I. INTRODUCTION

A. Purpose

What is a copyright?

may not copy (by photocopying or other means) and use copyrighted materials without

The University has adopted these copying guidelines for faculty and staff in an effort to achieve greater certainty of procedure, reduction of the risk of infringement of copyright, or allegations thereof, and the maintenance of a desirable flexibility to accommodate specific copying needs.

What are common misconceptions of copying copyrighted materials?

The importance of these guidelines is underscored by four common misconceptions:

1) The duplication of copyrighted materials without permission for non-profit educational
   There are some very well-defined limits to such uses.

The University encourages faculty members to exercise good judgment in the use of copyrighted materials, and to carefully and efficiently balance the following guidelines with the best interests of the students when making use of copyrighted materials.

B. Identifying Copyrighted Material

1) Published Works:

All copyrights prior to 1927 have expired. These works can be freely photocopied.

All copyrighted works published before March 1989 were required to bear

the materials is permissible without obtaining permission. Be aware, however, that some law firms may assert copyright ownership for court documents that they have prepared and filed with the court on behalf of their clients.

State Statutes, Regulations, Ordinances, and Municipal Codes: These materials are in the public domain, and reproduction of portions of their official text may be freely made without permission. However, if the text of a statute or of a regulation is taken from a commercial source (e.g. BNA, Patent, Trademark & Copyright Journal), then you should exercise care to copy only the text of the statute or regulation. Editorial comments and explanatory material are within the

permission to make multiple copies.

Fully Copyrighted Materials:

Outlines; Newsletters; and Periodicals.

Some periodicals published by tax-exempt educational institutions, such as some law journals, expressly grant the right to copy for classroom use, subject to three conditions:

How do you determine fair use?

There are four factors that are to be considered in determining Fair Use, and in each case faculty members must determine for themselves the factors which weigh in favor of and against Fair Use. These factors are:

1) the purpose and character of the use, including whether such use is commercial in nature;
2) the nature of the copyrighted work;
3) the amount and substantiality of the portion used in relation to the copyrighted work; and
4) the effect of the use upon the potential market for or value of the copyrighted work.

See 17 U.S.C. § 107 for more on Fair Use.

1) Purpose and Character of the Use

Does it advance a socially beneficial activity?

Including: criticism, comment, news reporting, teaching, scholarship, or research

Is the use commercial or noncommercial?

Noncommercial use (such as for nonprofit educational purposes) weighs more in favor of fair use than commercial use.

different character, altering the first with new expression, meaning or

-Rose Music, Inc., 510 U.S. 569, 579 (1994).

Ex: using a quotation in a critical literature essay to illustrate a point. This is transformative because while the original purpose of the quote was for art, the purpose of the quote in the essay is for scholarship and critique.

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2) Nature of the Copyrighted Work

Is the work published or unpublished?

Unpublished works have more protection because the author has the right to decide when his or her work will be made public. However, the fact that it is unpublished in itself will not bar fair use.

An out of print published work may tend to weigh in favor of fair use since the work is not otherwise available.

Is it creative or factual?

A creative work will weigh against fair use while a factual work weighs for fair use since the purpose of a copyright is to protect expression rather than facts.

Note: this second factor is generally the least important in making a fair use determination.

3) Amount and Substantiality of the Portion Used In Relation to the Copyrighted Work as a Whole

What percentage of the original work has been used?

Quantitative approach: higher the percentage, more likely that this factor will weigh against fair use.

Qualitative approach: even if the percentage is small, if the portion of the

use. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985)

What is the nexus between the purpose of the fair use and the portion of the copyrighted work taken?

If you take more of the copyrighted work than is necessary to accomplish the purpose, it will weigh against fair use.

However, this third factor is neutralized if the amount used is necessary for a transformative purpose.

4) The Effect Upon the Potential Market for or Value of the Copyrighted Work

Does the use adversely affect the market for the original work?

A use that results in lost sales to the copyright owner will weigh against fair use.

Does the use adversely affect derivative or potential markets?

The market is not limited to the original but also derivative markets and

likely to be developed by copyright owners).

Ex: market for movie rights for a novel.

Does the use decrease demand for the original work by criticizing it?

Courts have stated there is no protectible market for criticism or parody.

Ex: A negative film review will have no impact on the fourth factor.

