

Operating Policy and Procedure

OP 30.22: Guidelines for the Educational Use of Copyrighted Works

DATE: July 7, 2011

PURPOSE: The purpose of this Operating Policy/Procedure (OP) is to ensure understanding and a standardized approach regarding the handling of materials controlled by a copyright.

REVIEW: This OP will be reviewed in May of odd-numbered years by the director of intellectual property technology commercialization with recommended revisions presented to the vice president for research, the provost and senior vice president, and the vice chancellor for technology commercialization.

POLICY/PROCEDURE

States and their instrumentalities are liable for violations of the copyright act, and all remedies for copyright infringement apply to states as well as to private individuals (PL 101-553). The following policy guidelines have been adopted by the university to provide faculty and staff with greater certainty of procedure, to reduce risks of infringement or allegations thereof, and to maintain a desirable flexibility to accommodate specific needs.

1. Background

On June 10, 1983, the Association of American Publishers (AAP) Inc., published a recommended policy statement on photocopying of copyrighted materials for classroom and research use. This university policy follows closely their recommended guidelines and, in addition, addresses the library reserve policy, the use of music, the use of audiovisual materials, the off-air recording of television broadcasts, the use of non-broadcast audio and video transmissions, the use of computer software, and when and how to obtain a legal opinion regarding a specific use of a copyrighted work.

The AAP states in essence:

- a. The principles of the copyright law are designed to promote the creation, publication, and use of works of the intellect. These principles include both the exclusive rights of copyright owners to determine certain uses of their works (in not for profit as well as commercial contexts), and certain exceptions, including the doctrine of "fair use." These precepts are in the mutual interest of the university, author, publisher, communities, and the public.
- b. Under the copyright laws, certain photocopying of copyrighted works for educational purposes may take place without the permission of the copyright owner under the doctrine of "fair use." This principle is subject to limitations, but neither the statute nor judicial decisions give specific practical guidance on what photocopying falls within "fair use."

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- c. "Fair use" is a legal doctrine developed by the courts through case law. Section 107 of the Copyright Act of 1976 (effective January 1, 1978) codified this doctrine. This section sets out certain criteria to be taken into consideration in determining whether a use is a "fair use" (if it is deemed "fair use," clearance from or payment to the copyright owner is not required). The "fair use" criteria are as follows:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or 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.

In addition, the purpose for which the work is used must generally fall within one of the following categories: criticism, comment, news reporting, teaching, scholarship, or research.

2. Guidelines for the Use of Printed Material

To aid in the interpretation of "fair use," and especially to clarify the "fair use" right for teachers at all levels, the following set of minimum guidelines was drawn up by representatives of the Ad Hoc Committee of Educational Organizations and Institutions on Copyright Law Revision, The Authors League of America, and the Association of American Publishers. The complete text of the agreement reached by the educators, authors, and publishers is included in the House Judiciary Committee report (HR94-1476, pp. 68-70) which accompanies the law.

a. Single Copies for Teachers

A single copy may be made of any of the following at the individual request of a teacher if it relates to that person's scholarly research or is to be used in teaching or in preparation to teach a class:

- (1) A chapter from a book;
- (2) An article from a periodical or newspaper;
- (3) A short story, short essay, or short poem, whether or not from a collective work;
- (4) A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

b. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion provided that:

- (1) The copying meets the tests of brevity and spontaneity as defined below;

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- (2) Meets the cumulative effect test as defined below; and

- (3) Each copy includes a notice of copyright.

c. Definitions

- (1) Brevity

(a) Poetry: A complete poem if less than 250 words and, if printed, on not more than two pages, or if from a longer poem, an excerpt of not more than 250 words.

(b) Prose: Either a complete article, story or essay of less than 2,500 words, or an excerpt from any prose work of not more than 1,000 words or 10 percent of the work, whichever is less, but in any event a minimum of 500 words.

Each of the numerical limits stated in (a) and (b) above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.

(c) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(d) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph (b) above notwithstanding, such "special works" may not be reproduced in their entirety, however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10 percent of the words found in the text thereof, may be reproduced.

(2) Spontaneity

(a) The copying is of immediate need as a result of the inspiration of the individual teacher; and

(b) 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.

