MCC Library Guidelines for Copyright and Fair Use

Disclaimer
The information presented here is only general information. Legal advice must be provided in the course of an attorney-client relationship specifically with reference to all the facts of the particular situation under consideration. Such is not the case here, and accordingly, the information presented here must not be relied on as a substitute for obtaining legal advice from a licensed attorney.

Purpose
The MCC Library has implemented guidelines used with permission from the UMUC Library, University of Maryland University College, Adelphi, MD for the use of copyrighted materials. These guidelines address library and educational fair use as well as fair use exceptions for research and scholarly work. The purpose of this document is to help MCC faculty and students understand copyright and fair use in the online and face-to-face classroom.

The MCC Library addresses copyright and intellectual property issues because of its role in teaching and promoting information literacy. Information literacy is defined as a set of abilities requiring individuals to "recognize when information is needed and have the ability to locate, evaluate, and use effectively the needed information" (Association of College and Research Libraries, 2010, para. 1). One of the information literacy competency standards of the Association for College and Research Libraries concerning the effective use of information states that “an information literate individual is able to ... understand the economic, legal, and social surrounding the use of information, and access and use information ethically and legally” (ACRL, 2010, para. 2).
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An Introduction to Copyright

What is copyright?
Simply put, "copyright is a legal device that provides the creator of a work of art or literature, or a work that conveys information or ideas, the right to control how the work is used" (Fishman, 2008, p. 6). The intent of copyright is to advance the progress of knowledge by giving an author of a work an economic incentive to create new works (Loren, 2000, para. 12).

What can be copyrighted?
Tangible, original expressions can be copyrighted. This means, for example, that a verbal presentation that is not recorded or written down cannot be copyrighted. However, anything that is tangible can be copyrighted. There are three fundamental requirements for something to be copyrighted, according to the United States Copyright Office (2008, p. 3):

- **Fixation:**
  - The item must be fixed in some way. The manner of fixation may be just about anything. For example, fixation occurs if something is written on a piece of paper, posted online, or stored on a computer or phone, or on an audio or video device.

- **Originality:**
  - The work must be original. Originality includes a novel or a student's e-mail message to a professor. Both are considered examples of original expression.
  - It is not necessary for the work to be completely original. Works may be combined, adapted, or transformed in new ways that would make them eligible for copyright protection.

- **Minimal Creativity:**
  - The work must include something that is above and beyond the original. Verbatim use is not considered original. Reference to the original work that is used to discuss a new concept would be considered original, however.
  - Creativity need only be extremely slight for the work to be eligible for copyright protection. The law merely states this is "original works of authorship" (United States Copyright Office, 2008, p. 3).

What cannot be copyrighted?

- **Works in the public domain:**
  - Ideas are in the public domain.
  - Facts are in the public domain.
  - Words, names, slogans, or other short phrases also cannot be copyrighted. However, slogans, for example, can be protected by trademark law.
  - Blank forms.
  - Government works, which include:
    - Judicial opinions.
    - Public ordinances.
    - Administrative rulings.
  - Works created by federal government employees as part of their official responsibility.
  - Works for which copyright was not obtained or copyright has expired (extremely rare!) (U.S. Copyright Office, 2008, p. 3).
It is a common misperception that state employees and contractors performing work on behalf of the federal government cannot copyright their work. Unless it is explicitly stated in the contract between the government and a contractor, federal government contractors are permitted to copyright their works as can state employees (Commerce, Energy, NASA, Defense Information Managers Group, 2008, p. 19).

**What Does Copyright Protect?**

Copyright provides authors fairly substantial control over their work. The four basic protections are:

- The right to make copies of the work.
- The right to sell or otherwise distribute copies of the work.
- The right to prepare new works based on the protected work.
- The right to perform the protected work (such as a stage play or painting) in public (U.S. Copyright Office, 2008, p. 1).

