CENTER FOR SOCIAL MEDIA

School of Communication
American University

CODE OF BEST PRACTICES IN

FAIR USE FOR SCHOLARLY RESEARCH IN COMMUNICATION

JUNE 2010

INTERNATIONAL COMMUNICATION ASSOCIATION

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Funded by the Ford Foundation, through the
Center for Social Media's Future of Public Media

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LAW

CODE OF BEST PRACTICES IN

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WHAT THIS IS

This document is a code of best practices that helps U.S. communication scholars to interpret the copyright doctrine of fair use. Fair use is the right to use copyrighted material without permission or payment under some circumstances—especially when the cultural or social benefits of the use are predominant. It is a general right that applies even in situations where the law provides no specific authorization for the use in question.

This guide identifies four situations that represent the current consensus within the community of communication scholars about acceptable practices for the fair use of copyrighted materials.

WHAT THIS ISN'T

This code of best practices does not tell you the limits of fair use rights. Instead, it describes how those rights should apply in certain recurrent situations. The fair use rights of U.S. communication scholars may, of course, extend to other situations as well.

It is not a guide to using material that people give the public permission to use, such as works covered by Creative Commons licenses. Anyone can use those works the way their owners authorize—although other uses also may also be permitted under the fair use doctrine. Likewise, it is not a guide to the use of material that has been specifically licensed, which may be subject to contractual limitations.

It is not a guide to material that is already free to use without considering copyright (copyright.cornell.edu/public_domain). For instance, all federal government works are in the public domain, as are many older works. For more information on free use, consult the document *Yes, You Can!* (centerforsocialmedia.org/files/pdf/free_use.pdf).

It is not a guide to using material that someone wants to license but cannot trace back to an owner—the so-called "orphan works" problem. However, orphan works are also eligible for fair use consideration, according to the principles detailed below. And it does not address the problems created by the 1998 Digital Millennium Copyright Act, which creates barriers to otherwise lawful fair uses of copyrighted materials that are available only in formats that incorporate technological protections measures (such as encryption).

HOW THIS DOCUMENT WAS CREATED

This code of best practices was created by a committee of communication scholars within the International Communication Association (see committee member list on p. 14). The process was coordinated by Patricia Aufderheide and Peter Jaszi at American University. The code was reviewed by a legal advisory board (see member list on p. 15).

CHARACTERISTICS OF THIS FIELD

Communication scholars study, teach, and apply knowledge of all aspects of human and mediated communication. The divisions of the International Communication Association (ICA) indicate the broad diversity of approaches and interests. Divisional subjects include mass communication, political communication, law and policy, technology, journalism, organizational communication, visual communication, history, public relations, feminism, philosophy, and popular communication. Scholars commonly focus on three areas of concern: political and social; cultural; and technological. Popular culture is a common subject area of research, particularly in countries with thriving, internationally distributed entertainment media.

However diverse the topics, the discipline of communication—which burgeoned after World War II and with the growing significance of mass communication in society—draws upon the research methods typical of social sciences and humanities disciplines, such as history and anthropology. In the social sciences, empirical research—both qualitative and quantitative—is typical. Scholars who work on the humanistic side of the discipline, especially history, depend more on citation and quotation of closely read sources.

Media and communication products, often from commercial media companies, are important raw data for communication research. The raw material may range from newspaper articles to blog commentaries to radio commercials to television programs to computer software to children's educational media to election advertising and reporting to video games to e-mails to social networking pages. Scholars use this material to ask questions about, for instance, persuasion, influence, political process, adoption of new technologies, the formation of social networks, or the validity of a particular theoretical approach, among other things.

They often archive data relating to their research interests, in analog and digital formats, for long periods of time. They may re-use this data for different research projects over time.

They may employ a range of scholarly methods, including quantitative and qualitative textual analysis, experiments employing media as triggers for responses, participant-observation that may involve participation in media environments, surveys that may require response to excerpted media, and historical analysis that may involve comparison of media processes and productions. All of these methods may well employ copyrighted material. To provide one typical example, from 1974, of research involving popular culture: a team of experimental researchers used re-edited material from the popular children's program *The Flintstones*, into which they inserted advertisements so that they could study children's responses.

