

Fair Use Guidelines for MITx / edX

rev. 12/04/13

This document is intended to assist course content teams who are assessing whether content may be used in MITx courses, for the edX platform, on the basis of fair use. It provides some guidance about applying fair use principles in the MITx/edX context.

Topics covered:

Overall fair use guidelines:

Transformative Use	p.2
Non-transformative uses	p.3
Permission-seeking	p.4
Attribution	p.4

Guidelines for content types:

Abstracts	p.5
Art	p.5
Comic strips / highly creative works	p.6
Data	p.6
Images / Figures	p.7
Music	p.8
Readings	p.9
Scholarly articles – see sections on Readings and on Text(p9) and Licensed Content(p12)	
Text	p.9
Video	p.10
Problems	p.11
Workbooks	p.12

Special scenarios:

Incidental use	p.12
Licensed content	p.12
Articles covered by the MIT Faculty Open Access Policy	p. 13

Prepared by:

Ellen Finnie Duranceau, Program Manager, Scholarly Publishing & Licensing, MIT Libraries
Dan Carchidi, Director, Special Projects, Office of Digital Learning, MIT
Lindsey Weeramuni, Intellectual Property Supervisor, MIT OpenCourseWare

Overall Guidelines:

Transformative Fair Use

Overall, fair use assessments should focus on two questions:

- Does the use **transform** the material, by using it for a different -- or particularly , a pedagogical -- purpose?
- Was the **amount taken appropriate** to the new purpose?

Fair use assessments should focus on these questions but also be carried out within the context of the full ‘four factor’ test that is part of the fair use statute. For each factor (purpose of use, nature of work, amount used, and market effect), the following considerations help *support* a fair use case¹:

1. *The purpose and character of the use*: Nonprofit, educational, scholarly or research; transformative use; repurposing, putting in a new context, or creating a new purpose or meaning (see more below on p.3)
2. *The nature of the copyrighted work*: Using published, fact-based content
3. *The amount and substantiality of the portion used in relation to the copyrighted work as a whole*: Using only the amount needed for a given purpose; using small or less significant amounts
4. *The effect of the use upon the potential market for or value of the copyrighted work*: If there would likely be no/little effect on a readily available market for the work in a convenient format at a reasonable price, or it is not possible to gain permission to use the work

Uses that tend to weigh against fair use include:

- Non-transformative use of highly creative content, or content marketed specifically to the educational institutions (factors 1,2, and 4)
- Use of an entire work, unless pedagogically necessary and/or highly transformative (factor 3)

¹ The wording for the four factors is taken directly from section 107 of the US copyright law, “Limitations on exclusive rights: Fair use” at: <http://www.copyright.gov/title17/92chap1.html#107>.

In the edX/MITx context, fair use evaluations should emphasize identifying a direct link to pedagogical purpose; transformative use; and the use of only the amount needed for the new (transformative) context or purpose. For example, fair use analysis should assess whether:

- Use enriches content of course/lecture
- Material is an integral part of the pedagogical point
- Amount used is just right to make the pedagogical point
- Use transforms the material by using it for a purpose different from initially intended or by adding criticism, commentary, or context

Relevant examples of transformative use, which are applicable to edX/MITx, include (for example):

- ***Critique and analysis:*** when content is repurposed as an object of commentary or other related discourse, this is an example of transformative use. Commentary should be integrated, to the extent possible, with the copyrighted material, and wherever possible, incorporated material should be drawn from primary sources.
- ***Illustration (providing examples):*** Illustrative uses are essential for effectively portraying and explaining information to learners, and thus support a pedagogical purpose and a strong fair use case. The incorporated material should advance an instructor's teaching goals. Copyrighted material that serves primarily to add entertainment value should be avoided.
- ***Demonstration or explanation:*** Use of the copyrighted material furthers understanding by demonstrating or explaining a process, procedure, or arrangement. Demonstrations should be integral to the pedagogical purpose and should not be merely cumulative with other lesson materials serving the same function.

