

HANDBOOK OF COPYRIGHT AND FAIR USE



**OFFICE OF GENERAL COUNSEL
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TABLE OF CONTENTS

| | |
|---|---|
| I. COPYRIGHT PROTECTION | 1 |
| II. THE FAIR USE EXCEPTION | 2 |
| Factor 1: The purpose and character of the use | 3 |
| Factor 2: The nature of the copyrighted work | 3 |
| Factor 3: The amount and substantiality of the work used in relation to the whole copyrighted work | 3 |
| Factor 4: The effect of the use on the market for or value of the copyrighted work | 4 |
| III. APPLICATION OF THE FAIR USE FACTORS IN THE UNIVERSITY SETTING | 4 |
| A. Fair Use Rules for Classroom Instructors | 5 |
| B. Determining How Much May Be Copied/Excerpted | 5 |
| C. What NOT To Do | 5 |
| D. Electronic Publishing | 6 |
| E. Educational Multimedia | 6 |
| IV. Getting Permission | 7 |
| Fair Use Factors Checklist | 8 |

FUNDAMENTALS OF COPYRIGHT AND FAIR USE

I. COPYRIGHT PROTECTION

Federal copyright law provides the exclusive legal rights authors have over their “original works of authorship” – whether or not published – for an established and limited period.¹ The person who creates the original expression in a particular work is the work’s author, and the author will have a copyright in the particular work if it has been recorded in any physical form. The author is usually the copyright holder, but there are exceptions.²

Copyright protects original literary, dramatic, musical, and artistic works such as, poetry, novels, magazine articles, films, songs, sound recordings, broadcasts, architectural designs, computer software code, CD-ROMs, video games, videos, plays, paintings, sheet music, recorded music performances, sculptures, photographs, and choreography. Copyright does not protect facts, ideas, systems, or methods of operation, although it protects the way they are expressed.³

The copyright holder has the exclusive right to do and to authorize others to do certain things regarding the copyrighted work, including the right to reproduce the work, to prepare derivative

¹ All works published in the United States before 1923 are in the public domain. A work created on or after January 1, 1978, is copyright protected for the life of the author plus an additional 70 years after the author’s death. In the case of “a joint work prepared by two or more authors,” the term lasts for 70 years after the last surviving author’s death. For works made for hire, and for anonymous and pseudonymous works (unless the author’s identity is revealed in Copyright Office records), the duration of copyright will be 95 years from publication or 120 years from creation, whichever is shorter. For works created before January 1, 1978, but not published or registered by that date, in no case will the term of copyright expire before December 31, 2002, and for works published on or before December 31, 2002, copyright will not expire before December 31, 2047. Works originally created and published before January 1, 1978, the term of copyright protection is 95 years from the date of publication.

² Some important exceptions to the general rule that the creator of a work of expression owns the copyright include: (1) if a work is created by an employee in the course of his or her employment, the employer owns the copyright unless the employer and employee have agreed otherwise; (2) if the work is created by an independent contractor and the independent contractor signs a written agreement stating that the work shall be “made for hire,” the commissioning person or organization owns the copyright only if the work is (i) a part of a larger literary work, such as an article in a magazine or a poem or story in an anthology; (ii) part of a motion picture or other audiovisual work, such as a screenplay; (iii) a translation; (iv) a supplementary work such as an afterword, an introduction, chart, editorial note, bibliography, appendix or index; (v) a compilation; (vi) an instructional text; (vii) a test or answer material for a test; or (viii) an atlas. Works outside these eight categories constitute “works for hire” only if created by an employee within the scope of employment; and (3) if the creator has sold or otherwise assigned the entire copyright, the receiving person or entity becomes the new copyright owner.

³ Other categories not generally eligible for copyright protection include: (1) works that have not been fixed in a tangible form of expression, such as choreographic works that have not been notated or recorded, or improvisational speeches or performances that have not been written or recorded; (2) titles, names, short phrases, and slogans, familiar symbols or designs, simple variations of typographic ornamentation, lettering, or coloring, simple listings of ingredients or contents; (3) ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices, as distinguished from a description, explanation, or illustration; and (4) works consisting entirely of information that is common property and containing no original authorship, such as: standard calendars, height and weight charts, tape measures and rulers, and lists or tables taken from public documents or other common sources.

works, to distribute or sell copies, to transfer ownership, to perform the work publicly, and, in the case of sound recordings, to perform or broadcast the work.

