COPYRIGHT COMPLIANCE AT SUNY EMPIRE STATE COLLEGE

THE FAIR USE OF COPYRIGHTED MATERIALS FOR INSTRUCTIONAL PURPOSES

Table of Contents

1. What is a Copyright?
2. Using Copyrighted Materials for Instructional Purposes
3. Making Multiple Copies for Contract Learning Activities
4. Obtaining Permissions from Copyright Owners
5. Posting Copyrighted Material Online
6. Posting Your Own Academic Work Online
7. Posting Photographs, Images and Multi-Media Files Online
8. Using Video Recordings for Instructional Activities
9. Using Audio Recordings for Instructional Activities
10. Copyright and Fair Use Resources

This text is not intended to substitute for legal advice. You should consult with an attorney familiar with intellectual property issues and laws, and how they apply to the specific facts surrounding your case.
1. WHAT IS A COPYRIGHT?

Points of Consideration

- A copyright grants an author or composer the exclusive right to control the use, reproduction, performance and distribution of his or her material.

- Aside from certain fair-use provisions, you must secure permission if you intend to use or reproduce copyrighted materials.

- Copyright protection is secured the moment the material is rendered in a "fixed" medium (meaning that the material must be recorded in such a way as to allow for reproduction), and is good for the entire life of the author plus 70 years.

- Copyright grants the owner the following exclusive rights:
  - To reproduce the material;
  - To prepare derivative works based upon the material;
  - To distribute copies of the material to the public;
  - To display the work publicly; and
  - To perform the material publicly, including over a digital audio transmission.

- You do not need to register a work to enjoy copyright protection. However, if you wish to sue for damages, you will need to formally register your work as a form of public record with the U.S. Copyright Office.

- It is solely up to the copyright owner's discretion to grant or deny permissions for others to legally utilize the protected material. The owner has the option to issue licenses, which can parcel the authorized use of the material for one or more users as well as provide additional use restrictions. The owner can also legally transfer a copyright to another individual or party.

Material Must Be An Original Work of Authorship

Copyrightable works include:
1. literary works
2. musical works, including the accompanying words
3. dramatic works, including any accompanying music
4. pantomimes and choreographic works
5. pictorial, graphic and sculptural works
6. motion pictures and other audiovisual works
7. sound recordings and architectural works
8. software

Copyrightable works exclude:
1. short phrases
2. lists of contents or ingredients
3. indexes or concordances
4. methods of operation
5. ideas

Additional Resources:


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2. USING COPYRIGHTED MATERIALS FOR INSTRUCTIONAL PURPOSES

How do you properly employ the fair-use exemption to legally use copyrighted material in your research or teaching without obtaining permissions and/or paying royalty or licensing fees?

Points of Consideration

- According to U.S. Copyright Law, it is not an infringement of copyright if the material is used “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research.” This exemption is commonly referred to as a “fair use” of copyrighted material.

- Keep in mind that “fair use” is not as much of an affirmative right as it is a legal defense. It is up to the user of the copyrighted work to properly demonstrate his or her “fair use.”

- Fair use is not automatically granted simply because you intend to use the material for research or teaching. To claim fair use, you must weigh your use of the copyrighted material against four “factors” as listed in section 107 of the copyright law.

- These factors are not mutually exclusive, and are intended to weigh differently given the context of each unique situation. Of particular significance, is the impact of the amount of copyrighted material being used and the influence of that use on the material’s market value.

SECTION 107 OF TITLE 17, UNITED STATES CODE

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Additional Resources:


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3. MAKING MULTIPLE COPIES FOR CONTRACT LEARNING ACTIVITIES

You have a learning contract that you routinely modify for an introductory-level study in anthropology. Although you have each student purchase a textbook, you have always provided copies of pertinent articles to your students under the fair-use guidelines. Are you infringing on copyright? Most likely, yes.

Points of Consideration

- It is lawful to supplement your instructional activities with copies of pertinent essays and articles that you obtain from journals or texts under certain conditions (listed below). Additionally, there are specific guidelines available to aid educators regarding the multiple copying of copyrighted materials from periodicals and books that are intended for instructional use. In detail, these guidelines explicitly lay out the minimum requirements necessary to claim the fair use exemption.

- The copyrighted material must be brief (e.g. a complete periodical article if it is less than 2,500 words, a complete poem if under 250 words, etc.).