The strongest argument for fair use arises when the copyrighted content was prepared by the copyright owner for purposes other than education and is not being actively licensed, and when it is not possible to find a substitute that may be used.

(Adapted From <http://www.centerforsocialmedia.org/ocw>)

Non-transformative uses:

While the emphasis for edX/MITx evaluations is on transformative fair use, nontransformative uses can be fair—especially nonprofit educational ones that don't cut into the earnings of copyright owners. In this context, it may be important (although not determinative) whether the source of the repurposed material can be identified and whether the material is being actively exploited by its owner, e.g. through use, licensing, and/or sales. If the answer to either of these subsidiary questions is "no," fair use is more likely to apply than otherwise.

(From <http://www.centerforsocialmedia.org/ocw>)

Permission-seeking:

Permission-seeking may be appropriate in some circumstances, including: when the entire original work is needed; when the portion of the work sought to be used is subject to active commercial exploitation at a reasonable price (particularly highly creative work); when the content is known to be licensed under terms that prohibit fair use (e.g. appears at one or more commercial licensing sites under restrictive terms); or when the content is being marketed specifically for course use (e.g. workbooks/consumables/text books).

Attribution:

In all cases, reasonable efforts should be made to properly attribute incorporated materials. Attribution will not necessarily protect against infringement, but is an important ethical matter; it also demonstrates good faith, which may support a fair use case.

Specific Guidelines for content types

Some formats or types of works carry additional specific considerations, which are addressed below.

Abstracts

Abstracts may be considered separate copyrighted works. In the context of scholarly journals, abstracts are typically prepared by the author(s) of the article, with copyright transferred to the publisher. Some publishers make abstracts openly available on the web, but others do not. Special care should be taken when using an abstract in its entirety if the publisher licenses access to the abstracts, and particularly if the abstract was obtained from a resource licensed by MIT under particular terms of use.

Please see the guidelines below under “other scenarios” regarding content from articles from the MIT Faculty Open Access Articles Collection (or more broadly, which fall under the MIT Faculty Open Access Policy). The Policy may provide the possibility of reuse without needing a fair use case or referring to the license agreement.

Example: A course includes a list of suggested readings, including abstracts for each, from many different journals. Where it is possible to link to the publisher’s openly accessible abstract, that is preferred. Where the abstract appears in an article that falls under the MIT Faculty Open Access Policy, reuse in edX/MITx is permitted and no fair use case is needed. License agreements are likely to control use of this content and may provide permission for use or prohibit it. (*see below under Other Scenarios/Licensed Content.*)

Art

Photographs of works of art may involve the rights of the work's creator/copyright holder, and these must be considered when assessing the fair use case.

Photographs of 2-D public domain works are usually not protected by copyright, as they do not add original expression. Such photos usually may be used without making a fair use case.

Beware, however, that such photos may be licensed by a museum or cultural organization, in which case the terms of use must be considered along with the fair use case.

Example: A basic, straight-on photo of the Mona Lisa is incorporated into course materials. No fair use case is needed. If a photo of a sculpture or building is incorporated, a fair use case may be needed (because the angle or lighting of the photo may involve a sufficient modicum of

creativity), and if there is an indication that the photo came from a cultural institution's collection (e.g. Getty images) the terms of use at that site should be reviewed.

Comic strips and other highly creative works

Comic strips and other highly creative works carry more protection than fact-based works (see below under *Data*), and the fair use assessment must take this into account. In addition, highly creative works are often highly licensed works. In the absence of a very strong fair use assessment, permission or substitution should be considered. Particular care should be taken to avoid using comic strips and other highly creative works in contexts where they merely add entertainment rather than contribute to the pedagogical purpose, or when their illustrative purpose could be met through less heavily licensed content. Identifying the original source of the content will be important in establishing the fair use case.