This data is valuable once again in the distribution of scholarly research. Scholars routinely quote copyrighted work in research results that may be published in journals, in books, online, and in media products, such as podcasts and films. They develop curricula that include their own and others' research results, across all media platforms. Inclusion of illustrative or demonstrative material is routine. For instance, print journals have long incorporated, to the extent technically possible, illustrative material. Online journals such as *International Journal of Communication*, *Canadian Journal of Communication*, *Cultural Studies Review*, and *Flow* all incorporate a range of links, images, and sounds to illustrate and demonstrate scholarly arguments.

PROBLEMS OFTEN ENCOUNTERED

These time-tested research methods, building upon the raw data of cultural expression and often resulting in specialized and personal archives, have been challenged in recent years, partly because of increased capacity to research and produce research results across digital media platforms and partly because of increased public campaigns and public awareness of copyright issues. Increasingly, scholars find their research goals stymied because of confusion over their rights to quote copyrighted material, particularly in newer digital formats. Graduate students are being asked by advisors to pick other topics; librarians doubt whether they can archive electronic theses that include illustrative material that is copyrighted; publishers discourage inclusion of evidence that involves copyrighted material. There is disconcertingly wide variety in practice. Some publishers and distributors allow extensive unlicensed use of copyrighted material, while other publishers demand permissions for any and all illustrations. Insecurity over basic copyright knowledge and the interpretation of exemptions and limitations, such as fair use, thus hobbles communication research. This happens at many levels: when selecting materials, analyzing them, sharing them, and publishing them.

In a 2009 survey of ICA members, summarized in the report *Clipping Our Own Wings* (centerforsocialmedia.org/clipping), respondents reported that in the current environment they are often insecure about their rights to use unlicensed copyright materials, and as a result nearly a third avoided some research subjects or questions and a full fifth abandoned research already under way because of copyright concerns. Topics avoided for scholarly research included television news, fiction film, online games, and political cartoons. When they begin research, communication scholars often find it difficult to collect materials, in significant part because of copyright insecurity. Communication scholars have also abandoned research, particularly when using popular commercial culture, because of copyright insecurity. In addition, many ICA members faced resistance from publishers, editors, and university administrators when seeking to include copyrighted works in their research. They experienced these problems and resistances as violations of their expectation to be able to conduct research on media in society. In some cases they overcame these problems and resistances, often only to fight the same battles again the next time. Other ICA members, some working in less highly visible or fraught subject areas, were more routinely able to make scholarly uses of copyrighted material that they believed were justified by the academic mission of the field. The accounts

that communication scholars give of how and why they make responsible use of copyrighted media material, in situations where they are able to do so, resonate strongly with the evolving copyright doctrine of fair use. The best practices in fair use described below draw from the traditions of the field, scholars' expectations when facing resistance, and the routine practice of the scholars who did not indicate intimidation or resistance in the survey.

FAIR USE

Law provides copyright protection to "works of authorship" in order to foster the creation of culture. Its best-known feature is protection of owners' rights. But copying, quoting, and generally re-using existing cultural material can be, under some circumstances, a critically important part of generating new culture. In fact, the cultural value of copying is so well established that it is written into the social bargain at the heart of copyright law, as inscribed in the United States Constitution. The bargain is this: we as a society give limited property rights to creators to encourage them to produce culture; at the same time, we give other creators the chance to use that same copyrighted material, without permission or payment, in some circumstances. Without the second half of the bargain, we could all lose important new cultural work.

Copyright law has several features that permit quotations from copyrighted works without permission or payment, under certain conditions. Fair use is the most important of these features. It has been an important part of copyright law for more than 170 years. Where it applies, fair use is a user's right. In fact, as the Supreme Court has pointed out (in its 2003 *Eldred* decision), fair use helps to keep copyright from violating the First Amendment. New creation inevitably incorporates existing material. As copyright protects more works for longer periods than ever before, creators face new challenges: licenses to incorporate copyrighted sources become more expensive and more difficult to obtain—and sometimes are simply unavailable. As a result, fair use is more important today than ever before.

Copyright law does not specify exactly how to apply fair use, and that gives the fair use doctrine a flexibility that works to the advantage of users. Creative needs and practices differ with the field, with technology, and with time. Rather than following a specific formula, lawyers and judges decide whether an unlicensed use of

copyrighted material is fair according to a "rule of reason." This means taking all the facts and circumstances into account to decide if an unlicensed use of copyrighted material generates social or cultural benefits that ultimately are greater than the costs it imposes on the copyright owner.

