

MEMORANDUM ON COPYRIGHT LAW AND COMPLIANCE

As educators, authors and creators of copyrightable works, members of the University community have a duty to respect the copyright interests of third parties. In an age when continuing innovations in the field of digital technology have allowed individuals to limitlessly broadcast and distribute content, the duty to respect the rights of ownership of copyrights and intellectual property is critical. Members of the University community shall comply with the requirements of the copyright laws of the United States and shall make every effort to make appropriate uses of content and copyrighted works of third parties for educational and scholarly purposes. The University is committed to supporting this effort and to providing tools and resources to the University community to assist decision-making in this complex environment.

This Memorandum sets forth basic legal requirements under the copyright laws of the United States with the expectation that the members of the University community will acquaint themselves with these requirements and conduct themselves accordingly. The following sections of this Memorandum discuss basic copyright principles, public domain, fair use, face-to-face teaching activities, distance education and the TEACH Act, the Digital Millennium Copyright Act (DMCA), and peer-to-peer file sharing. This Memorandum may be updated periodically should additional rules, regulations or legislation be enacted that affect these areas.

I. RIGHTS OF COPYRIGHT OWNERS

A. Definition of Copyright

Under the United States Copyright Act, copyright protection subsists in *original works of authorship* fixed in a *tangible medium of expression*. In order for a work to be considered an original work of authorship, the creator of the work must expend a modicum of intellectual effort in the creation of the work, and the work must have a degree of originality. A work is fixed in a tangible medium of expression when it is preserved in such a manner that it can be perceived, reproduced, or otherwise communicated to others for more than a brief period of time. It is also important to remember that Copyright protects the unique expression of an idea, but *not the idea itself*.

Under 17 U.S.C. § 106, the owner of a copyrighted work has the exclusive right to:

1. Reproduce the copyrighted work;
2. Prepare derivative works based upon the copyrighted work;
3. Distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
4. Publicly perform the copyrighted work (in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work); and
5. Perform the copyrighted work publicly by means of a digital audio transmission (in the case of sound recordings).

B. Infringement of Copyright

In order to protect the exclusive rights of copyright owners, the Copyright Act provides that “(a)nyone who violates any of the exclusive rights of the copyright owner...is an infringer of the copyright or right of the author, as the case may be” (see 17 U.S.C. § 501). Normally, an infringer is liable to the copyright owner for the actual losses sustained because of the unauthorized use or copying of the work and for any additional profits of the infringer (see 17 U.S.C. § 504). Where the monetary losses are normal, the copyright owner usually will claim statutory damages instead of the actual losses (see 17 U.S.C. § 504). These statutory damages may reach as high as \$30,000 per occurrence, or up to \$150,000 per occurrence if the infringement is willful. However, the Copyright Act specifically exempts from statutory damages any employee of a non-profit educational institution, library, or archives, who “believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under Section 107.” In addition to suing for monetary damages, a copyright owner can usually prevent future infringement through obtaining a court injunction (see 17 U.S.C. § 502).

A member of the University community who has sought permission to use a copyrighted work and has not received such permission (or has received permission contingent upon conditions that the faculty or staff member considers inappropriate) may request a review of the matter by the Office of General Counsel. If upon review the General Counsel determines that the proposed use of the work is permitted by the copyright law, the General Counsel will so advise the faculty or staff member.

Under Section 6.8 of the Bylaws of the Board of Regents pertaining to legal defense and indemnification of faculty and staff members, the University may reserve its rights or refuse to provide a defense to a faculty or staff member if the claim or demand does not arise out of an alleged act or omission in the course or scope or duties of employment of the requesting individual or that the act or omission complained of amounted to malfeasance in office or willful and wanton neglect of duty. The failure of a faculty or staff member to secure the permission of a publisher of copyrighted material in a situation where this policy would clearly indicate that securing such permission would be necessary will be viewed by the Office of General Counsel as such an example of unprotected conduct.

II. PUBLIC DOMAIN

Works that are no longer protected by copyright are in the public domain, meaning that they are free for anyone to use without the consent of the author or prior owner of the copyright to the work. However, determining whether or not a work is protected by copyright can be somewhat difficult. Under current copyright law, works published prior to 1923 are now in the public domain. The term of copyright protection for works published after 1923 is now the life of author plus 70 years in most cases. For works authored or published after 1923 the determination can be complicated and depends on the date the work was published, the date the copyright to the work was registered, and whether or not the copyright registration was renewed.

