Copyright and fair use guidelines

The purpose of these guidelines is to provide basic guidance to faculty in making informed decisions before using materials in the classroom, specifically in developing on-line course curriculums. A document or published work may be copyrighted even if it does not explicitly state that it is copyrighted. As a result, it is a good idea to assume materials such as documents, images, or video clips are copyrighted. Educators can avoid copyright violations and legally use copyrighted material if they and understand and comply with the fair use guidelines. If you believe, after you review this document that your proposed use does not comply with fair use guidelines, you always have the option to ask for permission from the copyright holder. A sample letter for that purpose is attached as Appendix B for guidance.

What is Copyright?

Simply put, “copyright is a legal device that provides the creator of a work of art or literature, or a work that conveys information or ideas, the right to control how the work is used.” The Copyright Handbook, Stephen Fishman, Esq. (1996).

The intent of copyright is to advance progress of knowledge by giving an author of a work an economic incentive to create new works. The same copyright protections exist for the author of a work regardless of whether the work is a database, CD-ROM, bulletin broad or on the Internet. Remember, the Internet is not the public domain. There are both non-copyrighted and copyrighted materials available. Assume a work is copyrighted.

What Does Copyright Protect?

Copyright provides authors fairly substantial control over their work. The four basic protections are:

1. The right to make copies of the work.
2. The right to sell or otherwise distribute copies of the work.
3. The right to prepare new works based on the protected work.
4. The right to perform the protected work (such as a stage play or painting) in public.

What is “Fair Use” of Copyrighted Material?

Fair use is a legal principle that provides certain limitations on the exclusive rights of copyright holders. Section 107 of the Copyright Act sets forth the four fair use factors which should be considered in each instance:

1. The purpose and character of the use:
   a. Is the new work merely a copy of the original? If it is simply a copy, it is not as likely to be considered fair use.
   b. Does the new work offer something above and beyond the original? Does it transform the original work in some way? If the work is altered significantly, used for another purpose, appeals to a different audience, it is more likely to be considered fair use.
   c. Is the copyrighted work for nonprofit or educational purposes? The use of copyrighted works for nonprofit or educational purposes is more likely to be considered fair use.
2. The nature of the copyrighted work.
   a. Is the copyrighted work published or unpublished? Unpublished works are less likely to be considered fair use.
   b. Is the copyrighted work out of print? If it is, it is more likely to be considered fair use.
   c. Is the work factual or artistic? The more a work tends toward artistic expression, the less likely it will be considered fair use.

3. The amount and substantiality of the portion use:
   a. The more you use, the less likely it will be considered fair use.
   b. Does the amount you use exceed a reasonable expectation? If it approaches 50 percent of the entire work, it is likely to be considered an unfair use of the copyrighted work.
   c. Use only enough to make your point.

4. The effect of use on the potential market for the copyrighted work:
   a. The more the new work differs from the original, the less likely it will be considered an infringement.
   b. Does the work appeal to the same audience as the original? If the answer is yes, it will likely be considered an infringement.
   c. Does the work contain anything original? If it does, it is more likely the use of the copyrighted material will be seen as fair use.

What is the face-to-face teaching “fair use” exemption?

Section 110(1) of the Copyright Act permits “performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction.” If you meet the requirements of this section, your performance or display does not need to meet the requirements of fair use. Thus, Section 110(1) exemption permits the instructor to play a rental video in class if the following requirements are met:

1. The performance of the video is part of the teaching activity of the class;
2. The class is part of the regular curriculum;
3. The entire audience is involved in the teaching activity;
4. The entire audience and the teacher are in the same room or general area; and
5. The performance takes place in a classroom or similar place devoted to instruction, such as a school library, gym, auditorium or workshop.

This exemption applies only to the performance or display of lawfully made copies; if the copy was not legally made, it cannot be performed or displayed in the classroom.

What is the distance education “fair use” exemption?

Under Section 110(2) of the Copyright Act, many performances or displays that would be permitted in the classroom would also be permitted to be transmitted by closed-circuit television or by the internet to students in remote locations.

Under the TEACH Act, a 2002 amendment to the Copyright Act, the distance education exemption generally permits instructors to distribute on-line the same materials that the instructor could present in face-to-face teaching (see above). Distribution under the TEACH Act is subject to restrictions.
The following categories of materials may be distributed under the authority of the TEACH Act:

- Entire performances of non-dramatic literary and musical works;
- Reasonable and limited parts of dramatic literary, musical or audiovisual works; and
- Displays of other works, such as images, in amounts similar to typical displays in face-to-face teaching.

The following materials are specifically excluded from distribution under the TEACH Act:

- Material specifically marketed for classroom use for digital distance education;
- Copies the instructor knows, or should know, have been made illegally;
- Textbooks, course packs, electronic reserves or similar materials typically purchased individually by students for independent review outside the classroom.

In using materials under the TEACH Act, the instructor must also ensure that:

- Access to the materials is restricted to students registered in the course;
- Access to the materials is terminated at the end of the course;
- The materials are used at the direction of the instructor;
- The materials used are directly related and of material assistance to the course content; and
- The materials include the following notice that the materials are protected by copyright: “The materials used in this course are protected by copyright, and they are presented here for use only by students registered in this course.”

**What are the Guidelines for Fair Use of Books and Periodicals by Faculty?**

In connection with the Copyright Act of 1976, educators and publishers established guidelines for classroom copying of books and periodicals in non-profit educational institutions. This Agreement on Guidelines are contained in their entirety and attached hereto as Appendix A.

**What are the Guidelines for Fair Use of Educational Multimedia Projects?**

The following guidelines have been established and endorsed by various educational groups, publishing, and music motion picture associations relating to educational multimedia projects that incorporate educators’ original material, such as course notes or commentary, together with various copyrighted media formats, including motion media, music, text material and graphic illustrations. If these guidelines are followed, it is highly likely that use will be considered fair use. Fair use of copyrighted material in multimedia projects lasts for two years.

Faculty may include portions of copyrighted works when producing their own multimedia project for their teaching in support of curriculum-based instructional activities at an educational institution. Other uses, such as selling the work commercially, require permission from the creator. Faculty may use their project for the following purposes:

1. Assignments for student self-study.
2. For remote instruction provided the network is secure and is designed to prevent unlawful copying.
3. For conferences, presentation or workshops.
4. For personal professional portfolio.
Types of media and permissible amounts

- **Motion media**: Up to 10 percent of the total or three minutes, whichever is less.
- **Text material**: Up to 10 percent of the total or 1,000 words, whichever is less. An entire poem of less than 250 words may be used, but no more than three poems by one poet or five poems by different authors in an anthology. For poems exceeding 250 words, 250 words should be used but no more than three excerpts from one poet or five excerpts from different poets in the same work.
- **Music, lyrics, and music video**: Up to 10 percent of the work but no more than 30 seconds of the music or lyrics from an individual musical work.
- **Illustrations or photographs**: No more than five images from one artist or photographer. No more than 10 percent or 15 images, whichever is less, from a collection.
- **Numerical data sets**: Up to 10 percent or 2,500 fields or cell entries, whichever is less, from a copyrighted database or data table.
- **Copying of the multimedia project**: No more than two copies may be made of the project. If you intend to duplicate the project beyond two copies, or for non-educational purposes, permission to use the works must be obtained.