Example: A Dilbert comic strip appears on the home page of a course, supplying ironic commentary related to the overall course content and serving to draw interest. Unless the comic strip provides a unique way to convey a specific pedagogical goal, other options such as substitution should be considered. See below under *Other Scenarios/Incidental Use* if the comic strip appears as part of a lecture capture.

Example: A comic by 'naked pastor,' a person who sells his own work through the web, of a 4-way tug of war. The comic is used in a discussion of forces, which can be seen as transformative, but the specific comic is not needed for this topic, as any 3-way tug of war would have done; and the content is highly creative and licensed. This is therefore a case where swapping the content and using a creative-commons licensed image or one in the public domain would be the best course.

Data

"Fact-intensive" works (a category including tables and charts that display scientific or historical data, technical photographs, etc.) receive "thinner" protection than do "creative" works (films, poetry, etc.). Fair use applies more broadly to fact-intensive works than to highly creative ones. Thus, excerpts from fact-intensive works can be used fairly in a wider variety of contexts than more creative ones. And it is possible to avoid even these "thin" copyrights altogether by extracting the unprotected (i.e. not subject to copyright) factual information or making changes to the presentation format.

(Adapted From <http://www.centerforsocialmedia.org/ocw>)

Put another way: Data is not copyrightable; only the particular expression of the data is. A simple tabular display of data (e.g. in a table) is likely to have no, or limited, copyright, so a fair use case may not even be necessary to reuse such data.

Example: An image from a table in a well-known reference work appears in relation to a problem set. The table displays numerical values in columns with simple headers. The material has “thin”-- if any -- copyright, and, as long as a limited amount from that one source is used, the case is strong for using the material. In contrast, a complex, 3-D table with shading and illustrative overlay, is probably copyrightable and a fair use assessment should be made or the table recreated using the underlying raw data.

Example: A figure supplying standard materials data on three axes appears in a set of powerpoint slides. This figure, originally produced by a for-profit company, is widely known and used and has even been made into a poster. The figure is largely a representation of data, with only limited original expression. There is a reasonable fair use case, based in part on transformative use. Should link to the original and attribute the source.

Images/Figures

Use of an entire image may be needed, but if it is possible to achieve the pedagogical purpose by using only part of the image, or by using a lower resolution or thumbnail version, this will support the fair use case. Images are frequently shown on screen briefly as part of a course video, including in powerpoint slides. A fair use case for such use of an image can be supported when the image is commented upon, critiqued, juxtaposed with other examples, or otherwise used in a transformative manner, with a pedagogical purpose. Prohibiting easy replication or storage of a local copy of videos (so as to prevent further distribution), if possible without compromising the educational mission, is another way to strengthen the fair use case when images appear in course videos.

Mechanistic photographs taken of objects (e.g. equipment) with few aesthetic or creative elements (such as lighting, angle, focus) bear ‘thinner’ copyright than photographs or images which reflect creative choices (see under *Data* and *Art*). It strengthens a fair use case when using such photos, rather than highly creative photos or images.

Example: a photo of a ‘mad scientist’ is included in a lecture in a manner more than ‘incidental.’ The fair use case is weaker if the photo is displayed as an ice-breaker during an introductory piece of a lecture. The fair use case is stronger if the photo is referenced in a lecture with a social science or historical purpose, such as a discussion of the image of the scientist in culture.

Example: some images shown within slides during a lecture on landscape design are untraceable and permission cannot be sought. The fair use case is stronger if the lecture includes commentary on each image, and relates one to the other, or to other material, to

make a pedagogical point. The fair use case is weaker if the lecturer presents a number of redundant examples of the same kind of image, where the inclusion of many examples does not substantially advance the pedagogical purpose.

Example: A corporation has mounted a series of pictures of its equipment on a website. The photos are taken inside, with a blank white wall behind, from a position straight in front of the equipment, with little shadow, and no evidence of a special angle, lighting, or focus. The fair use case is stronger for such images than for images that are more uniquely staged and bear creative elements.