Fair use is flexible; it is not unreliable. In fact, for any particular field of critical or creative activity, lawyers and judges consider expectations and practice in assessing what is fair within that field. In weighing the balance at the heart of fair use analysis, judges refer to four types of considerations mentioned in Section 107 of the Copyright Act: the nature of the use, the nature of the work used, the extent of the use, and its economic effect (the so-called "four factors"). This still leaves much room for interpretation, especially since the law is clear that these are not the only permissible considerations. So how have judges interpreted fair use? In reviewing the history of fair use litigation, we find that judges return again and again to two key questions:

- Did the unlicensed use "transform" the copyrighted material by using it for a different purpose than that of the original, rather than just repeating the work for the same intent and value as the original?

- Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

If the answers to these two questions are "yes," a court is likely to find a use fair. Because that is true, such a use is unlikely to be challenged in the first place.

Both key questions touch on, among other things, the question of whether the use will cause excessive economic harm to the copyright owner. Courts have told us that copyright owners are not entitled to an absolute monopoly over transformative uses of their works. By the same token, however, when a use supplants a copyright owner's core market, it is unlikely to be fair. Thus, for example, a textbook author cannot quote large parts of a competitor's book merely to avoid the trouble of writing her own exposition. Another consideration influences the way in which these questions are analyzed in practice: whether the user acted reasonably and in good faith, in light of general practice in his or her particular field. The fact that community practice influences judicial decisions makes it important for communities of practice to understand and articulate their fair use rights.

In any case, fair use is not medium specific. The principles of fair use apply equally to a university publication and to a Web site. However, since all fair use instances are context dependent and case-by-case, potential fair users of copyrighted material will weigh all the circumstances in making a decision about how to proceed.

Communication scholars' ability to rely on fair use will be enhanced by this code of best practices, which will serve as documentation—both for scholars and for the gatekeepers who control access to distribution of their knowledge in universities, publishing houses, and media companies, among others—of commonly held understandings drawn from the experience of scholars themselves and supported by legal analysis. Thus, the code helps to show that the uses of copyrighted materials described here are reasonable and appropriate for the purposes of scholarship in communication.

Fair use is in wide and vigorous use today in many professional communities. For example, historians regularly quote both other historians' writings and primary textual sources; filmmakers and visual artists use, reinterpret, and critique copyrighted material; scholars illustrate cultural commentary with textual, visual, and musical examples. Equally important is the example of commercial news media. Fair use is healthy and vigorous in daily broadcast television news, where references to popular films, classic TV programs, archival images, and popular songs are both prevalent and routinely unlicensed.

In some cases professional communities have set forth their understandings in consensus documents, which may be useful to those who are involved with these creative practices. For instance, documentary filmmakers have established their own code (http://www.centerforsocialmedia.org/resources/publications/statement_of_best_practices_in_fair_use/); so have film scholars, who routinely use popular films in their teaching (dii4.com/documents/SCMSBestPracticesforFairUseinTeaching-Final.pdf); and now a code of best practices has been established for online video creators as well (centerforsocialmedia.org/remix). Although professional groups create such codes, no one needs to be a member of a professional group to benefit from their interpretations.

CODE OF BEST PRACTICES IN FAIR USE FOR COMMUNICATION SCHOLARS

GENERAL POINTS ABOUT PRINCIPLES

This code of best practices identifies four sets of current practices in the use of copyrighted materials in communication scholarship to which the doctrine of fair use clearly applies.

These situations may involve all forms of media. In all cases, a digital copy is the same as a hard copy in terms of fair use, and an online use (unless otherwise noted) is equivalent to an off-line one. If a use is fair in the course of scholarship, then it is fair in the publication and distribution of that scholarship by any means, including publishing and media distribution, and in the archiving of that scholarship.

The situations identified concern fair use without a license of copyrighted materials for communication scholarship, not the way those materials were acquired. When a user obtained a copy illegally or in bad faith, that fact may affect fair use analysis. The same may be true if the user acquired the material from a source, such as an academic library, which had acquired it subject to specific restrictions on use, and the user agreed to be bound by those restrictions. Otherwise, of course, where a use is fair, the origin is irrelevant.

