

Copyright and Fair Use Guidelines

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The information presented here is general information for educational purposes only. It is not a policy statement and does not constitute legal advice. This resource describes general library and educational fair use and fair use exceptions for research and scholarly work. The purpose of this resource is to help faculty understand the basics of copyright and fair use. Students may also find this resource useful.

What is copyright?

Copyright is a legal device that provides the author of a work of art, literature, or drama with the right to control how the work is used. Copyright is a form of protection grounded in the U.S. Constitution and granted by law for original works of authorship fixed in a tangible medium of expression. Copyright covers both published and unpublished works. The intent of copyright law is to advance the progress of knowledge by giving an author of a work an economic incentive to create new works.

I. What is protected by copyright?

Copyright protects original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture. Copyright does not protect facts, ideas, systems, or methods of operation, although it may protect the way these things are expressed. Other examples include websites, YouTube videos, online articles, blogs, videos, photographs, and many other types of works found online.

A work is protected by copyright law from the moment it is created and fixed in a tangible form that it is perceptible either directly or with the aid of a machine or device. In other words, a copyright exists from the time a work is written down or recorded. A copyright does not have to be registered to be protected; although, there are benefits of registration.

A work must be fixed, original and exhibit minimal creativity to be protected by copyright:

Fixation – A work is “fixed” when it is captured in a sufficiently permanent medium such that the work can be perceived, reproduced, or communicated for more than a short time. For instance, a work is fixed when it is written on a piece of paper, posted online, stored on a computer or phone, or recorded on an audio, video or electronic device.

Originality – An original work of authorship is a work that is independently created by a human author and possesses at least some minimal degree of creativity.

Minimal Creativity – If the work is based on a previous work, the new work must include something that is above and beyond the original work; however, there must just be a spark of

creativity to meet this requirement. Verbatim use is not considered original or minimally creative.

II. What cannot be protected by copyright?

Facts, ideas, systems, or methods of operation, although the method of expression may be protected;

Words, names, titles, slogans, or other short phrases or clauses, although they can be protected by trademark law if used in commerce to identify the source of goods or services;

Blank forms and similar works designed to record rather than to convey information;

Recipes or a mere listing of ingredients;

Government works, such as statutes, regulations, public ordinances, administrative rulings and judicial opinions – Note, however, that other works of state or local governments may be subject to copyright protection;

Works created by federal government employees as part of their official duties – Note, however, that:

Works prepared for the U.S. government by independent contractors may be protected by copyright;

Information on government websites that are used by the government with permission of the copyright holder;

U.S. government works used in other countries may be protected under the copyright laws of other jurisdictions when used in these jurisdictions.

III. Who owns the copyright?

The original creator or author of the work owns the copyright, unless the copyright was created as a “work made for hire.” A work made for hire is a work created by an employee within the scope of employment, in which case the copyright is owned by the employer or if the parties expressly agree in writing that a work shall be considered a work made for hire, in which case the work is owned by the party determined by the agreement.

A copyright owner may transfer the copyright to another person or organization. This transfer is called an “assignment.” For example, the named author(s) of an academic journal article may assign the copyright to the work to the publisher. Once assigned, the author is no longer the copyright holder and rights outlined above are transferred to the person or organization who becomes the copyright holder. Even when the copyright is transferred, however, the author should still receive attribution as the creator of the work.

A copyright holder may grant permission to another to use the work. This permission is often referred to as a “license.” The copyright, however, is not transferred and the copyright holder continues to have the rights outlined above, depending on the terms of the license. When a copyright is licensed, the author should still receive attribution as the creator of the work.

IV. What rights does a copyright holder have?

Copyright holders have the right to control the use of the copyrighted work, including the rights to:

Make copies of the work;

Sell or otherwise distribute copies of the work;

Make adaptations or modifications to the work (called a derivative work);

Display or perform the work in public (such as performing a stage play, displaying a painting or showing a movie) in public.

Copyright holders can prevent others from copying, selling, distributing, or displaying their works or making derivative works based on their works.