**An Introduction to Fair Use**

**What is fair use?**

Fair use is the most significant limitation on the copyright holder’s exclusive rights (United States Copyright Office, 2010, para. 1). Deciding whether the use of a work is fair IS NOT a science. There are no set guidelines that are universally accepted. Instead, the individual who wants to use a copyrighted work must weigh four factors:

The purpose and character of the use:

- Is the new work merely a copy of the original? If it is simply a copy, it is not as likely to be considered fair use.
- Does the new work offer something above and beyond the original? Does it transform the original work in some way? If the work is altered significantly, used for another purpose, appeals to a different audience, it more likely to be considered fair use (NOLO, 2010, para. 6). Recent case law has increasingly focused on transformative use to make fair use determinations – for a discussion of this topic see Luhtschik, 2010.
- Is the use of the copyrighted work for nonprofit or educational purposes? The use of copyrighted works for nonprofit or educational purposes is more likely to be considered fair use (NOLO, 2010, para. 6).

The nature of the copyrighted work:

- Is the copyrighted work a published or unpublished work? Unpublished works are less likely to be considered fair use.
- Is the copyrighted work out of print? If it is, it is more likely to be considered fair use.
- Is the work factual or artistic? The more a work tends toward artistic expression, the less likely it will be considered fair use (NOLO, 2010, para. 9).

The amount and substantiality of the portion used:

- The more you use, the less likely it will be considered fair use.
- Does the amount you use exceed a reasonable expectation? If it approaches 50 percent of the entire work, it is not likely to be considered a fair use of the copyrighted work.
- Is the particular portion used likely to adversely affect the author’s economic gain? If you use the “heart” or “essence” of a work, it is less likely your use will be considered fair (NOLO, 2010, para. 13).
The effect of use on the potential market for the copyrighted work:

- The more the new work differs from the original, the less likely it will be considered an infringement.
- Does the work appeal to the same audience as the original? If the answer is yes, it will likely be considered an infringement.
- Does the new work contain anything original? If it does, it is more likely the use of the copyrighted material will be seen as fair use (NOLO, 2010, para. 11).

What are the rules for fair use for instructors?
Copying by instructors must meet tests for brevity and spontaneity:

- Brevity refers to how much of the work you can copy.
- Spontaneity refers to how many times you can copy and how much planning it would take to otherwise seek and obtain permission from a copyright holder (U.S. Copyright Office, 2009, p. 6).

According to the rule, the need to copy should occur closely in time to the need to use the copies. If you use something repeatedly, it is less likely to be considered fair use. The expectation is that you will obtain permission from the copyright holder as soon as it is feasible. Using something over a period of multiple semesters or years is not within the spirit of the fair use exception.

In addition, there are recommendations for what the U.S. Copyright Office calls "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" (U.S. Copyright Office, 2009, p. 6).
- Special works should never be copied in their entirety.
- An excerpt of no more than two pages or 10 percent, whichever is less, is the rule for special works (U.S. Copyright Office, 2009, p. 6).

The use of the copies should be for one course at one school. The copies should include a notice of copyright acknowledging the author of the work (U.S. Copyright Office, 2009, p. 7).

The MCC Library recommends that its faculty and instructors consider both the special guidelines for instructors and take into account the four factors that are used to evaluate fair use when they are deciding what and how much of a copyrighted work to use.

In general, what counts as fair use?
Keeping in mind the rules for instructors listed above, and that the source(s) of all materials must be cited in order to avoid plagiarism, general examples of limited portions of published materials that might be used in the classroom under fair use for a limited period of time, as discussed by the U.S. Copyright Office (2009, p. 6), include:

- An article from a periodical or newspaper.
- A short story, essay, or poem. One work is the norm whether it comes from an individual work or an anthology.
- A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.
- Poetry
  - Copies of a poem of 250 words or less that exists on two pages or less or 250 words from a longer poem.

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• Prose
  o Copies of an article, story or essay that are 2,500 words or less or excerpts up to 1,000 words or 10 percent of the total work, whichever is less.

