

Basic Copyright Principles

The Law. Congress enacted the federal Copyright Act to protect works of authorship. The Act gives the owner of a copyright the exclusive right to do and authorize others to do certain things regarding a copyrighted work, including make copies, distribute the work, display, or perform the work publicly, and create derivative works.

Original Scope of Copyright. The Act applies to nearly all forms of captured content, including traditional works such as books, photographs, architectural drawings, music, drama, and sculpture.

Expanded Scope of Copyright. The copyright laws have adapted to advancing technology by expanding the scope of protected works to include such things as video, motion pictures, electronic media, software, multimedia works and databases.

Test to Determine Copyright. A copyright will attach to an original work that is “fixed in any tangible medium of expression” (i.e., a medium that is captured in an accessible form of content).

No Mark or Registration Necessary. Since 1989, works are protected by copyright regardless of whether a copyright notice is attached and regardless of whether the copyright is registered.

Public Domain Works. Not all works carry copyrights; those in the public domain may be freely used. Any work published before 1923 is in the public domain. Works published from 1923 through 1978 are protected for 95 years from the publication date if proper copyright formalities were followed. Since 1978, works generally have copyright protection for the life of the author plus 70 years.

If No Exception, Seek Permission. There are three major exceptions to the copyright owner’s right to control the reproduction and use of works of authorship are: the fair use exception, the library exception, and the face-to-face teaching exception. These three exceptions are described below. Unless an exception applies, you must obtain permission to reproduce copyrighted work in any medium for any purpose.

Penalties. The penalties for copyright infringement are harsh. A court may award up to \$150,000 for each separate willful infringement.

The Fair Use Doctrine

Fair Use Defined. The Fair Use Doctrine provides for limited use of copyrighted materials for educational and research purposes without permission from the owners. It is not a blanket exemption. Instead, each proposed use must be analyzed under a four-part test.

Fair Use Applied. Unfortunately, the four-part test to determine fair use is necessarily vague and fact dependent. In some instances, two reasonable people could apply the

four factors to the same facts and reach opposite conclusions. If the weighing and balancing analysis below does not provide an answer, please refer to the Copyright and Fair Use Resources section below.

Fair Use Four Factor Test.

1. **What is the character of the use?** Educational, nonprofit, and personal use is favored for fair use, while commercial use is disfavored. However, the fact that a use is educational or nonprofit in nature does not in and of itself mean the use is necessarily fair. More important than the educational or nonprofit nature of the use is whether the use is “transformative” in nature. A use is transformative if it builds upon, criticizes, comments on, parodies or otherwise adds something new to the original work. Put another way, the question is whether the new use, in the words of the Supreme Court, merely “supersedes the objects of the original, or instead adds something new, with a further purpose or different character.”
2. **What is the nature of the work to be used?** Use of a work that is factual in nature weighs toward a finding of fair use. Use of imaginative works is more likely to require permission. **What is the amount and substantiality of the portion to be used?** Using only a small portion of a copyrighted material tips towards fair use, while using large portions indicates a need for permission. Be careful with this factor, however; a court recently held that copying only 5% of a book into a course pack was not fair use.
3. **Will the use negatively affect the value of the copyrighted material?** Where a work is available for purchase or license from the copyright owner, copying all or a significant portion of the work (in lieu of purchasing or licensing enough “authorized” copies) would likely be unfair. If only a small portion of a work is to be copied, and one would likely forego using the portion if permission were required, then the balance tips towards fair use.
4. **Good Faith Fair Use Defense.** Even if a copyright infringement occurs, a court may refuse to award damages if the infringer reasonably believed that the use was fair.

Obtaining Permission to Use Copyrighted Material

In General. If an exception (such as fair use, the library exception, or face-to-face teaching activities) is not clearly available, permission to use a copyrighted work must be obtained from the copyright holder. A request to use copyrighted material should be sent to the permission department of the publisher of the work. Assume four to six weeks for a request to be processed. Permission requests should contain:

1. Title, author and/or editor, and edition.
2. Exact material to be used.
3. Number of copies to be made.
4. Intended use of the material, e.g., educational.
5. Form of distribution, e.g., hard copy to classroom, posted on internet.
6. Whether material is to be sold (e.g., as part of a course pack).

Journal Articles. The Stanford libraries have blanket copyright permission from many journals. Before forwarding a request for an article, check with the appropriate library to see if there is a blanket permission covering the article you would like to use.

Copyright Clearance Center (CCC). The CCC can give permission to use a wide number of materials for a fee. Please contact CCC at www.copyright.com or (978) 750-8400.

Evidence of Permission. Written permission should be obtained and kept by the academic department. If oral permission only is obtained by faculty members, department personnel or library staff, a written record should be kept of the oral permission.

Internet and Electronic Medium Copyright

In General. Digitally created works and copyrighted works transformed into a digital format and placed on-line or on the internet are protected.

Exercise Caution. Be especially careful of copyright/fair use principles when downloading material from the internet. There is growing concern about the ability to pull copyrighted material from the internet without permission. Note too that material may have been placed on the internet without the author's permission.

The Fair Use Doctrine. In 1998, the Conference on Fair Use (CONFU) attempted to form guidelines specifically addressing copyrighted material found on the internet. Unfortunately, there was no consensus at the conference, and many organizations, including Stanford, have not endorsed the guidelines. In addition to the traditional four fair use factors, you should consider the following additional concern:

Is access to the material limited or protected? Using material that is password protected or otherwise guarded from general distribution by some device weighs against a finding of fair use. Further, it is a violation of law to circumvent an access control mechanism and use copyrighted material — even if the use would otherwise be fair. See the Digital Millennium Copyright Act information sheet. Conversely, limiting access to the new work to a small audience by using passwords or other access control devices weighs toward a finding of fair use.

Personal Use. Generally, posting material on the internet by the copyright owner gives an internet user the right to use that material for his or her own personal use. It does not necessarily give the user the right to redistribute that material.

Protect the Copyright. Electronic distribution of a copyrighted work should state: This work is protected by copyright laws and is provided for educational instruction only. Any infringing use may be subject to disciplinary action and/or civil or criminal liability as provided by law.

THE DIGITAL MILLENNIUM COPYRIGHT ACT

In General. The DMCA provides limited protection for Internet service providers from the infringing acts of their users. It also prohibits gaining unauthorized access to a work by circumventing a technological protection measure put in place by the copyright owner to control access to the work. Such circumvention is prohibited 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 protection.