

COPYRIGHT GUIDELINES FOR EDUCATORS

The copyright law of the United States (*Title 17, United States Code*) governs the making of all photocopies or other reproductions of copyrighted material at Eastern Oregon University. For information concerning EOU copyright policy refer to the EOU Faculty Staff Handbook under copyright policy.

What does “copyright” mean?

Copyright law begins with the premise that the copyright owner has exclusive rights to many uses of a protected work, notably rights to reproduce, distribute, make derivative works, and publicly display or perform the work. But the Copyright Act also sets forth several important exceptions to those rights. Individual statutes make specific allowance for such concerns as distance learning, backup copies of software, and some reproductions made by libraries. The best-known and most important exception to the owners’ rights is fair use. The entire fair-use statute, as enacted by congress, is as follows:

The Fair-Use Statute

Section 107 of the Copyright Act of 1976. Limitations on exclusive rights: Fair-Use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified in that section, for purposes such as criticism, comment, new reporting, teach (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- 1) the purpose and character of the use, including whether such use is of a 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; and*
- 4) the effect of the use upon the potential market for or value of the copyrighted work.*

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The meaning of the Four Factors

1) **THE PURPOSE AND CHARACTER OF THE USE.** In general this criteria suggests that a nonprofit educational purpose is more likely to be considered fair use than one that is strictly commercial. That does not mean, however, that any commercial purpose will fall outside of fair use, but only that it is more difficult for a commercial use to be considered a fair use.

2) **THE NATURE OF THE COPYRIGHTED WORK.** Fair use is more likely to be found when the copyrighted work that has been used is factual in nature, or, perhaps, based on public documents, rather than when it consists entirely of creative elements, as in the case of a novel. As a practical matter, very few works are either entirely factual or creative, and so, this remains

one of the more difficult criteria upon which to base any judgment. Another factor to consider is whether the use is educational, scholarly or newsworthy in nature or, at the other end of the spectrum, whether it is closer to pure entertainment. The closer the program is to being pure entertainment, the further away from fair use protection the use would move.

3) **THE AMOUNT AND SUBSTANTIALITY OF THE PORTION USED.** Use of a very small portion of the copyrighted work is closer to fair use. As the proportion of the copyrighted material used increases, the further one moves from fair use. In general, any substantial degree of use would generally fall outside of fair use, as would use of any entire work. Although not referred to in the statute, another factor to consider is the ratio between amount of copyrighted material used and the length of the new program being created. In other words, use of even a small amount of copyrighted material in a packet, which is very short, could run afoul of fair use.

4) **THE ECONOMIC EFFECT OF THE USE.** The less actual or potential economic harm represented to the copyright owner, the better the fair use case. In contrast, the greater the potential or actual economic harm to the copyright holder, especially if the use becomes a substitute for the copyrighted work, the greater the likelihood of copyright infringement.

Additional factors not contained in the statute but worth consideration include:

5) **DEGREE OF EXPOSURE.** A single use before a small or especially meritorious audience would probably be closer to fair use than would a multiple uses before large public audience.

6) **LEVEL OF PREMEDITATION.** A spontaneous use would be more likely to be considered fair use than would a use, which is part of a systematic and continuing plan.

7) **HONESTY OF USE.** Fair use is more likely to apply if the use is being made in good faith, with full credit to the copyright owner, as opposed to the situation where some type of deception has taken place, or there the user has shown dishonesty in connection with the usage. Deception and dishonesty are almost always sufficient by themselves to take a proposed use out of the fair use category.

Are there simpler standards than the ones in the statute?

The distinction between “fair use” and infringement may be unclear and not easily defined. There is no specific number words, lines, or notes that may safely be taken without permission. Acknowledging the source of the copyrighted material does not substitute for obtaining permission. The safest course is always to get permission from the copyright owner before using copyrighted material. When it is impracticable to obtain permission, use of copyrighted material should be avoided unless the doctrine of “fair use” would clearly apply to the situation.

What are the punishments for copyright infringement?