- The use of the work must be spontaneous, meaning that the decision to use the materials must occur so close to its actual use that it is virtually impossible to obtain lawful permission in time. Copying an article that you read this morning for a study group you will meet this evening is an example of spontaneous use.

- Each copy needs to include a notice of copyright.

- The copies can not substitute for the purchase of a lawful copy, be directed by a higher authority (e.g. a dean), or be repeated by the same instructor from term to term.

- The copied material must pass the test of the "cumulative effect." This test restricts your use of the multiple copies to one learning activity. Thus, you can not use the work simultaneously for a group study as well as several learning contracts you’re currently involved in. Cumulative effect also limits the number of works you can use from a single author (or from a volume of work) as well as the number of times that you can make copies for a learning activity.

- Materials that are sold to supplement textbooks, such as workbooks, exercises and standardized tests, are referred to as “consumable materials.” Reprinting this material is prohibited under fair use, and you will need to get permission from the copyright owner.

Additional Resources:

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4. OBTAINING PERMISSIONS FROM COPYRIGHT OWNERS

If you do not meet the requirements for making lawful copies for your instructional activities, then you will need to obtain permission from the copyright owner in order to use the material.

Points of Consideration

- Obtaining permission to use copyrighted material should be made in writing either directly to the copyright owner or through the use of an authorized agent, such as the Copyright Clearance Center.

- It can be difficult to investigate and obtain copyright permissions on your own. Sometimes it is not clear who the true owner of a copyright is, and you may find yourself negotiating with publishers and professional organizations in order to track the owner down.

- Although verbal permissions are legally binding, you should document these transactions as they can aid you in the event that your legal use of the materials is challenged.

- Often, permission to use copyrighted material is not free. Publishers will charge you royalties for each requested copy. Permissions to copy unpublished materials may come at no charge.

- You may wish to consider obtaining permission to develop a “course pack.” Course packs are a collection of supplemental readings assigned to students that are apart from the formal texts. If you know ahead of time what materials you would like made available, you could arrange for the Empire State College Bookstore to print these “course packs” for your students. The finished “course packs” are sold to your students only for the cost of royalty fees and printing the copies. There is also the potential for making course packs available electronically.

- The copyright owner is under no obligation to respond to your request. A good faith effort to obtain permissions is not a replacement for obtaining legal permission. If you have not received notification granting you permission to use the material, you can not legally use it.

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5. POSTING COPYRIGHTED MATERIAL ONLINE

You received permission to reproduce a limited number of physical copies of a recent newspaper article for use in your face-to-face dealings with students. To facilitate access, you post the text of the article on your public web site. For good measure, you also include the copyright notice. Are you in violation of copyright? Most likely, yes.

Points of Consideration

- Obtaining permission to use copyrighted materials online is fundamentally different from the use of printed materials in face-to-face learning activities. This is partly because posting material on the web is often considered a form of publishing. Indeed, some scholarly journals will disqualify a submission if it is available (published) on the web. There is also concern over the ease to which copies can be downloaded and printed online.

- When obtaining permissions for using copyrighted works, it is very important to be up-front with both your intended use of the work and how you plan to disseminate the information. Most publishers, including newspapers, rarely grant permissions if the material will appear on a publicly accessible web site. Those that do grant permission often charge hefty royalty fees. It is very important to understand the individual publisher’s limitations regarding the online work.

- Because online distance learning courses are password secured and accessible to only a set number of students, it may be easier to obtain legal permissions to post electronic copies of protected materials. Be sure to mention the password security when making the request.

- Publishers often have explicit guidelines as to how the materials will be formatted online as well as the verbiage of the copyright notice.

- Remember, visual images, photographs, logos and music are often copyrighted and can not be posted electronically without permission.

- You can view a sample request letter at the Center for Educational Technology in University Systems web site (www.cetus.org/fair7.html).

Obtaining Web Permissions through the Empire State College Bookstore

The Empire State College Bookstore has an account with the Copyright Clearance Center (CCC), which provides a service for obtaining permissions to copyrighted works as well as maintains a mechanism for providing the payment of royalties.

- The CCC provides the means for obtaining special permissions for the posting of electronic copies of protected material.
- It also provides instructions as to how the article should be displayed online and any copyright statement that needs to appear.

Keep in mind that these permissions are only good for a limited time and the information MUST be removed when the license expires.