(3) Cumulative Effect

(a) The copying of the material is for only one course in the school in which the copies are made;

(b) 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; and

(c) There shall be no more than nine instances of such multiple copying for one course during one class term.

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The limitations stated in (b) and (c) above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.

(4) Prohibitions as to Brevity and Spontaneity

Notwithstanding any of the above, the following shall be prohibited:

(a) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitutions may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately;

(b) There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material;

(c) Copying shall not:

- Substitute for the purchase of books, publisher's reprints, or periodicals;
- Be directed by higher authority; or
- Be repeated with respect to the same item by the same teacher from term to term.

(d) No charge shall be made to the student beyond the actual cost of the photocopying.

3. Guidelines for the Use of Library Reserve Photocopying

- a. At the request of a faculty member, the Library will photocopy and place on reserve excerpts from copyrighted works in its collection in accordance with guidelines similar to those governing formal classroom distribution for face-to-face teaching. The university believes that these guidelines apply to the library reserve shelves to the extent it functions as an extension of classroom readings or reflects an individual student's right to photocopy for personal scholastic use under the doctrine of "fair use."
- b. In general, photocopied materials may be placed in the reserve room for the convenience of students both in preparing class assignments and in pursuing informal educational activities which higher education requires, such as advanced independent study and research.
- c. No legal distinction is made or should be implied between library staff or faculty making copies for placement on reserve.
- d. No copyright restrictions will be applied to copies placed on reserve if:
 - (1) The item was published before January 1, 1978 and was never copyrighted (both of these qualifications must be clearly discernible on the work);
 - (2) The item has an expired copyright (all copyrights prior to 1921 have expired);
 - (3) The item is a U.S. Government publication containing no copyrighted materials from other sources;
 - (4) Permission to copy has been received. (It is the responsibility of the person requesting copying or supplying copying to seek permission. A copy of the letter giving permission must accompany the item being placed on reserve—see attachment.)
 - (5) Permission is pending. (A copy of the letter seeking permission must accompany the item being placed on reserve. In these cases, only one copy will be placed on reserve for only one semester unless the permission letter arrives before the end of the semester.)
 - (6) The person placing the item on reserve is the copyright owner.
 - (7) Only one copy of a copyrighted work is to be placed on reserve for only one semester (at the end of the semester, the copy will be returned to the requesting instructor).
- e. In the case of multiple copies, the library will:
 - (1) Place only one copy of the article on reserve immediately unless the request is accompanied by a copy of the permission letter;

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- (2) Add the remaining photocopies when clearance has been received; and
 - (3) Return the single copy, for which permission is pending, to the instructor at the end of the semester.
- f. Each copy of copyrighted materials placed on reserve should carry a notice of copyright, e.g., "NOTICE: This material may be protected by copyright law (Title 17, U.S. Code)."

4. Guidelines for the Uses of Music

In a joint letter dated April 30, 1976, representatives of the Music Publishers' Association of the United States, Inc., the National Music Publishers' Association, Inc., the Music Teachers National Association, the Music Educators National Conference, the National Association of Schools of Music, and the AD Hoc Committee on Copyright Law Revision wrote to Chairman Kastenmeier, forwarding the minimum guidelines they had developed "to clarify Fair Use as it applies to music (under Section 107)." The complete text of that letter and those guidelines also are included in the House Judiciary Committee report (HR94-1476, pp. 70-71) which accompanies the law.

a. Permissible Uses

- (1) Emergency copying to replace purchased copies that, for any reason, are not available for an imminent performance, provided purchased replacement copies shall be substituted in due course.
- (2) For Academic Purposes Other Than Performance:

- (a) Multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole, which would constitute a performable unit such

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as a section, movement, or aria, but in no case more than 10 percent of the whole work. The number of copies shall not exceed one copy per pupil.

- (b) A single copy of an entire performable unit (section, movement, aria, etc.), that is (1) confirmed by the copyright proprietor to be out of print or (2) unavailable except in a larger work, may be made by or for a teacher solely for the purpose of that teacher's scholarly research or in preparation to teach a class.
- (3) Printed copies that have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if none exist.
- (4) A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.
- (5) 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 aural exercises or examinations and may be retained by the educational institution or individual teacher. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

b. Prohibitions

- (1) Copying to create, replace, or substitute for anthologies, compilations, or collective works;
- (2) Copying of or from works intended to be "consumable" in the course of study or of teaching such as workbooks, exercises, standardized tests and answer sheets, and like material;
- (3) Copying for the purpose of performance, except as in 4.a.(1) above;
- (4) Copying for the purpose of substituting for the purchase of music, except as in 4.a.(1) and 4.a.(2) above; and
- (5) Copying without inclusion of the copyright notice that appears on the printed copy.