Copyright holders also have the right to grant permission to others to copy, distribute, display or make derivative works, typically referred to as a license. Copyright holders can place limits on how someone can use their works. See below regarding copyright licenses.

V. What is a derivative work?

A derivative work is a work based on or derived from one or more already existing works. Examples of derivative works include, but are not limited to, translating a work into another language, adapting a written work into a movie, play or audio version, digitizing a work as an e-version, abridging a work, compiling multiple works or recasting, transforming or adapting a work in any other form.

Compiling data or preexisting works may create a derivative work. When works are compiled, there is often more than one copyright holder from which the user would need a license to copy and distribute the work. Someone seeking to use a compilation should check that it has a license from all copyright holders and that the license permits the creation of derivative works. Alternatively, one may remove unlicensed third party content contained in compiled work.

Many institutions of higher learning, in particular public institutions, have an obligation to make academic content accessible to students with disabilities. In order to comply with this

obligation, the institution may need to modify the original work. Accordingly, if an institution is licensing a copyrighted work from a third party, the institution should check to ensure that the copyright license permits the institution to make a derivative work and complies with any terms of the license regarding the modified version of the work.

VI. How long does a copyright last?

Generally speaking, a copyright expires after the life of the author plus 70 years.

A work made for hire expires 95 years from the date of publication or 120 years from the date of creation, whichever expires first.

Prior versions of the Copyright Act had different lengths of time for copyright protection so a user must check the rules to verify whether the copyright has expired.

VII. What is the public domain?

Once a copyright expires, the work is said to be “in the public domain.”

Once a work is in the public domain, anyone can copy, distribute, display or modify the work without permission from the copyright holder.

Copyright holders may also place their works into the public domain before the copyright expires. If someone wishes to use a work that was placed into the public domain before the copyright has expired, he/she should ensure that there is documentation showing that the work has been placed into the public domain.

Most materials found on the Internet, even if publicly available for free, are not in the public domain and are subject to copyright protection.

If a work is not in the public domain, someone who wishes to use the work generally needs a license to copy and distribute the work to students, unless the use falls within the doctrine of fair use. See Section below regarding fair use.

Faculty and staff should assume that every work is protected by copyright unless the user can establish that it is not protected by a valid copyright.

Faculty and staff should not rely on the presence or absence of a copyright notice (©) to determine whether a work is protected by copyright because a notice is not required for many works. It is unlikely that the absence of a copyright notice would affect the validity of the copyright.

VIII. What is a copyright license?

Copyright holders can grant permission to use their works through a license. Some licenses allow use of a work for free without any restrictions.

Some licenses allow use of a work for free but are subject to terms and conditions that restrict the manner in which a person can use the work.

Some licenses require the payment of a royalty fee to use the work and may or may not be subject to terms and conditions that restrict the manner in which a person can use the work. Websites often have a link at the bottom to the Terms and Conditions (sometimes referred to as “Terms of Use”), which sets forth the terms upon which their content can be used. If the licensee violates the terms of a license, the licensee can be liable for infringement. If a user requests permission to use a work, the user should be sure to keep a copy of the request and the permission granted (i.e. the license).

Attribution

Even if the user has a license, the user must always appropriately attribute the copyrighted material.

The four (4) main elements of attribution are: Title, Author, Source, and License.

If the title of the work itself is unknown, then a user should ensure the other requirements in the attribution help clarify what the copyrighted material is. For example, if a user is citing to a copyrighted photo on a website for which there is no discernable title, the attribution should have a link to that website so the exact image can be easily referenced.

It is important to credit the author, if known, and the source of the work. If an individual is not named as the author of a particular work found online, the user should attribute the work to the organization responsible for the website.

Many licenses require that the attribution include a link to the license and a link back to the published source where the user obtained the copyrighted material.

Please note that providing attribution does not automatically enable fair use, which must be determined using a fair use analysis as described below.

The user should also use a copyright notice.

Many licenses require that if the user made any changes to the copyrighted materials, the attribution should include a statement that changes were made.