To use or reproduce some or all of a copyrighted work, it is necessary to either obtain the copyright holder's permission or come within an exception to the copyright holder's exclusive rights. **Getting permission from the copyright holder is the safest way to use or copy a copyrighted work.** But to do so, one must first determine whether a particular work is copyright protected and who the copyright owner is. Several ways exist to investigate whether a work is copyright protected and the facts and circumstances of the copyright including:

- (1) Examining the work for such elements as a copyright notice, place and date of publication, author and publisher. If the work is a sound or video recording, examine the disc, tape, cartridge, or cassette in which the recorded sound or video is fixed, or the album cover, sleeve, or container in which the recording is sold.
- (2) Searching the Copyright Office catalogs and other records.
- (3) Having the Copyright Office conduct a search (for a fee).

Copyright investigations may require several of these methods, and the results may nonetheless be inconclusive. The changes in copyright law over the years have made determining copyright ownership and validity difficult, so University Counsel should be consulted. Coming within an exception to the copyright owner's exclusive rights is an alternative to determining whether a work is copyright protected and seeking permission to use. "Fair use" is the most common such exception.

II. THE FAIR USE EXCEPTION

"Fair use," one of the most frequently used exceptions to a copyright holder's exclusive rights, provides for using or copying portions of copyrighted works without the copyright holder's permission for a limited and "transformative" purpose, such as criticism, comment, news reporting, parody, teaching, scholarship and research. Section 107 of the Copyright Law, 17 USC 107, makes clear a fair use is not copyright infringement. Deciding whether a use is "fair," and therefore not copyright infringement, is based on the weighing of four factors:

1. the purpose and character of the use;
2. the nature of the copyrighted work;
3. the amount of the work that will be used in relation to the whole copyrighted work;
and
4. the effect the use would have on the market for or value of the copyrighted work.

Each is analyzed below.

Factor 1: The purpose and character of the use.

On the lists below, items on the left weigh in favor of fair use, whereas the commercial use listed on the right weighs against fair use, and permission to use the work would be required. The items listed in the middle can add weight to the uses on the left and make the fair use determination more likely.

| | | |
|-------------|----------------|------------|
| Nonprofit | Criticism | Commercial |
| Educational | Commentary | |
| Personal | News reporting | |
| | Parody | |

No one factor by itself determines fair use, but generally an educational purpose, although NOT dispositive, weighs in favor of fair use. If the work is used in the classroom as part of a commentary and criticism, the case for fair use is strengthened. However, when a copyrighted work is used for a commercial purpose, Factor 1 weighs against fair use and permission from the copyright holder will almost certainly be necessary.

Factor 2: The nature of the copyrighted work.

Works disseminating facts or information benefit the public, so greater leeway in finding fair use is given to copying from factual works, such as biographies, than from purely creative/fictional works, such as plays or novels. Hence, if the work is factual and has been published, the balance favors fair use. If the work is creative and unpublished, it is likely not fair use. The balancing test under this factor is as follows:

| | | |
|-----------|---------------------------------|-------------|
| Factual | Mixture of fact and imaginative | Imaginative |
| Published | | Unpublished |

The middle column is not a weighing factor, but a recognition that some works are both imaginative and factual. Additionally, if a copyrighted work is out of print, it is more likely to be considered fair use.

Factor 3: The amount and substantiality of the work used in relation to the whole copyrighted work.

The less that is used/copied, the more likely it will be a fair use. However, even using a small portion of a work can constitute copyright infringement (not be considered fair use) if the portion used/copied is the “heart” (the seminal or most memorable aspect) of the work. Here, the items on the left weigh in favor of fair use and those on the right weigh against fair use.

Small amount
Not the “heart” of the work

Large amount
“Heart” of the work

If the use is educational and for commentary purposes (Factor 1, strongly in favor of fair use), then more of the work may be used/copied and still be considered fair use. Similarly, if the use is commercial, even using a small amount will weigh against fair use.