5. Guidelines for the Use of Audiovisual Materials

a. The Copyright Act grants to the owners of audiovisual works the right to control the public display and public performance of their works. The Act defines "audiovisual works" to include motion pictures, filmstrips, slide sets, and other works consisting of a series of images, together with accompanying sounds, if any, regardless of the storage medium. Thus, an audiovisual work might be stored on film, videotape, CD-ROM, computer disk, or other storage medium. The Act also defines the terms "public display" and "public performance" to include most uses of audiovisual works in the classrooms and libraries of the university.

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- b. The Act limits the right of copyright owners to control public displays and performances of their works if the displays or performances fall within the educational exemption or the fair use limitation (see section 1.c.).
- c. Displays and performances of audiovisual works (including those labeled "For Home Use Only") fall within the educational exemption under the following conditions:
- (1) They must be directly related to the educational mission of the class (displays or performances to reward the class for any reason do not qualify);
 - (2) They must be shown by the instructor(s) and/or student who comprise the class (a guest lecturer, including a librarian, who has been invited officially to be a part of the class on that occasion, may substitute for the instructor);
 - (3) They must be shown in a classroom or other school location dedicated to instruction (a studio, workshop, library, gymnasium, auditorium, or other location would qualify if it is used for instruction);
 - (4) They must be shown where the students and the instructor(s) and/or guest lecturer (see section 5.c.(2)) are in the same general area, such as the same building (broadcasting by radio or television or transmitting by cable system does not qualify);
 - (5) They must be shown only to the instructor(s) and/or guest lecturers and the students enrolled in that class (meetings open to the public, such as sporting events, graduation, and community events do not qualify); and
 - (6) They must be from lawfully made copies (i.e., not illegally made or acquired).

c. Displays and performances of audiovisual works (including those labeled "For Home Use Only") fall within the fair use limitation if they are directly related to teaching, scholarship, or research and take place in a location that will limit attendance to students viewing the display or performance for educational purposes. For example, students may view a videotape assigned by their instructor in preparation for their next class in a library viewing room, if the location generally prevents students not in the class from viewing.

The fair use limitation does not apply to displays or performances of audiovisual works for purposes not directly related to the teaching, scholarship, and research mission of the university.

6. Guidelines for the Use of Television Broadcast Programming

In March of 1979, Congressman Robert Kastenmeier, Chairman of the House Subcommittee on Courts, Civil Liberties and Administration of Justice, appointed a Negotiating Committee consisting of representatives of educational organizations, copyright proprietors, and creative guilds and unions. The following guidelines reflect the negotiating committee's consensus as to the application of "fair use" to the recording, retention and use of television broadcast programs for educational purposes.

a. The guidelines were developed to apply only to off-air recording by nonprofit educational institutions.

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b. A broadcast program may be recorded off-air simultaneously with broadcast transmission (including simultaneous cable retransmission) and retained by a nonprofit educational institution for a period not to exceed the first forty-five (45) consecutive calendar days after date of recording. Upon conclusion of such retention period, all off-air recordings must be erased or destroyed immediately. "Broadcast programs" are television programs transmitted by television stations for reception by the general public without charge.

c. Off-air recordings may be used once by individual teachers in the course of relevant teaching activities, and repeated once only when instructional reinforcement is necessary, in classrooms and similar places devoted to instruction within a single building, cluster, or campus, as well as in the homes of students receiving formalized home instruction, during the first ten (10) consecutive school days in the forty-five (45) day calendar day retention period. "School days" are school session days—not counting weekends, holidays, vacations, examination periods, or other scheduled interruptions—within the forty-five (45) calendar day retention period.

d. Off-air recordings may be made only at the request of and used by individual teachers and may not be regularly recorded in anticipation of request. No broadcast program may be recorded off-air more than once at the request of the same teacher, regardless of the number of times the program may be broadcast.

e. A limited number of copies may be reproduced from each off-air recording to meet the legitimate needs of teachers under these guidelines. Each such additional copy shall be subject to all provisions governing the original recording.

f. After the first ten (10) consecutive school days, off-air recordings may be used up to the end of the forty-five (45) calendar day retention period only for teacher evaluation purposes, i.e., to determine whether or not to include the broadcast program in the teaching curriculum and may not be used in the recording institution for student exhibition or any other non-evaluation purpose without authorization.