Example: A small museum's picture of an induction coil appears in the powerpoint slides for a lecture. It is a mechanistic, simple photographic reproduction, of a device. The museum is not licensing the work; the copyright is probably limited given the lack of artistic or creative aspects to the image. There is a reasonable fair use case, based in part on transformative use. Should include a link to the original and attribute the source.

Example: A photo of two teams in business dress engaging in a tug of war is included in a set of powerpoint slides. A reverse image search via Google reveals that it comes from a site that exists to license and sell images – the image is a “stock photo” (a photo available on the web at a commercial site whose business is to sell images, e.g. istockphoto.com). The particular image is not required for the point made in the lecture— any tug of war would do. This is therefore a case where swapping the content and using a creative-commons licensed image or one in the public domain would be the best course.

Example: A picture of house that held the first radiation lab, from a German website that appears to be not-for-profit and which focuses on presenting the historical information. Floorplans and photos of the house are collocated in the powerpoint slides, to make a new point about what inspires innovation. Therefore there is a reasonable fair use case, based in part on transformative use. Should link to the original and attribute the source.

Example: An MIT Press book-cover photo of Vannevar Bush. The assumption is that MIT Press will not be disturbed by use, and that, very likely, MIT owns the photo. Since it is practical to do so, suggestion is to look at the book to see what copyright ownership information appears about the photo, to confirm MIT's ownership. If information cannot reasonably be determined, it seems low risk to use.

Music

The fair use case for using music clips is strengthened when the use is transformative or linked to the pedagogical purpose. The fair use case is weakened when music is synchronized solely to entertain, establish a mood, or convey an emotional tone, or when popular songs are used simply to exploit their appeal and popularity.

Adapted from the 4th principle in the Code of Best practices in fair use/ Media Literacy Education: <http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-media-literacy-education>

Example: Video footage of a rocket launch is shown, accompanied by “Chariots of Fire,” in an Aeronautics course, in a lecture on an engineering aspect. The fair use case is weaker unless there is some link from the music to the lecture content, other than dramatizing or expressing mood.

Readings (Assigned or Supplemental)

Fair use should be employed cautiously where assigned or supplemental readings are concerned. It will be particularly inappropriate to rely on fair use when the material in question originally was prepared for educational purposes, or is being actively licensed for use in educational settings. It is preferable to provide links or citations to materials of this kind, rather than to include. This is true whether the reading is required (assigned) or supplemental (recommended).

(Adapted From <http://www.centerforsocialmedia.org/ocw>)

Note that some articles or other readings (often in manuscript form) may be available under open licensing through various repositories. It may be productive to perform a search for an alternative version of the work that is lawfully available and reusable.

In making a fair use analysis for scholarly articles, the degree of ‘transformative’ use may appropriately include whether the original purpose – scholarship and research – is changed when the article is being used for instruction and education.

Text

Excerpts of text should be considered in light of the overall guiding principles, emphasizing a direct link to pedagogical purpose; transformative use; and the use of only the amount needed for the new (transformative) context or purpose. Length of the excerpt alone is not the key measure of fair use. For example, use of even a short excerpt may weigh against fair use if the excerpt represents the heart of a highly creative and heavily licensed work and is included in the course with limited commentary or contextualization. At the same time, a highly transformative use of an entire work – for example through employing text or data mining methods that prevent sequential reading of the entire work – could offer a stronger fair use case.

A recent court ruling in a case involving electronic reserves at Georgia State University may be relevant, at least as a possible model to begin from. The case examined excerpts from books from three scholarly publishers that had been assigned for course reading, and which had been

copied and made available online to students enrolled in a given course. The judge determined that such use, if it was limited to 10% of works with 10 chapters or fewer, or 1 chapter of books with more than 10 chapters, constituted fair use. The case is being appealed, so at this time should be seen as simply one judge's opinion; in addition, the context of the judge's opinion was limited numbers of students in brick-and-mortar courses; the broader audience of a MOOC could be seen as changing the context.

