

Information Paper*
Copyright-Protected Works

1. Purpose. To provide general guidance regarding the use of copyright-protected works by staff and faculty at the University of Kansas (“KU”).

2. Discussion.

a. Copyright Protection

(1) Copyright is simply legal protection for creative intellectual works. Copyright protection provides a bundle of exclusive legal rights to the copyright owner for limited period of time. The copyright owner may be the author, the author’s employer, or someone to whom the author has assigned ownership, such as a publisher, gallery, or estate. The copyright owner’s exclusive rights consist of the right to copy, distribute and sell, modify and adapt, convert to other formats, and publicly perform or display the work.

(2) Just about any expression of an idea may be protected by copyright, including books, articles, poetry, plays, email messages, lectures, speeches, photographs, art, sculpture, architecture, choreography, music, sound recordings, films television programs, audiovisual works, internet sites, video games, and software. Copyright-protected works are protected regardless of the medium in which they are created or reproduced. As such, copyright extends to both digital works and works transformed into a digital format.

(3) While identifying copyright status was once relatively simple, notice (the copyright symbol, ©, followed by the first year of publication and name of the copyright owner) is no longer required for copyright protection. Copyright now attaches contemporaneously upon the creation of an original work that is “fixed in a tangible medium of expression.” As a result, the absence of copyright notice does not necessarily mean the work is in the public domain.

b. Public Domain. The public domain is generally defined as consisting of works that are either ineligible for copyright protection, or works with expired copyrights. Although there is no easy method to determine whether a work is in the public domain, the following general guidelines facilitate identification of public domain status. Public domain works may be used freely, without regard for permission or application of a copyright exception.

(1) If the work was published in the United States prior to 1923, it is in the public domain.

(2) If the work was published in the United States between 1923 and 1963, without a public notice, it is in the public domain. If published during this period with a

copyright notice but registration was not renewed, it is in the public domain. If published during this period with a copyright notice and registration was renewed, it is generally protected for sixty-seven years from date of publication.

- (3) If the work was published in the United States between 1964 and 1978, without a copyright notice, it is in the public domain. If published during this period with a copyright notice, it is generally protected for ninety-five years from the date of publication.
 - (4) If the work was published in the United States between 1978 and 1 March 1989, without a copyright notice *and* registration, it is in the public domain. If published during this period with notice, but without registration, it is generally protected for seventy years from the death of the author.
 - (5) After 1 March 1989, all works – published and unpublished – are generally protected for seventy years from the death of the author. For works of corporate authorship, however, the copyright term is the shorter of ninety-five years from publication, or one hundred twenty years from creation.
- c. Federal Government Works. Federal government employees may not copyright works created in their official capacity. Such works are those undertaken as part of assigned duties, or produced with federal government resources. Federal government works are in the public domain.
 - d. Personal Use Licensing. Personal use of copyright-protected works is usually authorized by a license granted concurrently with purchase. For example, films are usually sold or rented “for home use only.” This personal license does not authorize public distribution or display of the work, nor does it grant permission to incorporate the material in derivative works, such as PowerPoint presentations, videos, and other media.
 - e. Penalties. The potential penalties for copyright infringement are significant, including fines ranging from \$200 to \$150,000 per infringement and/or imprisonment. Liability may be reduced in cases of nonprofit educational use, however, where the user can demonstrate that his or her good faith evaluation of the fair use factors resulted in a reasonable belief that the use was fair use.
 - f. Exceptions. There are three exceptions to copyright law commonly used by educators: fair use, classroom performance, and distance education. Fair use is most frequently applied by nonprofit educational institutions, as it is much broader and more flexible than the other two. If an exception to copyright law applies to a specific use, the material may be used without regard to permission.
3. Fair Use Exception. Because fair use is technology neutral, the same analysis applies regardless of the medium in which copyright-protected works are created or used. Reliance upon this exception should be limited to those cases in which the weighing of the four factors

of the analysis favors the fair use of a portion of another's copyrighted work. The analysis should be carefully documented to support a conclusion of fair use.

- a. Fair Use Factor 1 – *Character and Purpose of Use*. Is the use merely reproductive, or does it transform the work? Is the use commercial or nonprofit? Although educational use generally favors the user, it is critical to note that there is no general exception to copyright protection which permits unrestricted use for educational purposes.
- b. Fair Use Factor 2 – *Nature of Copyright-Protected Work*. Is the work creative or factual? Use of factual material, as opposed to a creative work, generally favors the user.
- c. Fair Use Factor 3 – *Amount and Substantiality of Use*. What size is the sample in relation to the entire work? Does the use go to the heart of the work (*i.e.*, the seminal, defining moment)? While there are several criteria used to evaluate this prong, limited use, which targets specific educational goals, generally favors the user.

(1) *Brevity*. The following examples offer guidelines for maximum use which favors fair use. Notwithstanding these guidelines, the use of material which constitutes the heart of the work is not fair use. The guidelines may be helpful, but they are not part of the copyright statutes.