• Illustrations
  o Copies of a chart, graph, diagram, drawing, cartoon, or picture contained in a book or periodical issue (U.S. Copyright Office, 2009, p. 6).

What should be avoided?
• Making multiple copies of different works that could substitute for the purchase of books, publisher’s reprints, or periodicals.
• Copying and using the same work from semester to semester.
• Copying and using the same material for several different courses at the same or different institutions.
• Copying more than nine separate times in a single semester (U.S. Copyright Office, 2009, p. 7).

When is permission required?
• When you intend to use the materials for commercial purposes.
• When you want to use the materials repeatedly.
• When you want to use a work in its entirety, especially when it is longer than 2,500 words (U.S. Copyright Office, 2009, p. 7).

How do I get permission?
• To use materials that do not fall within the Fair Use guidelines either for course reserve or in the virtual or face-to-face classroom, you must obtain permission yourself. You may do this by either 1) going through the Copyright Clearance Center, or 2) sending a letter to the copyright holder of the work with the following information:
  o State that you seek to use the material continuously in future semesters/courses.
  o Bibliographical information about the work, title, author, page range, publisher, date.
  o The material to be duplicated (e.g. chapters 3, 5, and 12) and provide a copy.
  o The number of copies you seek to make
  o The type of reprint (e.g. photocopy)
  o How the copies will be distributed (in the classroom)
  o How the materials will be used (e.g. as supplemental reading).
  o A self-addressed stamped envelope for a reply.

Copyright and electronic publishing
• The same copyright protections exist for the author of a work regardless of whether the work is in print, in a library research database, a blog, an online discussion board or comment space, or any social media formats.
• If you make a copy from an online source for your personal use, it is more likely to be seen as fair use. However, if you make a copy and put it online, it is less likely to be considered fair use.
• Linking to materials in a library database from a content management system, such as Blackboard, is more likely to be seen as fair use as access to the materials are limited to the students in the course and access has been purchased by the library.
• Note that the Internet IS NOT the public domain. There are both copyrighted and uncopyrighted materials online. Always assume a work online is copyrighted.
Tips for using online information

- Always credit the source of your information. If you do not see an individual named as the author, do not forget that the author may in fact be the organization responsible for the Web site. Credit the organization.
- Find out if the author of a work (e.g., text, video, audio, graphic, etc.) provides information on how to use his or her work. If the author provides explicit guidelines, follow them.
- Whenever feasible, ask the copyright holder for permission. If no copyright holder is specifically named, do not assume that the material is in the public domain. Assume that the copyright holder is the author, whether it be an individual or an organization. Keep a copy of your request for permission and the permission received.

Educational Multimedia Guidelines

The guidelines provide guidance for the use, without permission, of portions of lawfully acquired copyrighted works, and are based on the U.S. Copyright Office guidelines mentioned above (see U.S. Copyright Office, 2009) and the findings of the Conference on Fair Use (see Lehman, 1998).

Definitions

- The guidelines are intended to apply to educational multimedia projects that incorporate educators' original material, such as course notes or commentary, together with various copyrighted media formats, including motion media, music, text material, and graphics illustrations.
- The guidelines are voluntary and do not have the force of law.
- If you follow the guidelines, it is more likely that your use is fair use.
- The guidelines are safe minimums.
- The newly created work that includes copyrighted material may only be used for learning activities. Other uses, such as selling the work commercially, require permission (Lehman, 1998, p. 51).

Student guidelines

- Students may incorporate portions of copyrighted materials when producing a project for a specific course.
- Students may perform and display their own projects and use them in their portfolio or use the project for job interviews or as supporting materials for application to graduate school (Lehman, 1998, p. 52).

Faculty guidelines

- Faculty may include portions of copyrighted works when producing their own multimedia project for their teaching in support of curriculum-based instructional activities at educational institutions.
- Faculty may use their project for:
  - Assignments for student self-study
  - For online instruction provided that the network is secure and is designed to prevent unlawful copying
  - For professional conferences, presentations, or workshops
  - For their professional portfolio (Lehman, 1998, p. 52).