Example: A press release from the company Intel, in its entirety, with the Intel logo, appears in a set of powerpoint slides. The point being made in the lecture doesn't require that the entire press release be read, so ideally it would be preferable to crop the work such that only the portion needed to support the lecture point is used. Still, there seems to be a reasonable fair use case, based in part on transformative use; the text has been widely distributed on the internet, apparently without Intel being concerned; and the proposed context would be positive, not negative, for the company, so it also seems low risk to use the press release. Should link to the original and attribute the source.

Video (other than lecture capture)

Incorporated video should be evaluated to determine whether synchronized music could raise a concern (see above under *Music*); whether it is highly creative and/or heavily licensed (see above under *Comic Strips and other highly creative works*); and whether the transformative use case is sufficient to support the amount of video shown. Identifying the original source of the video will be important in establishing the fair use case.

Example: Film of the Challenger shuttle explosion is shown during a discussion of the failure of the o-rings in a materials science and engineering course. The fair use case is strengthened by the transformation of the original context (news) into an educational context, and will be further strengthened by using only the portion of video needed to make the point about the failure of the material. A Disney clip of a cartoon rocket, used to humorously highlight the general content of an Aeronautics course, would make a weaker fair use case.

Example: There is a wish to use an entire video that is distributed by BBC and copyrighted to a company. It would be possible to use only short clips, but the instructor believes having the entire video available, or certainly very long sections of it, would be preferable. For this use, permission should be sought, which would normally be granted through a license agreement.

Problems from a text or workbook

Reuse of particular problems from a text or workbook raises the same issues as indicated for workbooks and other material produced for use in courses (see below). Here are some suggested practices for using *problems from textbooks*:

- Take the ‘essence’ of the problem or figure, and modify the details (e.g. angles, dimensions), style (colors, graphics), and ‘discretionary’ content (i.e. more original or unique content) as much as possible/practical.

In particular, the following practices should be employed:

- Change the aesthetics as much as possible (though be aware that small changes such as making a red car blue will not in themselves be sufficient to make an entirely new work)
- Develop, as far as possible, a unique and common style for all the problems – a ‘look and feel’ for the course problems that define them as part of the edX course and set them apart from those in textbooks
- Assess the amount of discretionary content that appears in a given original problem or figure, and alter that discretionary content as much as possible/practical. Content that is nondiscretionary (e.g. three gears must appear in the problem) does not have to be altered to the same degree. When more original or unique (discretionary) content is used, indicating “adapted from” and providing the source is appropriate.
- Wording should be altered as much as possible; focus should be on changing the expression overall, not just swapping out specific numbers and nouns.
- Limit the total number of figures used from a single book both in one semester and over time.
- Use as many sources as practical/possible for figures/problems.
- Avoid using any commercially available solution set, except as a check after creating original solutions.
- Avoid using figures and problems from any online or CDROM version of the text, unless/until any applicable license terms have been reviewed.

Example: The text for a course includes a supplement with problems and their solutions. The supplement has not been licensed for the course. The fair use case for direct use of content from this supplement within the course is weak.

Example: A large number of problems are being taken verbatim from a single text. To improve the fair use case, modify the approach by using the suggested practices above.

Example: A team creates weekly problem sets (consisting of 4 or 5 problems each), routinely adapting problems from a single text. Because the text is marketed for educational/classroom use, thus weakening a potential ‘fair use’ case, it is suggested that the steps above be followed. The suggested practices emphasize creating new problems and figures (new copyrighted works) which are based on commonly understood and standard concepts for teaching the course content.

Workbooks and other material produced for use in courses

The fair use case for workbooks or other material produced specifically for use in a classroom/course setting is weaker, because it is difficult to make a transformative use case and use could directly undermine the market for that material. Therefore, workbooks and other such material should not normally be incorporated, unless there are transformative factors, such as juxtaposing sample pages from workbooks to demonstrate a point about the history of a certain topic.

