Copyright and Fair Use in Instruction Policy

Section: Research, Sponsored Program, Technology Transfer and Intellectual Property Policies
Policy Name: Copyright and Fair Use Policy
Policy Owner: Provost
Responsible University Office: Vice Provost and Director for Libraries
Origination Date: July 1, 2005
Revisions: July 1, 2015
Legacy Policy Number: 6-15

I. SCOPE OF POLICY

This policy addresses the use of copyrighted material for instructional purposes and applies to all university departments, faculty, staff and students.

II. DEFINITIONS

A. "Copyright" shall be defined as a collection of rights granted authors and creators for a limited time. The U.S. Constitution granted Congress "the Power ...to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors exclusive Right to their respective Writings and Discoveries."

Copyright is a form of protection provided to the authors of "original works of authorship" including literary, dramatic, musical, artistic, and certain other intellectual works, both published and unpublished. The 1976 Copyright Act generally gives the owner of copyright the exclusive right to reproduce the copyrighted work, to prepare derivative works, to distribute copies or phonorecords of the copyrighted work, to perform the copyrighted work publicly or to display the copyrighted work publicly. In the case of sound recordings, the copyright owner has the right to perform the work publicly by means of a digital audio transmission. These exclusive rights are freely transferable and may be licensed, sold, donated to charity or bequeathed to the copyright owner's heirs. It is illegal for anyone to violate any of the exclusive rights of the copyright owner.

The exclusive rights of the copyright owner are limited. The Copyright Act contains a number of statutory limitations covering specific uses for educational, religious and charitable purposes. The best known of these is fair use.

B. "Copyright Author" is defined as either the person who creates the work, the person or business that pays another to create the work in an employment context, or the person or business that commissions the work under a valid work-for-hire contract. "Fair Use" shall be defined as an exemption under the Copyright Act which permits the fair use exemption (Section 107, U.S. Copyright Law) limited reproduction of copyrighted works for purposes such as criticism, comment, news reporting, teaching or research without the permission of the copyright owner. While many cases of instructional use are permitted by the fair use exemption, the law does not provide clear directives for what is and what is not fair use. Each case must be decided on its own merits. Four statutory factors must be weighed in making a fair use analysis.

C. "Copyright Owner" is defined as either the person or entity listed as the owner in the U.S. Copyright Office, usually the original author or developer or a person or entity to which an exclusive part of the copyright has been transferred in writing. (See Policy Standards & Procedures section for an enumeration of these four statutory factors.)
D. "Fair Use" shall be defined as an exemption under the Copyright Act which permits the fair use exemption (Section 107, U.S. Copyright Law) limited reproduction of copyrighted works for purposes such as criticism, comment, news reporting, teaching or research without the permission of the copyright owner. While many cases of instructional use are permitted by the fair use exemption, the law does not provide clear directives for what is and what is not fair use. Each case must be decided on its own merits. Four statutory factors must be weighed in making a fair use analysis.

III. POLICY STATEMENT

The University of Delaware expects all members of the University community to respect copyright law (Title 17, U.S. Code). Except as allowed by law, it is a violation of this policy and law for University of Delaware faculty, staff or students to reproduce, distribute, display publicly, perform, digitally transmit (i.e. in the case of sound recordings) or prepare derivative works based upon a copyrighted work without permission of the copyright owner.

Recognizing that copyright law provides certain exemptions that limit the right of the copyright holder (www.copyright.gov/title17/92chap1.html#107), this policy provides guidance to University authors using copyrighted material for educational purposes.

IV. POLICY STANDARDS AND PROCEDURES

A. The doctrine of "fair use" is one of the more important limitations to copyright law. The doctrine of fair use has been developed through a substantial number of court decisions over the years and has been codified in section 107 of the copyright law. Section 107 also sets out four factors to be considered in determining whether or not a particular use is fair.

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

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

5. Thoughtful analysis of these four factors in relationship to the need for the copy must be made in order to arrive at a good faith determination of fair use for a specific situation. Authors are encouraged to use the Fair Use Worksheet attached to this document and to file the completed worksheet with the product. When relying on fair use, proper attribution should be included and material should be marked to indicate copyright protection.

B. Applications of Fair Use: The University Library has developed guidelines to provide assistance to individuals determining if fair use applies to their particular case. These guidelines may be found on the Library Copyright Research Guide (guides.lib.udel.edu/copyright). The University encourages use of the four factors delineated in the law (and listed above in section IV A) to guide decision making and provides a Fair Use Worksheet with this document (Appendix A).

APPENDIX A: Fair Use Checklist (pdf)

Date: November 19, 2015
APPENDIX A: FAIR USE CHECKLIST

This checklist is a tool to assist University of Delaware faculty, staff and students to determine if the intended use may be considered fair use. Check only those factors that apply to the specific intended use. For each of the four sections below, determine whether a factor favors or disfavors fair use. No single item or factor is determinative of fair use, as some factors may weigh more heavily than others, but a tally of factors favoring and weighing against fair use will help the decision-making process.

Keep the completed checklist in your files in case you need to show evidence of a decision made in “reasonable and good-faith.” If you have any questions, please contact a reference librarian at the University of Delaware Library, 302-831-2965. Legal questions will be referred to campus counsel.

Name: ___________________________ Date: ___________________________
Class or project: ___________________ Title of copyrighted work: ___________________
Author and publisher: ___________________ Portion to be used (i.e. pages): ___________

FACTOR 1: PURPOSE OF THE USE

Favoring Fair Use

☐ Educational
  • Teaching (including multiple copies for classroom use)
  • Research
  • Scholarship
  • Criticism
  • Comment
  • Parody

☐ Transformative or changes the work to a new purpose

☐ Nonprofit use

Weighing against Fair Use

☐ Commercial, entertainment or for profit

☐ Public distribution

☐ Verbatim or exact copy, not transformative

FACTOR 2: NATURE OF THE COPYRIGHTED MATERIAL

Favoring Fair Use

☐ Factual, nonfiction, news

☐ Published Work

Weighing against Fair Use

☐ Creative (art, music, fiction) or consumable work (workbook, test)

☐ Unpublished work
**FACTOR 3: AMOUNT COPIED**

**Favoring Fair Use**
- Small quantity (e.g. single chapter or journal article, other short excerpt consisting of less than 10% of the work)
- Portion used is not central to work as a whole
- Amount is appropriate to the educational purpose

**Weighing against Fair Use**
- Large portion or entire work)
- Portion used is central or the “heart” of the work
- Includes more than necessary for the educational purpose

**FACTOR 4: EFFECT ON THE MARKET FOR THE ORIGINAL**

**Favoring Fair Use**
- No significant effect on the market or potential market for the copyrighted work
- One or few copies made and/or distributed
- No longer in print; absence of a licensing mechanism
- Restrict access (limited to students in a class or other appropriate group)
- One-time, spontaneous use (no time to obtain permission)

**Weighing against Fair Use**
- Cumulative effect of copying would be to substitute for purchase of work
- Numerous copies are made and/or distributed
- Reasonably available licensing mechanism for obtaining permission exists (CCC license or off-print for sale)
- Repeated or long-term use

Revised for use by the University of Delaware from the “Checklist for Fair Use,” a project directed by Kenneth D. Crews, formerly at the IUPUI Copyright Management Center and the Copyright Advisory Office at Columbia University (www.copyright.columbia.edu/fair-use-checklist)