Time restrictions

- The fair use of copyrighted material in multimedia projects lasts for two years only. After two years, obtain permission before using the project again (Lehman, 1998, p. 53).
Types of media and permissible amounts

- Motion media, e.g., movies, film clips, excerpts from television shows, etc.:
  - Up to 10 percent of the total or three minutes, whichever is less.

- Text material:
  - Up to 10 percent of the total or 1,000 words, whichever is less.
  - An entire poem of less than 250 words may be used, but no more than three poems by one poet or five poems by different authors in an anthology. For poems exceeding 250 words, 250 words should be used but no more than three excerpts from one poet or five excerpts from different poets in the same work.

- Music, lyrics, and music video:
  - Up to 10 percent of the work but no more than 30 seconds of the music or lyrics from an individual musical work.

- Illustrations or photographs:
  - No more than five images from one artist or photographer.
  - No more than 10% or 15 images, whichever is less, from a collection.

- Numerical data sets:
  - Up to 10 percent or 2,500 fields or cell entries, whichever is less, from a copyrighted database or data table.

- Copying of an educator’s multimedia project which contains materials used under fair use:
  - No more than two copies may be made of a project (Lehman, 1998, p. 53-54).

When should you get permission?

- When you intend to use the project for commercial or non-educational purposes.
- When you intend to duplicate the project beyond the two copies allowed by the guidelines.
- When you plan to distribute the project beyond the scope of the guidelines (Lehman, 1998, p. 54).
- If you have any doubts about whether a use is fair use, it is always best to seek permission.

How do I get permission?

- To use materials that do not fall within the Fair Use guidelines either for course reserve or in the virtual or face-to-face classroom, you must obtain permission yourself. You may do this by either 1) going through the Copyright Clearance Center, or 2) sending a letter to the copyright holder of the work with the following information:
  - State that you seek to use the material continuously in future semesters/courses.
  - Bibliographical information about the work, title, author, page range, publisher, date.
  - The material to be duplicated (e.g. chapters 3, 5, and 12) and provide a copy.
  - The number of copies you seek to make
  - The type of reprint (e.g. photocopy)
  - How the copies will be distributed (in the classroom)
  - How the materials will be used (e.g. as supplemental reading).
  - A self-addressed stamped envelope for a reply.

Open Educational Resources (OERs)

The MCC Library encourages its faculty and students to make use of Open Educational Resources (OERs) whenever possible. Open educational resources (OERs), according to an often-cited definition, are “teaching, learning, and research resources that reside in the public domain or have been released under an intellectual property license that permits their free use or re-purposing by others” (Atkins, Brown, and Hammond, 2007, p. 4).

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Because we work in a collegial, sharing atmosphere in higher education, many creative individuals and institutions have made resources freely available on the Web so that others can use and adapt them in their classes. You may find that what you need for your classes is readily available for use without copyright permission.

The T.E.A.C.H. Act

In 2002 Congress passed the T.E.A.C.H. Act (Technology, Education, and Copyright Harmonization Act) in an effort to make explicit how copyright works in online, distance education. Previously, when U.S. copyright law applied to the classroom, it applied only to face-to-face settings. While the T.E.A.C.H. Act gave educators some rights in the online, distance education environment corresponding to the rights enjoyed in the face-to-face classroom, the amount of material that may be used in online and distance education classrooms is much more restricted. Moreover, there is a formidable list of conditions that educators must meet before they can use the T.E.A.C.H. Act as legal protection against copyright infringement claims. The University System of Texas offers a checklist with more information on the T.E.A.C.H. Act (Harper, 2002, para. 17). At the present time, however, Manchester Community College has not implemented the T.E.A.C.H. Act, so it cannot be used by MCC faculty to justify use of copyrighted materials within MCC classrooms.

Other Resources on Fair Use

- Stanford University Libraries Copyright and Fair Use Center
- American University Center for Social Media, Fair Use

Notes


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