Weighing the factors

There are no bright line rules. Courts assess factors together and consider the totality of the circumstances.

Keep in mind weighing the factors should reflect the purpose of copyright law

.S. Const., art. I, § 8, cl. 8).

See https://copyright.gov/fair-use/ for a searchable database of court opinions organized by category and type of use to help you determine what courts have considered to be fair use. Note this is not a substitute for legal advice.

See also https://fairuse.stanford.edu/overview/fair-use/cases/ for summaries of fair use cases which are divided by text, artwork/visual arts/audiovisual, internet, music, and parody.

Use this checklist from the Columbia Copyright Advisory Office to help you consider the factors and subfactors of the fair use analysis: https://copyright.columbia.edu/content/dam/copyright/Precedent%20Docs/fairusechecklist.pdf

B. Miscellaneous

Photocopying of Course Materials

Congress declined to adopt a specific exemption for photocopying of copyrighted material for educational and scholarly purposes, leaving this to be addressed under the fair use doctrine.

Congress published Classroom Guidelines leading up to the enactment of the 1976 Copyright Act. See H.R. Rep. 94-1476, pages 65-74.

These guidelines are not part of the copyright legislation nor are they legally binding, but they may be helpful in determining Congress's intent in interpreting fair use.

The Guidelines for Classroom Copying can be found at: https://www.copyright.gov/circs/circ21.pdf

Single Copying for Teachers: Guidelines liberally permit teachers to make a single copy for teaching or research.

Multiple Copies for Classroom Use: Guidelines require:

Brevity: limits on amount of material that may be copied1 12 Tf1 0 0 1 264.35 563

Cumulative effect: limits aggregate amount of copying

Fair Use Analysis: factors a court might take into account in determining whether photocopying course material constitutes fair use:

1) Purpose and Character of Use:

Will the material be used for commentary, criticism, explanation? If it supports or enables new meaning, it is more likely to qualify as

Include your own comments, criticism and explanation, or otherwise make your use of the copyrighted material transformative.

other such material.

Limit access to students enrolled in the course and other qualified people (e.g., a

require a password or PIN.

Allow access only during the term in which the course is given, and disable student access thereafter.

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Wherever feasible, employ streaming formats and technological limits on copying, retention and further dissemination of the work by students.

2) Nature of the Work:

Consider whether a license (permission) allowing the educational use of the material that you wish to make can readily be purchased. If it can, this fact generally will weigh against fair use, though it still may be possible to prevail on fair use depending on the other circumstances.

3) Amount Copied:

Use copyrighted material in your course website only if the material is integral to the course curriculum and use only a limited portion (what is necessary for the educational purpose).

Avoid taking many excerpts or portions from any one work.

4) Effect on Market:

primarily for instructional use, or where your use would reasonably be expected to harm the market for the analog version of the material.

Credit the sources fully and display the copyright notice from the original.

4. No charge shall be made to the student beyond the actual cost of the copying.

III. OBTAINING PERMISSION TO USE OR COPY

If it is determined that a proposed use of copyrighted material does not fall under the Fair Use guidelines above or under the broader factors of Fair Use, and that permission is needed to copy a work, there are several ways to obtain it.

A. How to Obtain Permission from the Copyright Holder?

This may involve no more than locating another professor from available directories, such as the AALS directory for law professors, and contacting him or her.

B. How to Obtain Permission from the Publisher?

If the address of a publisher is not apparent from the work in question, it may be

whether or not the material is to be sold; and
the type of reprint to be used (ditto, photocopy, offset, typeset, etc.).

IV. INFRINGEMENT

Normally an infringer is liable to the copyright owner for the actual losses sustained because of the copying and any additional profits of the infringer.

Where the monetary losses are nominal, the copyright owner usually will claim statutory damages instead of the actual losses.

The statutory damages may reach as high as $20,000 (or up to $100,000 if the infringement is willful).

In addition to suing for money damages, a copyright owner can usually prevent future infringement through a court injunction.

The Copyright Act specifically exempts from statutory damages any employee of a non-

reasonable grounds for believing that his or her use of the copyrighted work

While the fair use provisions are admittedly ambiguous, any employee who attempts to stay within the guidelines contained in this policy should have an adequate good faith defense in the case of an innocently committed infringement.

V. QUESTIONS

If you have questions regarding this policy, contact the

guidelines contain revisions approved as of January 2022.