Of note, however, is the fact that works created or published by the U.S. Government are by statute considered to be in the public domain (see 17 U.S.C. § 105). U.S. Government

publications are documents prepared by an official or employee of the government in an official capacity. Government publications include the opinions of courts in legal cases, Congressional Reports on proposed bills, testimony offered at Congressional hearings and the works of government employees in their official capacities. Works prepared by outside authors on contract to the government may or may not be protected by copyright, depending on the specifics of the contract. In the absence of copyright notice on such works, it would be reasonable to assume they are Government works in the public domain. It should be noted that state government works may be protected by copyright (see 17 U.S.C. § 105). However, the opinions of state courts are not protected. Furthermore, the U.S. Government is the grantee of numerous bequests of copyrighted works, and these works do carry copyright protection.

Copyright Office Circular 22 explains how to investigate the copyright status of a work. One way is to use the search engine found at the Copyright Office website at <http://www.copyright.gov>. Alternatively, one may request the Copyright Office to conduct a search of its registration and/or assignment records. The Office charges an hourly fee for this service. One needs to submit as much information as possible concerning the work in question, such as the title, author, approximate date of publication, the type of work or any available copyright data. Another useful resource for information regarding copyright term and the public domain is Peter B. Hirtle's extensive chart at the Cornell University Copyright Information Center at http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm.

III. THE DOCTRINE OF FAIR USE

From time to time, the faculty and staff of the University of Nebraska may use copyrighted works to supplement research and teaching. In many cases, such use can facilitate the University of Nebraska's mission; that is, the development and transmission of information. Included within the Copyright Act is the doctrine of "fair use" which allows, under certain conditions, the copying of copyrighted material without the prior permission of the owner. It is critical for members of the University community to understand and not abuse the rights of use allowed under the doctrine of fair use. The following guidelines explain the University's position concerning the "fair use" of copyrighted materials by members of the University community – faculty, staff, administration and students.

A. Definition and Purpose of Fair Use

As previously noted, the Copyright Act defines the rights of a copyright owner and how they may be enforced against an infringer. The doctrine of fair use essentially provides for the limited use of copyrighted materials without the consent of the owner for certain socially important purposes such as scholarship, research, education, commentary, criticism and news reporting.

B. Application of Fair Use

The doctrine of fair use does not give members of the University community a blanket exemption to use copyrighted works, and it should not be viewed as a license or affirmative grant of rights to use a copyrighted work. Rather, a determination of whether or not the use of a work

constitutes a fair use hinges on an analysis of the proposed use under a four-factor test codified at 17 U.S.C. § 107. Unfortunately, while the Act lists these four general factors under the heading of “fair use,” it provides little in the way of specific directions for what constitutes fair use. These four factors are rather vague and any analysis of fair use will depend largely on the facts of each particular case. Each of the four factors is to be given equal weight, and in some instances, two individuals applying the same facts to these four factors can reach opposite conclusions regarding whether or not the use is fair.

The following four factors are set forth in 17 U.S.C. § 107:

1. What is the purpose and character of the use?

In other words, is the use of the work commercial in nature or is the use for non-profit, educational purposes? Commercial uses are generally not favored under fair use, whereas non-profit educational uses are favored. However, the simple fact that a use is of a non-profit, educational nature does not in and of itself mean that the use is fair. A more important determination involves whether or not the use is transformative, or makes use of the work in a manner other than that for which it was created. A use is transformative if it adds something new to the work, with a further purpose or of different character, rather than merely superseding the objects of the original work.

2. What is the nature of the copyrighted work to be used?

Use of a work that is largely of a factual and non-fictional nature will tend to favor a finding of fair use. Some examples of these types of works are compilations of statistics and works based on factual accounts of events. Use of an imaginative, highly creative work will generally not weigh in favor of fair use. Some examples of highly creative works are multimedia works such as movies, as well as novels, plays, poems and works of art.

3. What is the amount and substantiality of the portion used in relation to the work as a whole?

Use of a small portion of a work (as small a portion as possible to convey the information necessary) will tend to favor fair use, so long as the portion used is not central to the “heart of the work.” Use of large portions of a work, or portions that are central to the heart of a work (i.e. the most memorable or recognizable portion of a work, no matter how brief) will weigh against a finding of fair use.

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

If the use of a work will diminish the right of the copyright owner to collect reasonable fees for the use, this factor will tend to weigh against a finding of fair use. Consider the following; if the use of the work would replace a sale or license of the work, if an affordable licensing option is available to the user, if repeated and long-term uses

will be made of a work, or if the use would significantly impair the market for the work, this factor will not favor fair use. However, if there is no efficient or affordable licensing mechanism available for the work, if the use would have no significant effect on the market or potential market for the work, if the work is not commercially available in the necessary format (i.e. digital) and/or if the user has lawfully obtained a copy of the work, this factor will weigh in favor of fair use.