The copyright law specifies that someone found guilty of certain categories of intentional copyright infringement can be fined up to \$25,000.00 and sentenced to up to one year in prison for a first offense with double penalties for later offenses. In addition, the court may require the destruction of all equipment, materials and copies related to the infringement.

CHECKLIST FOR FAIR USE

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

NAME:
PROJECT:
DATE:

PURPOSE

<i>Favoring Fair Use</i>	<i>Opposing Fair Use</i>
<ul style="list-style-type: none"> <input type="checkbox"/> Teaching (including multiple copies for classroom use) <input type="checkbox"/> Research <input type="checkbox"/> Scholarship <input type="checkbox"/> Nonprofit Education Institution <input type="checkbox"/> Criticism <input type="checkbox"/> Comment <input type="checkbox"/> News reporting <input type="checkbox"/> Transformative or Productive use (changes the work for new utility) <input type="checkbox"/> Restricted access (to students or other appropriate group) <input type="checkbox"/> Parody 	<ul style="list-style-type: none"> <input type="checkbox"/> Commercial activity <input type="checkbox"/> Profiting from the use <input type="checkbox"/> Entertainment <input type="checkbox"/> Bad-faith behavior <input type="checkbox"/> Denying credit to original author

NATURE

<i>Favoring Fair Use</i>	<i>Opposing Fair Use</i>
<ul style="list-style-type: none"> <input type="checkbox"/> Published work <input type="checkbox"/> Factual or nonfiction based <input type="checkbox"/> Important to favored education objectives 	<ul style="list-style-type: none"> <input type="checkbox"/> Unpublished work <input type="checkbox"/> Highly creative work (art, music, novels, films, plays) <input type="checkbox"/> Fiction

AMOUNT

<i>Favoring Fair Use</i>	<i>Opposing Fair Use</i>
<ul style="list-style-type: none"> <input type="checkbox"/> Small quantity <input type="checkbox"/> Portion used is not central or significant to entire work <input type="checkbox"/> Amount is appropriate for favored education purpose 	<ul style="list-style-type: none"> <input type="checkbox"/> Large portion or whole work used <input type="checkbox"/> Portion used is central to work or "heart of work"

EFFECT

<i>Favoring Fair Use</i>	<i>Opposing Fair Use</i>
<ul style="list-style-type: none"> <input type="checkbox"/> User owns lawfully acquired or purchased copy of original work <input type="checkbox"/> One or few copies made <input type="checkbox"/> No significant effect on the market or potential market for copyrighted work <input type="checkbox"/> No similar product marketed by the copyright holder <input type="checkbox"/> Lack of licensing mechanism 	<ul style="list-style-type: none"> <input type="checkbox"/> Could replace sale of copyrighted work <input type="checkbox"/> Significantly impairs market or potential market for copyrighted work or derivative <input type="checkbox"/> Reasonably available licensing mechanism for use of the copyrighted work <input type="checkbox"/> Affordable permission available for using work <input type="checkbox"/> Numerous copies made <input type="checkbox"/> You made it accessible on Web or in other public forum <input type="checkbox"/> Repeated or long term use

Analysis of Fair Use factors

The following graphic representation of factors was created with the above-described factors in mind, which will likely lead to **fair use at the extreme left** and **copyright infringement at the extreme right**.

1. Purpose and Character of Use

Noncommercial	_____	Commercial
Educational/scholarly Newsworthy	_____	Entertainment

2. Nature of Work

Factual/based on public documents	_____	Creative
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3. Amount and Substantiality

Degree of use: Very small portion of work	_____	Degree of use: Entire work
Proportion of use: Small % of work	_____	Proportion of use: Large % of work

4. Economic effect of use

Little or no devaluation	_____	Substantial actual or probable devaluation use becomes substitute for work
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5. Degree of exposure

Single use/small audience/ meritorious audience	_____	Multiple use/large public audience
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6. Degree of premeditation

Spontaneous Use one time	_____	Systematic/continuing use becomes routine
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7. Honesty of use

Good faith/credit to owner	_____	Deception/dishonesty
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Each factor can be viewed as a spectrum and the intended use of the material can be represented at some point on each of these seven lines. The overall picture that emerges should provide a basic indication of how the intended use would satisfy fair use standards.