- (a) Text Material – A complete article, story, or essay of less than 2,500 words; or, an excerpt of no more than 10 percent, or 1,000 words, whichever is less.
- (b) Poetry – An entire poem of less than 250 words (but no more than three poems by one poet, or five poems by different authors in a single work); an excerpt of no more than 250 words (but no more than three excerpts from one poet, or five excerpts from different poets in a single work).
- (c) Music – An excerpt of no more than 10 percent of a song or music video (but no more than thirty seconds of the total musical work).
- (d) Motion Media – An excerpt of no more than 10 percent, or three minutes, whichever is less.
- (e) Illustrations or Photographs – An excerpt of no more than five images from a single artist or photographer; an excerpt of no more than 10 percent, or fifteen images, whichever is less, from a collection.
- (f) Data Sets – An excerpt of no more than 10 percent, or 2,500 entries, whichever is less.

(2) *Spontaneity*. The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness must be so close in time that it would be unreasonable to expect a timely reply to a request for permission. The guidelines

caution that reliance on fair use in nine or more separate instances in a single semester tends to negate the good faith aspect of fair use.

(3) *Multiplicity*. Limit access to copyright-protected works. Make no more than one hard copy per student enrolled in the class. In an electronic environment, use passwords or some other authentication method to ensure that only students enrolled in the class have access to the material. Deactivate, or otherwise make inaccessible, internet pages that contain copyright-protected material at the end of each semester, or sooner, if the material is no longer needed. Apply other technological measures, as available, to reasonably prevent students from retaining the works beyond the class session and further distributing them.

(4) *Cumulative Effect*. Obtain permission for copyright-protected works used in more than a single semester. Routine use of copyright-protected material over successive semesters is not within the spirit of fair use.

d. Fair Use Factor 4 – *Effect of Use*. Does the use affect potential sales of the original work? Protection extends to loss of sales, regardless of whether use is for entertainment or educational purposes. Fair use does not extend to commercial educational materials, such as workbooks, exercises, and test booklets and answers. Moreover, copying may not be used to create, replace, or substitute for anthologies, compilations, or collective works. Use with little to no market impact generally favors the user; however, this factor is difficult to overcome.

4. Classroom Performance Exception. An audiovisual work, such as a film or television program, may be presented in its entirety, so long as four criteria are satisfied.

a. Classroom Performance Factor 1 – *Method*. The performance must involve face-to-face teaching. Faculty and students must be simultaneously present throughout the performance. Accordingly, closed-circuit, remote, and web-based transmission are not contemplated by this exception.

b. Classroom Performance Factor 2 – *Activity*. The performance must be integral to specific, systematic instructional activity. As such, the size or length of the material sampled should correlate directly with the mediated teaching activity. If an instructor intends to present an entire film, but has only forty-five minutes of teaching points, the sample used should be limited to forty-five minutes.

c. Classroom Performance Factor 3 – *Forum*. The performance must occur in a classroom or similar place devoted to instruction, such as a department conference room or an auditorium.

d. Classroom Performance Factor 4 – *Copy*. The performance must rely upon a copy which was legally made and obtained (i.e., not a bootleg copy). With this exception only, faculty may use a film borrowed from a library or video rental service, or originally purchased for personal use.

5. Distance Education Exception

- a. Commonly known as the Technology, Education, and Copyright Harmonization (“TEACH”) Act, the distance education exception permits limited use of copyright-protected material in mediated instructional activities that are similar to face-to-face teaching. Faculty may use copyright-protected materials, but only in portions, or under conditions, analogous to conventional teaching and lecture formats. Thus, this exception does not permit scanning and uploading of full or lengthy works, stored on a website, for students to access throughout the semester – even for private study in connection with a formal course.
- b. Although the TEACH Act may appear to offer greater flexibility with respect to use of copyright-protected material, the law’s rigorous requirements and numerous restrictions make it less advantageous than application of the fair use exception in the context of teaching at KU. Accordingly, faculty should apply fair use analysis to scanning, uploading, and transmission of copyright-protected materials for student use.

6. Guidance

- a. Assume that any non-federal governmental work created in the last seventy-five years is protected by copyright. Works that are subject to copyright protection may only be used with the permission of the copyright owner, or with a documented determination of exception to copyright protection (e.g., fair use).
 - b. Draft a memorandum for record to capture your analysis of the fair use or classroom presentation exceptions. Maintain this document in a department file.
 - c. If an exception to copyright law does not apply, request permission (*i.e.*, a “license”) from the copyright owner for each specific use. While there is no standard format for requesting permission, provide specific information regarding the course name and general description; teaching point for which the work will be used; number of students who will receive the work; the manner in which the work will be distributed (e.g., hard copy, electronic); and the duration of, and frequency with which, the instructor intends to distribute the work. Retain copies of the request, and subsequent authorization, to use copyright-protected material.
 - d. Always credit the source of copyright-protected works. Provide a full bibliographic description (including author, title, publisher, and place of publication) and notice of copyright (including copyright symbol, year of first publication, and name of copyright owner). For example, “Photographs and Videos Copyright © 2005, John Doe. Used with permission. All rights reserved.”
7. Conclusion. This information paper contains general guidance about copyright law and policy to assist KU faculty, staff and students in understanding this complex area of law; it does not provide legal advice. Legal advice can only be given and received in direct

consultation with counsel, based upon a fact-specific inquiry of the circumstances involved in a specific instance.

* This information borrows substantially from an information paper on copyright-protected works dated July 1, 2008 and produced by the Office of the Staff Judge Advocate, United States Military Academy, West Point, N.Y.