For more information, contact Mary Duncan at the ESC Bookstore:

SUNY Empire State College Bookstore
5 Grande Blvd
Saratoga Springs, NY 12866-9060
518 587-2100 or 800 847-3000 - ext. 247
<http://www.esc.edu/bookstore>

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6. POSTING YOUR OWN ACADEMIC WORK ONLINE

You post a paper that you presented at a professional conference on your public web site. Several months later, your paper is accepted for publication in a peer-reviewed journal. Can you legally continue to post your paper on your web site?

Points of Consideration

- As odd as it may sound, there may be restrictions upon posting your own academic work on a personal web site or in online instruction. These limitations refer primarily to any academic work that is currently, or that you are planning to have, published in a periodical.

- Copyright law can be transcended through contractual agreements. Many scholarly publishers have their submitters sign “legally-binding” contracts, often called “Copyright Transfer Statements,” which transfers the entire ownership of a work from the author to the publisher. Once you sign the contract, the only rights you have to your work are those “exemptions” that are explicitly spelled out in the contract. Publishers are very cognizant of online distribution of copyrighted works, and provide for this distribution in the transfer statement. These exemptions will vary from publisher to publisher.

- Some publishers may allow you to post a “pre-print” version of your article, provided you add a statement attesting that the article has been submitted for publication and the copyright ownership could transfer without notice.

- Some publishers regard the posting of “pre-prints” as a prior publication and may automatically disqualify the paper from getting published.

- Publishers may authorize the posting of complete articles, as published in their journals, by authors on their public web sites, again with explicit copyright disclaimers.

- Some journal publishers strictly forbid their authors from posting their own work, and may even dictate the future use of the supportive graphs, tables and illustrations that accompany the published text.

- It is extremely important to carefully read the copyright transfer statements you’ve signed, so that you know exactly what you can and can’t do with your published work.

- Keep in mind that the above discussion refers to academic works for which you are indeed the copyright owner. Please refer to the Policies of the SUNY Board of Trustees as well as the SUNY Computer Software Policy for guidelines as to the ownership of works created within the scope of employment at the State University.

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7. POSTING PHOTOGRAPHS, IMAGES AND MULTI-MEDIA FILES ONLINE

It is a common misconception that materials found on the Internet are fair game to use. All graphical and image materials are copyrighted, and some may even be registered with the U.S. Copyright Office. Therefore, you need to seek permission before you can use the material.

Points of Consideration

Graphics and Images

• Locating the copyright owner of graphics and images can prove difficult. Many images do not come with identifying signatures that can attest to its ownership. Furthermore, the website where you obtained the image may not necessarily be the owner. Indeed, the problem of individuals “pirating” images is so pervasive, it may be impossible to track down who the owner actually is.

• Your inability to locate the copyright owner does not automatically place the work in the “public domain.” If you have not received notification granting you permission to use copyrighted material, then you can not legally use the material.

Photographs

• Obtaining permission from individuals who appear in a photograph is not an issue of copyright but of privacy. You need to obtain permission from the individual who took the picture, because it is the photographer who created the original work of authorship and rendered it in a fixed and tangible form.

• Taking a photograph of a copyrighted work is, indeed, considered a copy. You may need to seek permissions based upon amount of the work that is photographed as well as its intended use.

• There are “stock photography” and “clip art” distributors available. These services own the copyright to various images and photographs, and often provide mechanisms to obtain licenses to lawfully utilize the material.

Multimedia

• For software, the established copyright laws are often superceded by what is known as the “shrink wrap” license. This license means that you agree to the terms and conditions for authorized use as written in the license the moment you open the software packaging or download the software from the Internet. Its very important to be familiar with the various licenses that you agree to, because they may have terms that explicitly limit your “fair use” of the material. In essence, when you accept a software license, you are agreeing to the terms of the contract, which essentially redefines the copyright protection for that particular material. Furthermore, these licenses are generally valid for only one user, so you will need to obtain multiple or site licenses to post software on the web for more than one user.

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8. **Using Video Recordings for Learning Activities**

*Is it a fair use to videotape a televised documentary in order to show it during one of your study group sessions?*

**Points of Consideration**

- The videotapes commercially made available for purchase or for rental are generally authorized for “home use” only. However, the U.S. copyright law provides certain exemptions for educational use.
  - The video must be a legally obtained copy.
  - The video may only be viewed by instructors and/or students in a classroom or similar place devoted to instruction.
  - The video must be used as part of a standardized, face-to-face instructional activity, and not for entertainment or cultural purposes.