IX. What is a Creative Commons license?

A type of standardized license that allows people to share works more easily if the copyright holder agrees to share a work for free. Using a work that is subject to a Creative Commons license (CC license) means that the user does not have to negotiate the terms of the license or pay for use of the work.

The most basic CC license is the Attribution license. Even this version of the CC license has terms and conditions that must be followed, namely providing proper attribution to the author(s), a copyright notice, and a link to the license agreement. A user must also indicate if changes were made to the copyrighted materials.

The best practices for appropriately attributing a CC license is to remember the four main elements of attribution listed above: Title, Author, Source, and License. However, each type of CC license may have its own specific requirements.

The format of the attribution may differ depending on the type of medium from which the content originated.

If there are specific instructions on how to attribute a particular work within the source itself, then the user should follow that instruction exactly.

All versions of the CC license have these requirements. The specific attribution requirements depend on the type of license.

There are four (4) main CC licenses. They include: Attribution (CC BY), Attribution ShareAlike (CC BY-SA), Attribution-NoDerivs (CC BY-ND), and Attribution-NonCommercial (CC BY-NC). The No Derivs provision provides that the user can use the work but cannot modify it in any way. This type of CC license can be problematic if an institution wishes to modify a work in order to make it accessible to students with disabilities.

The Share-Alike provision provides that if a user shares the original work or a version of the work that the user modified, the user is required to allow the person(s) with whom the user shared the work to be able to use the work under the same terms and conditions as it was licensed. Simply put, the user has to license the work using the same or compatible CC license that the copyright holder used.

The Non-Commercial provision provides that a user can use and share the work for non-commercial purposes. Creative Commons has stated that not all educational uses are non-commercial; however, it is not well-settled exactly which educational uses would be considered non-commercial.

Some CC licenses combine these provisions. The more provisions that are included in the CC license, the more restrictive it is. Some examples of other CC licenses are Attribution-ShareAlike-NoDerivs (CC BY-SA-ND), Attribution-ShareAlike-NonCommercial (CC BY-SA-NC),

Attribution-NoDerivs-NonCommercial (CC BY-ND-NC), or Attribution-ShareAlike-NoDerivs-Noncommercial (CC BY-SA-ND-NC).

For more information, visit the Creative Commons website.

When a user combines multiple copyrighted works, even when all of the works are subject to CC licenses, the user must be careful to check the terms of the particular license for each work, ensure compliance with the terms of all licenses for each work that is used, and properly attribute each work.

A collection is formed when more than one (1) copyrighted work is assembled into a collective whole but the individual works are organized as separate and distinct.

If the person who compiles the collection is not the author of the underlying work, the person has created a derivative work based on the selection and curation of the materials and may own the copyright to the collection but that person does not own the copyright to the underlying work(s).

A remix or adaptation (“remix”) is formed when a copyrighted work is combined with another work or original material in a manner where it is difficult to tell where one work begins and the other ends. If the person who adapts and remixes a copyrighted work, that person is not the author of the underlying work. Rather, the person has created a derivative work based on the combination of the materials and may own the copyright to the remix but that person does not own the copyright to the underlying work(s).

Whether the new work is a collection or a remix, each individual copyrighted work must be appropriately attributed to the creator by citing the Title, Author, Source, and License and including a statement that modifications were made. As stated above, the attribution should link to the license and the original source of the work.

Not all CC licenses are compatible with remixing or making collections.

While someone can privately use a work licensed under a NoDerivs license (CC-BY-ND) and make a remix or collection, the new work that is created cannot be published to anyone else without violating the terms of the license.

If the underlying work(s) is licensed under a ShareAlike license (CC-BY-SA), the user who created the new work must license it under the same or a compatible CC license.

If the underlying work(s) is licensed under a NonCommercial license (CC-BY-NC), the user could not use the collection or remix for commercial purposes.

For more information, visit Creative Commons’ explanation.

X. What is fair use?

Fair use “promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances” (United States Copyright Office, 2017c). There are no set guidelines that are universally accepted in making a fair use determination.