GENERAL POINTS ABOUT LIMITATIONS

The principles are all subject to a "rule of proportionality." Communication scholars' fair use rights extend to the portions of copyrighted works that they need to accomplish their goals—and sometimes even to works in their entirety. By the same token, the fairness of a use depends, in part, on whether the user took only what was needed to accomplish his or her legitimate purpose. That said, there are no numerical rules of thumb that can be relied upon in making this determination. It is the general practice of communication scholars to articulate the methodology of a project before engaging in research activity. The development of a protocol involves, among others things, a description of the necessary research materials. Determining what kind and amount of copyrighted content is required should generally be a part of the scholar's planning process.

Communication scholars share values, not only about what uses of copyrighted material are justified by their academic mission, but also about what constitutes best practices in the ways those uses are made. An example is the issue of attribution. Merely identifying the source material does not make an otherwise unjustified use fair, nor does the law literally require that uses be accompanied by attribution in order to be considered fair. But as is reflected below, communication scholars believe strongly that there is an ethical and academic imperative to provide proper attribution. And, self-evidently, if it is important to use specific copyrighted content in a particular scholarly project, appropriate citation will help to make that justification more apparent.

SITUATION ONE: ANALYSIS, CRITICISM, AND COMMENTARY OF COPYRIGHTED MATERIAL

DESCRIPTION: Scholars often direct their writing to the analysis of specific media works and their role in the communication system, with emphases on their production, consumption, or both. They may analyze aesthetic or presentational decisions; quantity of words, images, or tropes; reception by individuals; transmission of knowledge about the works through social networks; or they may otherwise analyze particular works. They may compare works of a particular genre or on a particular topic. In practice, critical analysis generally will be most persuasive if the work or works in question can be reproduced—whether in part or (as in the case of some photographs, announcements, or advertisements) in whole—both in the process of research and in exposition of research results.

PRINCIPLE: No category of use illustrates transformative fair use better, or is more widely regarded as legitimate in everyday scholarly practice, than this one. Nevertheless, copyright owners often refuse to permit such uses when asked, or seek to impose unacceptable terms and conditions (such as the right to review the scholar's work). Nevertheless, scholars may confidently invoke fair use to employ copyrighted works for purposes of analysis, criticism, or commentary directed toward those works. This fair use, made to enable the research, extends as well to the distribution of their research results, whether in the classroom, on a Web site, in printed work, in conference presentations, or by other methods of disseminating scholarly knowledge.

LIMITATIONS:

- A scholar should determine the extent of use based on the scholar's analytic objective. The scholar should not employ more than is needed for the scholarly objective, either to conduct the original research or to explain it to others.
- Scholars should provide citations in a form and manner typically used in communication scholarship for the material used in any publication of shared results of the study.

SITUATION TWO: QUOTING COPYRIGHTED MATERIAL FOR ILLUSTRATION

DESCRIPTION: Communication scholars often reproduce copyrighted material in their term papers, conference papers, academic presentations, journal articles, books, theses, and audiovisual media productions as illustrations or examples of an economic, social, or cultural phenomenon with which their scholarship is concerned. Depending on the illustrative context, these reproductions may be partial or complete.

PRINCIPLE: Scholars may invoke fair use to reproduce copyrighted material where it serves to explain or illustrate their scholarly insights or conclusions about communications in relation to social, cultural, political, or economic phenomena. Generally speaking, such uses transform the material reproduced by putting it in an entirely new context; thus, a music video clip used to illustrate trends in editing technique or attitudes about race and gender is being employed for a purpose entirely distinct from that of the original, and is typically directed to an entirely distinct audience from that for which it originally was intended. This is true even in situations where the media object in question is not subjected to specific analysis, criticism, or commentary.

LIMITATIONS:

- A scholar should determine the nature of the excerpt (or the use of a work in its entirety) based on the scholar's academic objective in choosing the illustration; merely decorative or entertaining uses of copyrighted material, under the guise of illustration, are inappropriate. However, should a work chosen for its significance to a scholarly argument also be entertaining, that fact should not disqualify the use from being considered fair. A scholar should determine the extent of use (both as to the number of illustrations employed and the amount excerpted from each) based on the scholar's illustrative objective. Scholars should provide citations in a

form and manner typically used in communication scholarship for the material used in any publication of shared results of the study.