Given the vagueness of the doctrine of fair use, the Copyright Act contains specific provisions which grant additional rights to libraries and insulate employees of non-profit educational institutions, libraries, or archives from statutory damages for infringement where the infringer believed or had reasonable ground to believe the photocopying was a fair use of the material (see 17 U.S.C. § 504 (c) and (2)). While the fair use provisions are admittedly ambiguous, any employee who attempts to stay within these guidelines should have an adequate good faith defense in the case of an innocently committed infringement.

Appendix A of this Memorandum contains a checklist to be used when analyzing the use of a work under the doctrine of fair use.

IV. FACE-TO-FACE TEACHING ACTIVITIES

The Copyright Act provides for the use of copyrighted materials in a traditional classroom setting in 17 U.S.C. § 110(1). This section of the Copyright Act allows for classroom uses of copyrighted materials so long as the following factors are met:

1. The use occurs at a non-profit educational institution;
2. The teachers and students are present in the same place at the same time;
3. The use occurs in a classroom or area devoted to instruction; and
4. If the work is an audiovisual work, the copy used must be a lawfully made or obtained copy.

V. DISTANCE EDUCATION AND THE *TEACH* ACT

The Technology, Education and Copyright Harmonization Act (*TEACH* Act) of 2002 (see 17 U.S.C. § 110(2)) modified the Copyright Act to allow for the use of copyrighted works of third parties in distance learning activities conducted over internet. The *TEACH* Act allows educators at accredited, non-profit educational institutions to copy and transmit copyrighted works over distance learning networks without the permission of the copyright owner or the payment of royalties provided certain conditions are met. In order to take advantage of the *TEACH* Act, the following factors must be met:

1. The work must be legally acquired;
2. The use must occur under the supervision or direction of an instructor;
3. The use must be directly related to the content of the course;
4. The use must be a regular part of a mediated instructional activity;
5. The work can only be accessed by or transmitted to students who are officially enrolled in the course;

6. To the extent technologically feasible, measures must be taken to protect the work from further distribution outside the class and to prohibit retention of the work by the students; and
7. Copies of the work can only be made available to students for so long as is reasonably necessary to complete the transmission of the information to the students (for example, the duration of a class session).

All material displayed under the TEACH Act must contain the following notice:

The materials on this course website are only for the use of students enrolled in this course for purposes associated with this course and may not be retained or further disseminated. The materials on this course website may be protected by copyright, and any further use of this material may be in violation of federal copyright law.

The TEACH Act does not permit the following:

1. Uploading material that was illegally obtained;
2. Uploading material that would typically be purchased by students for use in a class, such as textbooks, coursepacks and study guides;
3. Uploading materials specifically created for distance education.

Digitizing works only available in analog format for transmission to students in distance learning courses is allowable provided that there is no digital copy of the work available for use, purchase or licensing by the University, and that only the relevant portion needed for transmission is digitized.

VI. THE DIGITAL MILLENNIUM COPYRIGHT ACT (DMCA)

The University's general policy regarding compliance with the DMCA is set forth in **Executive Memorandum #16 – Policy for Responsible Use of University Computers and Information Systems**. This Memorandum does not in any way alter, modify or suspend the terms of Executive Memorandum #16.

However, with regard to use of copyrighted materials in an educational context, it is important to ensure compliance with certain other provisions of the DMCA. The DMCA sets forth a general prohibition on circumvention of technological measures that control access to a digital work. An example of this the encryption program on a DVD that prevents its contents from being copied. Most importantly, the DMCA prohibits gaining unauthorized access to a work by circumventing a technological protection measure even if the use of the work would otherwise be a fair use. The DMCA also prohibits trafficking in technology or devices that are primarily designed to circumvent such a technological measure. Violations of the DMCA carry severe penalties, including large fines and imprisonment.

This means that fair use cannot be claimed as a defense for violations of the DMCA. In addition, educational or classroom uses otherwise allowed by law will not protect one from

punishment for a violation of the DMCA. However, the anti-circumvention language of the DMCA only applies to digital content to which a technological protection measure has been applied. University faculty and staff are encouraged to make use of analog media or to use only digital media that is not copy-protected if possible when considerations of fair use are necessary.

VII. PEER-TO-PEER FILE SHARING

A. General Policy

Executive Memorandum #16 sets forth the University's policy on peer-to-peer file sharing activities:

Misuse of University information systems is prohibited. Misuse includes the following:

...

i. Using electronic communications to violate the property rights of authors and copyright owners.

As set forth in Section I of this Memorandum, the property rights of authors and copyright owners under United States law are defined in 17 U.S.C. §106. Specifically, authors and/or owners of a copyrighted work have the exclusive right to:

1. Reproduce the copyrighted work; and
2. Distribute copies of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending.

