighted materials in furtherance of the institution's education and research mission and in accordance with a good-faith understanding of the principles of copyright and fair use. The intended effects of this policy are multifold. Readers should be able to make a more informed and responsible exercise of fair use, and they should be able to meet teaching and research needs without infringing the rights of copyright owners. While the policy calls on individuals to learn about copyright and to reach informed conclusions, one purpose of the policy is to motivate decisions that allow faculty and others to keep their focus on serving the university mission.

4. If I do everything that this policy directs, will the university defend me?

If faculty, librarians, and staff act in good faith and consistent with their university duties, the general indemnification policy at IU will also likely offer protection in the event of an infringement allegation. Good faith increases the likelihood that activities are in fact fair use. Good faith reduces the risks of liability in the event of infringement. Good faith is also one important prerequisite to having the benefit of university assistance and support in the event that its faculty, staff, and librarians may face infringement allegations. Ultimately, good faith is best manifested through knowledge of, and reasonable application of, fair use.

5. Who is subject to this policy?

This policy explicitly applies to all faculty, librarians, and staff of Indiana University. While the policy does not address the activities of students who are not also employed by the university, the advice and guidance about fair use will be available to students as well. While the university does not offer indemnification for students and is not legally responsible for the independent fair-use activities of students in pursuit of their study or projects, the university does expect its student to act responsibly and ethically, in a manner consistent with this policy.

6. What do I need to know about fair use?

First and foremost, an underlying philosophy of this policy is that you will learn about fair use and help yourself reach responsible decisions. The Copyright Management Center will make information available about fair use on its web site: <http://www.iupui.edu/it/copyinfo>.

7. Why not put explanations about fair use in the text of the policy?

While the supporting and explanatory materials are important for assisting members of the university community to meet their responsibilities under this policy, elaborations on fair use ought not be included in the policy itself. Fair use is a area of the law that changes with court rulings, and that is adaptable to changing needs, technologies, and objectives. To put details into the policy itself would tend to freeze the doctrine of fair use at a time when it is in continuous transition. Thus, the policy remains flexible to reflect changing needs and the dynamic nature of fair-use law. The policy also remains flexible to address the growing innovations of our teaching and research.

8. Who can help me with copyright decisions?

The university recognizes that innovative research and instruction give rise to the need for additional insight or support for rethinking fair use. In addition, various officials at the university have developed experience with addressing certain matters and may be able to help you respond to the circumstances more efficiently. For assistance with understanding or applying this policy, offices at Indiana University that you may contact include:

1. Your department chair, dean, director, or other supervisor.
2. For library matters, the library director or designated copyright liaison in the library.
3. The Copyright Management Center, which you may contact:

By telephone: (317) 274-4400

By fax: (317) 278-3301

By e-mail: copyinfo@indiana.edu

On the World Wide Web: www.iupui.edu/it/copyinfo

4. The University Counsel Office.

9. Who is responsible for making fair-use decisions?

This policy makes no change in the designation of authority within the university. The primary responsibility for decisions about fair use belongs to the individual with authority to oversee the relevant project or activity. That responsibility is subject to customary review by and oversight from supervisors or senior officials at the university. Thus, if you are responsible for the activity or project, you are responsible for learning about the applicable fair use and reaching the appropriate conclusion.

10. Why does the policy resist adoption of "guidelines" that explain fair use?

Fair use is not determined by "guidelines" that purport to quantify the boundaries of fair use. In an attempt to clarify the meaning of fair use for common situations, various private parties have negotiated "guidelines," but those externally developed guidelines are often inappropriate for the realistic application of fair use to higher education. Such guidelines are too often an unduly narrow or rigid definition of fair use, and they usually impose additional restrictions and conditions that are not part of the law. No such guidelines have been read into the law by Congress or the courts, and the guidelines are not binding. Fair use must be determined according to the circumstances of each situation.

11. Who are the members of the Advisory Board that proposed this policy?

Members of Advisory Board of the IU Institute for the Study of Intellectual Property and Education are:

Fred H. Cate, Professor of Law
Kenneth D. Crews, Associate Professor and Institute Director
Jeremy Dunning, Professor of Geological Sciences
William Farquhar, Assistant Vice President for Research
J.T. Forbes, Coordinator of Federal and Community Relations
Michael Klein, Associate University Counsel
Arlen Langvardt, Associate Professor of Business Law
Christopher Peebles, Information Technology
Suzanne Thorin, University Dean of University Libraries
Julie Watson, Vice President of Technology Transfer

Coordinator of the Institute:

Dwayne K. Buttler, J.D.