- g. Off-air recordings need not be used in their entirety, but the recorded programs may not be altered from their original content. Off-air recordings may not be physically or electronically combined or merged to constitute teaching anthologies or compilations.
- h. All copies of off-air recordings must include the copyright notice on the broadcast program as recorded.
- i. Educational institutions are expected to establish appropriate control procedures to maintain the integrity of these guidelines.

7. Guidelines for the Use of Non-broadcast Audio and Video Transmissions

Non-broadcast transmissions normally would include audio and video programming being distributed/delivered via **cable** (closed circuit), the "**wireless cable**" systems, such as point-to-point microwave, instructional television fixed service (ITFS), or multipoint distribution service (MDS), **satellite**, **laser disk**, and **audio and videocassettes**. Except for simultaneous cable retransmissions of "broadcasts," and the face-to-face audiovisual exemption, the use of these audio and video materials would seem to be dependent upon what educator-use rights have been granted/sold by the copyright holder(s). For instance:

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- a. "Teachers affiliated with bona fide, degree-granting educational institutions may use any amount of C-SPAN video and audio product in a classroom setting, and they may retain such product indefinitely without any prior permission from or payment to C-SPAN (*C-SPAN in the Classroom: A Newsletter for Professors*, Jan/Feb 1990, Vol. 1, No. 4)."
- b. Satellite/cable subscription services cannot be utilized without specific permission/purchase of rights.

In general, whether it is for teacher only viewing or presentation to a class (while it is being transmitted), or for taping for later use, educators must first have been granted (or obtain) such rights from the copyright holder.

8. Guidelines for the Use of Computer Software

The following guidelines were developed to ensure that this university, its students, faculty and staff, maintain legal and ethical standards regarding the use of computer software.

- a. Copying, adapting, and electronic transmission of computer software is strictly forbidden except:
 - (1) In strict compliance with Public Law 96-517, Section 10(b), which, in amending Section 117 of Title 17 (U.S. Code) to allow for the making of computer software back-up copies, states (in part) "...it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:
 - (a) "That such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or
 - (b) "That such a new copy and adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful."

- (2) Where appropriate written consent (from the holder of such copyright) is obtained.
- (3) Where the software is in the public domain - and that can be proved.
- b. As with phonograph records, computer programs (under PL 101-650) may not be rented, leased or loaned for direct or indirect commercial advantage. However, the nonprofit lease or lending of computer software (bearing the warning notice prescribed by the Register of Copyrights) to this institution's staff, faculty, and students - for their nonprofit use - is exempt from these restrictions.
- c. Also exempt (from PL 101-650's restrictions), is the lawful transfer of possession of a lawfully made copy of a computer program, between nonprofit educational institutions, and between such institutions and the individuals comprising their staffs, faculties and student bodies.
- d. Illegal copies of software may not be used on this university's computers.

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9. Guidelines for Requesting a Specific Legal Opinion

Before any member of this university's faculty or staff takes action or causes action to be taken that could possibly infringe any "exclusive rights in copyrighted works" (Section 106 U.S. Code) that has not been exempted or otherwise removed from the scope of Section 106 by the specific provisions of Sections 108-118 or is not clearly a "Fair Use" (Section 107) under the guidance set forth in Sections 1-8 of this OP the matter will be submitted, in writing, to the university general counsel for a legal opinion. Such submissions must include:

- a. The work (original, reasonable facsimile, or reproduction) that possibly could be infringed;
- b. A description of the use/action contemplated, or anticipated, that could possibly cause the infringement;
- c. An explanation as to why the use/action is necessary and how it is of benefit to this university; and
- d. All related pertinent materials, including timelines and deadlines, especially those that would have a bearing on the amount of time available for developing the legal opinion.

[Attachment: Sample Letter to Copyright Owner](#)