Violations of copyright such as downloading and/or sharing unauthorized copies of copyrighted music and movies are especially troubling. Distributing copyrighted material without the consent of the owner is illegal and is a violation of University policy and the Codes of Student Conduct of the four campuses of the University of Nebraska. It is also subject to both internal disciplinary measures and criminal and civil prosecution, and puts the offender at risk of substantial liability.

It is critical to understand and acknowledge that copyrighted works cannot be shared by any means without the consent or permission of the author or owner. This includes sharing via file sharing networks, the web, or any other means and is **not** limited to peer-to-peer activities.

B. Campus Policies

The use of University computer systems for illegal activities such as peer-to-peer file sharing of copyrighted material are also specifically referenced and prohibited by the policies of each campus.

1. University of Nebraska-Lincoln

Paragraph 4.4.e of the UNL Student Code of Conduct states in part:

The use of computing resources for any purpose other than a purpose for which they are intended is an act of misconduct. Misuse of computers shall include: ... Violating copyright laws or license restrictions with respect to the copying or use of computer programs, data, materials or information.

2. University of Nebraska-Omaha

Paragraph 8.e. of the UNO Student Code of Conduct defines “computer related misconduct” as including the following:

Violating copyright laws or license restrictions with respect to the copying or use of computer programs, data, materials or information.

3. University of Nebraska-Kearney

Paragraph 17.b. of the UNK Student Code of Conduct defines “unauthorized use of computing resources” as including the following:

Unauthorized transfer of a file.

4. University of Nebraska Medical Center

UNMC’s Policy on Appropriate Use of Information Technology Resources prohibits the use of UNMC computing resources for the unauthorized downloading of copyrighted materials from the internet. In addition, the UNMC Student Handbook states the following:

Students are required to observe appropriate use of computers. Downloading music, video and text without permission is not allowed.

VIII. OBTAINING PERMISSION TO USE COPYRIGHTED MATERIAL

Unless a work is in the public domain or the use of the work for educational purposes is clearly allowable under fair use, the TEACH Act or face-to-face teaching activities, permission to use the work must be obtained from the owner or copyright holder. A request to use a copyrighted work can usually be sent to the permission department of the publisher of the work. The request can be in the form of a letter and should contain the following information, if known:

1. Title, author and/or editor, and edition of the work;
2. Exact material to be used;
3. Number of copies to be made;
4. Intended use of the work (e.g. educational, non-profit);
5. Form of distribution (e.g. photocopies, digital distribution via internet, etc...);
6. Whether the material will be sold as part of a coursepack; and

7. The duration of the use (e.g. academic semester, term of years, etc...).

The request should be acknowledged and agreed to by the author or owner before the work is used. All documentation of permissions received should be maintained at the academic department in accordance with University policies.

Please contact the Office of General Counsel at 472-1201 or your campus copyright specialist with any questions you have regarding this Memorandum or copyright issues in general.

Appendix A

FAIR USE CHECKLIST

Please complete and retain a copy of this form in connection with each possible "fair use" of a copyrighted work for your project

Name: _____ Date: _____ Project: _____

Department: _____ Prepared by: _____

Title/Description of Work Used: _____

PURPOSE

Favoring Fair Use

Teaching (including multiple copies for classroom use)
Research
Scholarship
Nonprofit Educational Institution
Criticism
Comment
News reporting
Transformative or productive use (changes the work for new utility)
Restricted access (to students or other appropriate group)
Parody

Opposing Fair Use

Commercial activity
Profiting from the use
Entertainment
Bad-faith behavior
Denying credit to original author

Reasoning: _____

NATURE

Favoring Fair Use

Published work
Factual or nonfiction based
Important to favored educational objectives

Opposing Fair Use

Unpublished work
Highly creative work (art, music, novels, films, plays)
Fiction

Reasoning: _____

AMOUNT

Favoring Fair Use

Small quantity of work used
Portion used is not central or significant to entire work
Amount is appropriate for favored educational purpose

Opposing Fair Use

Large portion or whole work used
Portion used is central to work or "heart of the work"

Reasoning: _____

EFFECT

Favoring Fair Use

User owns lawfully acquired or purchased copy of original work
One or few copies made of copyrighted work
No significant effect on the market or potential market for the copyrighted work
No similar product marketed by copyright holder
Lack of licensing mechanism

Opposing Fair Use

Use could replace sale of copyrighted work
Significantly impairs market or potential market for copyrighted work or derivative
Reasonably available licensing mechanism for use of copyrighted work
Affordable permission available for using work
Numerous copies made of copyrighted work
Work made available on the Web or other public forum
Repeated or long-term use of copyrighted work

Reasoning: _____