Courts weigh the following **four factors** when determining whether use of a copyrighted work without the copyright holder’s permission is a “fair use”:

The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

The nature of the copyrighted work;

The amount and substantiality of the portion used in relation to the copyrighted work as a whole;

The effect of the use upon the potential market for or value of the copyrighted work.

Factor 1 – The Purpose and Character of the Use

While using a copyrighted work for a non-profit educational purpose is more likely to be found to be a fair use, it is important to note that not all educational uses are covered by fair use. Factor 1 focuses on whether a use is transformative.

This Factor asks if the new work does something more than repackage or republish the original copyrighted work and adds something new, with a further purpose or different character, altering the original work with new expression, meaning or message.

This Factor assesses whether the new work serves a new and different function from the original work and is not a substitute for the original work. Functions that may be considered transformative include criticism, comments, news reporting, scholarship, research, or parody.

To be transformative, the use must do more than merely recast an original work into a new mode of presentation. For example, recasting a novel as an e-book, audiobook or translation into another language is likely to be found to be a derivative work that is protected by copyright and not a transformative use and would weigh against a finding of fair use.

If an individual or entity simply uses a verbatim copy of the work or portion of the work, it is not likely to be considered fair use.

Factor 2 – The Nature of the Copyrighted Work

This Factor focuses on whether the work is of a creative or instructive/factual.

Generally speaking, courts find that there greater need to distribute factual works than fiction and thus, provide more protection for fictional works.

Factor 3 – The Amount and Substantiality of the Portion Used

Factor 3 focuses on whether the use employs more of the copyrighted work than necessary and measures how much of the original work was copied. Generally speaking, the greater amount of the work is used, the less likely it will be considered fair use.

Previously, courts endorsed the 10% rule— if a person uses less than ten percent (10%) of the total work or one (1) chapter of a book if the book has ten (10) chapters or more, then it is a fair use. This rule has been criticized and should not be relied upon in determining whether a use will be considered a fair use.

If the “heart” or essence of a work is used, it may not be deemed a fair use, regardless of the percentage of the work that was used.

While earlier court decisions focused on how much of the work was copied, more recent decisions have focused on how much of the work has been made available to the public. Copying the entirety of a work can be justified as a fair use when it is reasonably appropriate to achieve a transformative use and does not offer a competing substitute for the original. For example, copying an entire work in order to make it searchable may be permissible under fair use if only snippets of the work is capable of being viewed in the search results. In other circumstances, copying and disseminating an entire work is likely not going to be found to be a fair use.

Factor 4 – The Effect of the Use on the Potential Market

Factor 4 is typically seen as the most important factor. This Factor focuses on the impact of the use on the traditional market for the work. This Factor asks whether the use competes with or takes sales away from the copyright holder or avoids payment of a royalty in an established market.

If many copies of the work are widely distributed (for example, the work is used in multiple sections of a course or is distributed to the general public), it is more likely that the use will be found not to be a fair use.

If the use of a work appeals to the same audience as the original work, it is less likely the use will be seen as a fair use.

Even if a use is a fair use for one semester, repeated use of copyrighted materials semester over semester may not be considered a fair use because there is enough time to seek a license from the copyright holder to use the work.

Fact Intensive Analysis

There is an inherent risk in relying on fair use. The factors are weighed by courts on a sliding scale, and it is difficult to predict whether a particular use will fall within the scope of fair use because the analysis is highly fact-specific.

Fair use is an important doctrine but should be used with caution. There is no formula to ensure that a predetermined percentage or amount of a work – of specific number of words, lines, pages, and copies – may be used without permission.

Fair Use and Course Resources in the Classroom

With the exception of scholarly quotations, which are appropriately attributed to the author, relying on the fair use doctrine as it pertains to core content in classrooms is not recommended.

Linking to a website is not a copyright violation; however, the website itself, may not be accessible to students with disabilities in accordance with the Americans with Disabilities Act and Section 508 of the Rehabilitation Act of 1973.