

## Copyright and Fair Use – Ramaker Library

*Disclaimer: The information contained in this copyright primer is for general use only. The following broad formulations should not be relied on as a substitute for legal advice from a licensed attorney.*

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### Why Is Copyright Important?

Copyright law in the US forms the basis of a complex system of legal protections that afford the *producers* of intellectual property (IP) control over the who, what, and when of content reproduction and alteration. These laws affect you in how they guide what you, the *consumer* of another's copyrighted materials, may modify, copy, and distribute.

### What Is Copyrighted?

Where colleges previously were concerned with the photocopying and distribution of copyrighted print materials, they now contend with a torrent of data and data formats that the Internet and World Wide Web (www) have put at our fingertips. As you are almost always accessing someone else's IP online, it is best to assume that the material you would like to download, copy, stream, or alter is copyrighted, regardless of whether it is a short video clip, a small image file, or an entire song or movie you find online.

### Who Can Use Copyrighted Materials?

Simply because something is copyrighted does not mean you are barred from using it. Depending on four factors (purpose, effect, nature, and amount of the use,) you as an educator or student may be protected by the 1976 Copyright Act fair use provision, which stipulates that certain limited, non-profit, educational uses of copyrighted materials do not constitute an infringement of copyright.

### When Can I Use Copyrighted Materials?

If, after reviewing this document, you conclude that your use of the proposed copyrighted materials is protected by fair use, please complete the Copyright Checklist and proceed to reproduce or modify the content as you see fit.

### What is copyright?

The *Oxford English Dictionary* defines copyright as "the exclusive right given by law for a certain term of years to an author, composer, designer, etc. [...], to print, publish, and sell copies of his [*sic*] original work." (2010).

The authority to control U.S. copyright law rests with Congress, which is charged with promoting the progress of science and arts by securing authors' and inventors' rights to their creations. Congress, in promoting the general welfare, seeks also to promote the progress of knowledge by incentivizing the creation and distribution of new, original works.

## What is copyrighted?

Works that satisfy the litmus test—expression in an original, fixed, and creative form—for whether a work can be copyrighted are automatically considered copyrighted. The *Berne Convention Implementation Act of 1983* amended previous copyright law by eliminating the need to register for copyright. This does not mean that verbal utterances that are not recorded in any fashion are be copyrighted, but rather any expression that can be fixed to a medium for preservation is afforded copyright protection automatically, as long as it accords with three principles:

- **Originality:** the expression must precede other expressions so it may not be a copy of another's expression. It must be *original*, a concept that also has gradations of originality. A chronological list of historical dates is not considered original enough while an academic article using those same dates in a creative or intellectual fashion helps to constitute the author's originality of expression.
- **Tangibility:** a work must be fixed in a tangible medium. Others must be able to physically access the expression by, for example, watching it on a television, reading it in a book, or hearing it on an mp3 player.
- **Minimal Creativity:** hard work and sweat alone may not be enough to guarantee copyright protections. To be copyrighted, the work must include content or expression that transcends or exceeds the original. The threshold for minimal creativity is low.

## What is not copyrighted?

Certain types of works cannot be copyrighted. Any work residing in the **public domain** is not afforded copyright protection. The public domain is a protected category of expression such as facts, ideas, words, and works for which copyright was not necessary, never secured, or has expired (always verify as public domain protection is the exception and not the rule). Works and content in the public domain include:

- **Facts:** you do not need permission to state that the height of Mount Everest is 8,848 meters, even if you found it on Wikipedia or in an encyclopedia. Copyright law does protect the creative selection and arrangement of facts. But a fact is a fact, you cannot copyright it.
- **Ideas:** your particular idea of a "girl meets boy" story would be copyrighted if it were expressed in an original and creative way. But you cannot claim copyright protections for the basic idea of a story such as "boy meets girl."
- **Slogans:** short phrases, names, and words may be protected by trademark law but they do not qualify for copyright protection.
- **Blank Forms:** these are intended to record rather than convey, so they do not qualify as expressions.
- **Government works:** judicial rulings and administrative publications are not a protected category.

## What protections are afforded?

Copyright law affords creators significant control over their work, including the right to:

- Make copies of a work.
- Create new works based on previous copyrighted work.
- Perform the protected work.
- Sell or distribute copies of a work.
- Receive benefits and compensations based on exercising the previous rights.