Special Scenarios:

Incidental Use

In an environment where copyright extends to so many kinds of information, some incidental copying—as when copyrighted material is inextricably linked to or juxtaposed with content included in a course offering, or simply appears in the background -- is unavoidable. Copyrighted material that is incorporated in this manner is being used for purposes very different from those intended by its creators. Where incidental use cannot be avoided with reasonable effort, or without detracting from the educational experience, it should be considered fair.

Example: a professor may comment on social implications of celebrity fashion as portrayed in a music video which also includes other copyrighted content, or a classroom where a lecture is videotaped may have copyrighted material on posters or slides in the background.

(Adapted From <http://www.centerforsocialmedia.org/ocw>)

Note that here, as in other cases, choosing to prohibit easy replication or storage of a local copy of a given video is an option, which generally reduces risk (though this must be weighed against the access problems that can occur when bandwidth constraints impair connectivity).

Licensed content and “terms of use”

A wide array of scholarly articles, statistical databases, ebooks, and other content is available as a result of the MIT Libraries’ license agreements for access. Access to this content through the MIT network may mimic free or open access, as in many cases no authentication other than being at a ‘net18’ (or other MIT) IP address is required for access. Nonetheless, the license determines how the content may be used, and it may be more restrictive than fair use, or impose special restrictions on use. In general it is appropriate to proceed with caution when accessing this content. The MIT Libraries make an effort to include fair use language in licenses for use of content at MIT, and they often succeed, allowing for a fair use case to be made as long

as only insubstantial amounts are taken from any one journal/publisher. However, this cannot be assumed.

Whether licensed for MIT, or openly available on the web, material may have originally appeared on a website with Terms and Conditions for use that are more restrictive than fair use. These terms should be taken under consideration when assessing reuse options, particularly if a visitor must acknowledge the terms to use the site. However, whether or not one has to click to 'agree' to these terms, they are likely enforceable, and should be reviewed.

To obtain details about the licensing arrangements for content, contact Ellen Finnie Duranceau, Program Manager for Scholarly Publishing & Licensing (efinnie@mit.edu).

(Adapted From <http://www.centerforsocialmedia.org/ocw>)

Example: Content appears in a journal article. The article seems 'freely accessible' because you did not have to use any special passwords or credentials to get to the content. A link for "terms and conditions" appears in the footer. The content should not be used without reading the language in those terms and conditions. These terms may be more restrictive than fair use.

Example: An image appears at a website that allows downloading of artistic images, which are not clearly attributed to individual photographers and do not carry any copyright statement. A small 'terms of use' link appears at the bottom of the screen containing the images. Those terms prohibit all redistribution and provide a link to a permissions page. The license terms may supersede fair use provisions, and should be carefully considered when assessing use.

Content from articles falling under MIT Faculty Open Access Articles

Content from articles falling under the MIT Faculty Open Access Policy do not require a fair use case, or permission, in order to incorporate them into MITx. MIT has a license to all scholarly articles completed by the faculty after March 18, 2009. This license allows MIT to make all uses of the articles under copyright, except MIT may not sell the articles for a profit. Therefore, any figure, chart, or text from a scholarly article with at least one faculty author that was completed after 3/18/09 may be reused in MITx -- unless the article has been 'opted out' of the Policy. Any or all of the manuscript versions appearing in the [Open Access Articles Collection](#) under a Creative Commons license may be reused within edX.

Articles under the Policy are available at: <http://dspace.mit.edu/handle/1721.1/49433>. A copy may also be obtained from an author.

CREDIT: Some content that appears here was adapted (where indicated) from the *Code of Best Practices in Fair Use for OpenCourseWare* by [A Committee of Practitioners of OpenCourseWare in the U.S.](#) and is licensed under a [Creative Commons Attribution 3.0 Unported License](#). Based on a work at Centerforsocialmedia.org/ocw.