SITUATION THREE: USING COPYRIGHTED MATERIAL TO STIMULATE RESPONSE, DISCUSSION, AND OTHER REACTIONS DURING RESEARCH

DESCRIPTION: Various scholarly research practices in communication require the ability to reproduce copyrighted material in experimental and collaborative research situations. For instance, communication scholars conducting media effects research need to test the responses of individuals and groups to various kinds of media in controlled research settings, such as experiments. They may also execute surveys, conduct focus groups, and be participant-observers using ethnographic observational methods. Some scholars conduct research on open and participatory media environments within those environments, using copyrighted material either to elicit a discussion or response or to analyze discussions or responses occurring in that environment.

PRINCIPLE: The fair use doctrine applies where a communication scholar employs copyrighted materials to elicit reactions or initiate a conversation for scholarly research purposes, in either an off-line or an online environment. Assessing the response of research subjects to media is an obvious example of transformative use, since the focus of such projects will be on reception rather than on content as such.

LIMITATIONS:

- Scholars should select copyrighted material in relationship to the design of a scholarly research project.
- The amount used should correspond to the research purpose.
- Access should be limited to subjects taking part in the research study and to purposes that are related to it, such as the dissemination of research results.

Scholars should provide citations in a form and manner typically used in communication scholarship for the material used in any publication of shared results of the study.

SITUATION FOUR: STORING COPYRIGHTED MATERIAL IN COLLECTIONS AND ARCHIVES

DESCRIPTION: Communication scholars often make private copies of individual copyrighted works that are the objects of scholarly inquiry to enable or facilitate their research, and they sometimes maintain organized research collections of copyrighted material for an indefinite period as their research interests evolve. In this, they are doing what scholars across disciplines do: make private archival collections of primary data to refer back to as their research interests develop. Examples include electronic reproductions of transient works (such as broadcasts and Internet content), and photocopies or scans of newspaper or other periodical articles, which enable the scholars who assemble them to better sort, manipulate, or markup materials. In addition, other scholars and students pursuing related projects may wish to access these collections. Some archiving activities may be justified under express and implied licenses, but others may require justification on the basis of fair use if they are to proceed.

PRINCIPLE: Fair use applies to personal archiving of copyrighted material for scholarly purposes, either immediately or within a set of ongoing research interests, with the expectation of allowing scholarly consultation of it by others, both within the discipline of communication scholarship and on an interdisciplinary basis. The materials in question, generally topical or even ephemeral in character, are transformed by collection or organization into a research corpus, which exists for a new and fundamentally different purpose.

LIMITATIONS:

- Material included in a collection governed by this principle should be related to a scholar's defined set of research interests in the field.
- Material archived in reliance on fair use should be intended only for scholarly use, including such functions as explaining scholarship results to others and distribution of scholarly results.
- Personal collections should be maintained only until individual scholars no longer hold the research interests that motivate the collection, or until the collection no longer is required to support published research based on items in it. At that point, such a collection should be destroyed or donated to either an institutional archive or to other scholars pursuing similar research interests. Maintenance of a personal collection may involve, as appropriate, format migration and back-up copying.

- Scholars who wish to open their collections of archived material to others should adopt policies appropriate to the medium, aimed at limiting access to scholars doing research in the relevant area and establishing appropriate limitations on the purposes to which the materials will be put.
- Archived material should be clearly marked as to its source, and (wherever possible) metadata associated with that material should be preserved.

INTERNATIONAL COMMUNICATION ASSOCIATION AD HOC COMMITTEE ON FAIR USE AND ACADEMIC FREEDOM

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Funded by the Ford Foundation through the Center for Social Media's Future of Public Media Project

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Professor Peter Jaszi cofounded the Program on Information Justice and Intellectual Property, which promotes social justice in law governing information dissemination and intellectual property through research, scholarship, public events, advocacy, and provision of legal and consulting services. The program is a project of the Washington College of Law at American University in Washington, D.C., led by Dean Claudio Grossman.

Patricia Aufderheide founded and directs the Center for Social Media, which showcases and analyzes media for social justice, civil society, and democracy, and the public environment that nurtures them. The center is a project of the School of Communication, led by Dean Larry Kirkman, at American University in Washington, D.C.

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