Factor 4: The effect of the use on the market for, or value of, the copyrighted work.

This factor requires a comparison of the first three factors in relation to their effect on the commercial market for the copyrighted work. If the proposed use is likely to become widespread and would have a negative effect on the marketability of the original work, this factor will weigh against fair use.

After evaluation of the first three factors, the proposed use tips toward fair use

Original is out of print

Competes with sales of the original

No ready market for permission

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

Copyright owner is not identifiable

The items in the middle column support fair use. If the copyright owner is not identifiable, even though the use would compete with commercial sales, the balancing test favors fair use because of the potential difficulty in obtaining permission. Unlike the components of the other factors, the relative ease of obtaining permission from the copyright owner has nothing to do with the use or the character of the work. Nevertheless, if permission from the copyright owner is not difficult to obtain, it will generally be required.

III. APPLICATION OF THE FAIR USE FACTORS IN THE UNIVERSITY SETTING

The law provides no clear or direct answer as to when fair use applies in a specific situation because each must turn on its own unique facts. Congress intentionally specified flexible factors that can be adapted for changing needs and circumstances. Attached is a checklist to assist in the analysis of the fair use factors.

To reach a decision each proposed use must be carefully analyzed in terms of the four factors outlined above. Reasonable minds may differ on the applicability of fair use in a particular circumstance, and as a result there is necessarily some risk incurred in arriving at a decision. If most factors outlined above lean in favor of fair use, the proposed use is most likely allowed without permission; if most lean the opposite direction, the action will most likely not fit the fair use exception and permission is required.

Time may also have a bearing on the decision. When a copyrighted work is new or has just been published, there may not yet be an established method for gaining permission. Therefore, it may

be possible for there to be a fair use of the work without permission, as opposed to a copyrighted work that has been in circulation for some time where there is an established method of gaining permission and an established commercial market. But the analysis may lead to an entirely different result for the same work used the very next year. In short, the fair use of a publication may have time limits.

Although no definitive rules exist conclusively establishing fair use, the following guidelines, which have been developed from court decisions, give an indication of how courts view fair use in the educational/instructional context.

A. **Fair Use Rules for Classroom Instructors**

Instructors using/copying copyrighted material in the classroom must meet the “brevity” and “spontaneity” test. “Brevity” refers to the amount of the work used/copied, and “spontaneity” refers to the number of times the work is used/copied. Copying should occur close in time to the need to use the copies (within the timeframe of a particular class) to qualify as fair use. If the same copied material is used repeatedly for the same course year after year, it likely will not be fair use and permission will be required.

B. **Determining How Much May Be Copied/Excerpted**

A good “rule of thumb” is to copy/excerpt no more than one chapter from a book (never the entire book); an article from a periodical or newspaper; a short story, essay, or poem – one work is the norm whether from an individual work or an anthology; a chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

(i) Poetry

Multiple copies of a poem with fewer than 250 words, and no more than 250 words from a longer poem.

(ii) Prose

Multiple copies of an article, story or essay that are 2,500 words or fewer or excerpts up to 1,000 words or 10 % of the total work, whichever is less.

(iii) Illustrations

Multiple copies of a chart, graph, diagram, drawing, cartoon, or picture contained in a book or periodical.

C. **What NOT to Do**

Do not make multiple copies of different works as a substitute for students purchasing the original books, reprints, or periodicals.

Do not use the same copied/excerpted work from semester to semester.

Do not use the same copied/excerpted material for several different courses at the same or different institutions.

D. Electronic Publishing

The same copyright protections exist for the copyright owner of a work regardless of form. This includes hard copies and electronic versions of copyright protected works, and includes databases, CD-ROMs, bulletin boards, and material on the Internet. Additionally, works on the Internet are NOT in the public domain merely because they are on the Internet.

E. Educational Multimedia

“Educational multimedia” – the use of legally acquired copyright protected works such as motion media, music, text, and graphics incorporated with an instructor’s original material, such as course and lecture notes – may be used for **only** educational activities, and may not be used for commercial purposes without permission. Therefore, fair use generally allows university faculty to include portions of copyrighted works into their own multimedia presentations for the purpose of teaching a course curriculum, assignments for student self-study, for remote instruction if the network is secure and prevents unlawful copying, for conferences, presentations, or workshops, and for their professional portfolio. Such use of copyright protected material should not last longer than two years without the copyright owner’s permission.