- There are separate guidelines that govern the use of programs videotaped from a broadcast transmission to be viewed at a later date.
  - You are only allowed to possess these “off-air recordings” for 45 days after the date the program was recorded (after which, it must be erased or destroyed).
  - You must use the video within 10 consecutive school days of the initial recording for classroom purposes. Afterward, only instructors can lawfully view the recording for evaluation purposes.
  - You may request another individual or department to tape these off-air recordings for you. However, these individuals or departments can not regularly record programs in anticipation of requests. In other words, your center can not systematically tape PBS documentaries in the hopes that someone may want to use it in the future.
  - No program may be recorded off-air more than once at the request of the same instructor, regardless of the number of times the program may be broadcast.
  - Although it is not necessary to view a recording in its entirety, you can not alter the recording from its original content nor combine or merge the content to constitute a teaching anthology or compilation.
  - All copies must include the copyright notice on the broadcast program as recorded.

- It is not permissible under fair use to distribute copies of video recordings in digital format on the Internet. You will need to obtain the necessary permissions.

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9. USING SOUND RECORDINGS FOR LEARNING ACTIVITIES

Is it a fair use to provide cassettes of recorded music to students as part of a learning exercise? Generally, no.

Points of Consideration

- For **audio recordings**, you are generally allowed to make copies for your own personal use, whether that is on cassette tape or digital format. However, it is a violation of copyright to reproduce and distribute those recordings without first obtaining permissions.

- There are some guidelines drawn from the legislative history of the copyright law that outline the fair use of audio recordings for educational purposes, although they tend to be quite narrow in scope.

  ✓ You are allowed to make an “emergency” copy of a recording if for any reason your purchased copy is unavailable for imminent use. It is understood, however, that this “emergency” copy is only temporary, and that you intend to purchase a replacement.

  ✓ You are allowed to make multiple copies of **excerpts** of works, provided that they do not comprise enough of the work to be considered a performable unit (such as a section, movement or aria). The copy must not exceed 10 percent of the whole work, and the number of copies can not exceed one per student.

  ✓ You may copy an entire performable unit (as outlined above) if the work is confirmed by the copyright owner to be out of print or only available as part of a larger work. Even then, you are only permitted to use the copy for research or in **preparation** for instruction.

  ✓ You may edit or simplify printed copies of a work provided that you are careful not to compromise the fundamental character of the work or alter the lyrics. You are also not allowed to add lyrics if none previously exist.

  ✓ You can retain a single copy of recordings of performances by students for evaluation or rehearsal purposes.

  ✓ A single copy of a sound recording (such as a tape, disc or cassette) of copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing exercises or examinations and may be retained by the educational institution or individual teacher.

  ✓ You are not allowed to make copies as a substitute for the purchase of the recording, nor are you allowed to use the copies to create, replace or substitute for anthologies, compilations or collective works.

  ✓ You must include the copyright notice, which appears on the purchased recording, on all copies that you make.

- It is not permissible under fair use to distribute copies of sound recordings in digital format on the Internet. You will need to obtain the necessary permissions.

- There are distributors of “stock” audio recordings available. These services own the copyright to various images and photographs, and often provide mechanisms to obtain licenses to lawfully utilize the material.

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10. COPYRIGHT AND FAIR USE RESOURCES

Print Resources


  This pamphlet, published by the Center for Educational Technology in University Systems, outlines the issues of fair use that face educators specifically in higher education. This resource provides a number of “illustrative scenarios” as well as guidelines to writing a copyright permissions letter.


  This government circular provides a summary of the key points of the federal copyright law.


  This is the official copyright law of the United States in its entirety.


  This government circular provides the sections of the “fair-use” statute of the U.S. copyright law that pertain directly to educators and librarians. This circular also provides additional “fair-use” guidelines that came out of the legislative history of the original bill.

Organizations


- American Society of Composers, Authors and Publishers (ASCAP) <http://www.ascap.com>

- Authors Registry < http://www.webcom.com/registry>


- Copyright Clearance Center <http://www.copyright.com>

- Copyright Society of the United States <http://www.csusa.org>

- Motion Picture Licensing Corporations <http://www.mplc.com>

- Media Photographers’ Copyright Agency <http://www.mpca.com>

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