## Introduction to Fair Use

Thankfully for libraries, colleges, instructors, and students, there are exemptions to copyright law that limit the rights of the copyright holder. These exemptions are typically grouped together under the **Fair Use Doctrine**, which, while it may be a formal, written declaration of rights, is not a black and white rule that makes it clear when a use is protected by fair use. Deciding to forgo the permission to use copyrighted material in accordance with fair use is often a balancing act involving four factors:

- **Purpose:** nonprofit educational uses are more likely to fall under fair use than commercial uses.
- **Nature:** published, factual or non-fiction works are more likely to qualify for fair use than unpublished and/or highly creative work such as art, fiction, and films.
- **Amount:** fair use is more likely in effect if the amount in question is small in quantity and not crucial or central to an entire work.
- **Effect:** the less the effect on the potential market your use of copyrighted material has, the more likely it is to be covered under fair use. That is, if you use copyrighted material repeatedly, if you make it accessible to the whole world over the web, or if you make numerous copies, you may have diminished the creator's ability to exercise the right to claim financial compensation for the use of copyrighted work.

## Fair use in the classroom and the lab

Fair use favors educational over commercial use, but just because a use is for classroom purposes does not constitute fair use. To claim fair use, you first have to verify that the factors that favor fair use outnumber those that oppose it (see "Copyright Checklist"). This process includes making sure that the amount of material to be copied accords with the fair use guidelines. And this is where most questions about copyright on a college campus come into play. You may make copies of the following works according to the rules as long as the purpose, nature, and effect of your use likewise qualify as fair use (taken from US Report House of Representatives 1997 Report 94-1476, Section on Brevity):

- An **article** from a journal, newspaper, or database.
- A **book chapter** or excerpts from a book constituting up to one chapter.
- A **poem, short story, essay, illustration**, and other works:
  - **Poetry:** (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.
  - **Prose:** (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.
  - **Illustration:** One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.
  - **Special' works:** Certain work in poetry, prose or in 'poetic prose' that often combine language with illustrations and that are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. 'Special works' may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such a special work and containing not more than 10% of the words found in the text thereof may be reproduced.

### Other Fair Use Considerations

So the amount of copyrighted material you have proposed to copy is minimal and accords with the rules and guidelines above. What other considerations might mitigate fair use?

- **Spontaneity:** “the inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission” is the government’s way of saying that:
  - Requesting permission is preferred but not always necessary, and;
  - Even if your use is fair use, you may need to request permission in the future if you intend to use it again (Report 94-1476). So your use is not fair use if you copy from semester to semester as repeated use erodes your claim to minimal or negligible effect on the copyright holder’s rights. By extension, copying the same material for other courses or for other institutions would not be fair use.
- **Cumulative Effect:** “not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term. There shall not be more than nine instances of such multiple copying for one course during one class term.” That is, accumulated uses of one particular author may constitute copyright infringement despite any individual qualification as fair use since the aggregate use violates the amount qualification.

## When Do I Need Permission?

- When you use the materials repeatedly or in a cumulative way.
- When your proposed use requires copying or distributing more than 2500 words of a work or the entirety of a work.
- When your proposed use is not for educational purposes.

## Fair Use and Copyright Myths

- **I found the material online so it is not copyrighted.** Unless your use involves hard facts, assume any content you find online is copyrighted.
- **I don't need permission because no one will know about my use or it will not hurt anyone.** Creators, companies, and corporations routinely seek out uses of their copyrighted material to determine whether it is being used unfairly. Legal communications and action often follow. Deciding whether or not your use constitutes harm is up to the copyright holder.
- **The author or creator is deceased, so it has to be in the public domain.** Copyright law is designed to protect the rights of creators, and those rights currently persist for 70 years after the creator's death. This means that, although Pablo Picasso died in 1973 and most of his famed works are much older, his works are still copyrighted until 2043 at the earliest.
- **Citing the work is enough to qualify for fair use or exculpate me in the case of a violation.** While proper citation of borrowed content is in the spirit of academic integrity, it has less to do with determining whether a proposed use is fair. Stated another way, just because one can cite an entire book does not mean you can copy and distribute it in its entirety.