(i) Motion media

May use up to three minutes or 10 % of the total work, whichever is less.

(ii) Text material

May use up to 1,000 words or 10% of the total work of prose, whichever is less.

May use an entire poem of fewer than 250 words, but no more than three poems by one author or five poems by different authors in the same work. If the poem has more than 250 words, then no more than 250 words may be used from three excerpts by one author or five excerpts by different authors in the same work.

(iii) Musical Work (including video)

May use up to 30 seconds or 10% of the total work.

(iv) Pictorial Representations

May use up to five images from one artist or photographer.

May use up to 15 images or 10%, whichever is fewer, from a collection.

(v) Numerical Data

May use up to 2,500 fields or entries or 10% of the total database or table, whichever is less.

IV. GETTING PERMISSION

If the intended use is not fair, permission from the copyright holder is necessary. Merely acknowledging the author of the original work (attribution of authorship) is NOT a substitute for express permission to use/copy the work.

If the work to be used is a book or journal, the best source for information about the author is the Copyright Clearance Center (see, www.copyright.com). In many cases the campus library will have helpful information about getting permission to use copyrighted works. For permission to use music, organizations such as the American Society of Composers, Authors and Publishers (ASCAP) and the Recording Industry Association of America (RIAA) have information about getting authorization to use musical works.

Permission must be in writing and come from the copyright owner or the owner's authorized agent. For more information about obtaining permission to use copyrighted works see <http://www.copyright.iupui.edu/permorg.htm> and <http://www.utsystem.edu/ogc/intellectualproperty/permisn.htm>, or contact the University Counsel assigned to your campus.

FAIR USE FACTORS CHECKLIST

This checklist can be used to help determine if your use of a copyrighted work falls within the fair use exception to copyright.

| <i>Purpose of Use</i> | |
|--|--|
| <i>Favoring Fair Use</i> | <i>Opposing Fair Use</i> |
| <input type="checkbox"/> Teaching (including classroom use copies) <input type="checkbox"/> Research <input type="checkbox"/> Scholarship <input type="checkbox"/> Nonprofit Educational Institution <input type="checkbox"/> Criticism <input type="checkbox"/> Changing the work for a new utility <input type="checkbox"/> Parody | <input type="checkbox"/> Commercial activity <input type="checkbox"/> Profiting from the use <input type="checkbox"/> Entertainment <input type="checkbox"/> Denying credit to original author |
| <i>Nature of work</i> | |
| <i>Favoring Fair Use</i> | <i>Opposing Fair Use</i> |
| <input type="checkbox"/> Published work <input type="checkbox"/> Factual or Nonfiction based <input type="checkbox"/> Important to favored educational objectives | <input type="checkbox"/> Unpublished work <input type="checkbox"/> Highly creative work (art, music, plays, etc.) <input type="checkbox"/> Fiction |
| <i>Amount Used</i> | |
| <i>Favoring Fair Use</i> | <i>Opposing Fair Use</i> |
| <input type="checkbox"/> Small Quantity <input type="checkbox"/> Portion used is not central to entire work <input type="checkbox"/> Appropriate portions for educational purpose | <input type="checkbox"/> Large portion or whole work used <input type="checkbox"/> Portion used is central to work |
| <i>Market Effect</i> | |
| <i>Favoring Fair Use</i> | <i>Opposing Fair Use</i> |
| <input type="checkbox"/> User lawfully acquired or purchased copy of original work <input type="checkbox"/> One or few copies made <input type="checkbox"/> No significant effect on the market or potential market for copyrighted work <input type="checkbox"/> Lack of licensing mechanism | <input type="checkbox"/> Avoids payment of royalties/permission <input type="checkbox"/> Significantly impairs market or potential market for copyrighted work or derivatives <input type="checkbox"/> Licensing mechanism is reasonably available <input type="checkbox"/> Permission is available <input type="checkbox"/> Numerous copies made <input type="checkbox"/> Placed it on Web or other public forum <input type="checkbox"/> Repeated or long term use |