

COPYING GUIDELINES FOR CLASSROOM AND RESEARCH USE FOR THE PEPPERDINE COMMUNITY

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I. INTRODUCTION

A. Purpose

What is a copyright?

A copyright allows the copyright owner to control others' use of his or her work. Others may not copy (by photocopying or other means) and use copyrighted materials without the creator's permission subject to some exceptions.

The University has adopted these copying guidelines for faculty and staff in an effort to achieve greater certainty of procedure, reduction of the risk of infringement of copyright, or allegations thereof, and the maintenance of a desirable flexibility to accommodate specific copying needs.

What are common misconceptions of copying copyrighted materials?

The importance of these guidelines is underscored by four common misconceptions:

- 1) The duplication of copyrighted materials without permission for non-profit educational purposes is always permissible as a "Fair Use". This is not true. There are some very well-defined limits to such uses.
- 2) A copyright owner is not likely to undertake efforts to protect a copyright. This is also untrue, and the penalties for copyright infringement can be very severe.
- 3) The absence of a copyright notice (©) signifies the absence of a claim of copyright. This is also not necessarily true and it should be assumed that a work may be protected, despite the absence of notice.
- 4) Properly citing the work avoids infringement. This is not true. Copyright infringement and plagiarism are not the same and it is possible to infringe without plagiarizing.

What forms of copying does Copyright Law protect?

Copyright law applies to all forms of copying, whether it is done, for example: (i) at a commercial copy center, (ii) at the University's copy facilities, (iii) at a self-service copy machine, or (iv) by computer (i.e. by posting copyrighted material on the University's computer network or the Internet, or by emailing materials via a class distribution list). If you use the services of a commercial establishment, you may be asked to provide documentation of permission from the publisher.

The University encourages faculty members to exercise good judgment in the use of copyrighted materials, and to carefully and efficiently balance the following guidelines with the best interests of the students when making use of copyrighted materials.

B. Identifying Copyrighted Material

1) Published Works:

- **All copyrights prior to 1927 have expired.** These works can be freely photocopied.
- **All copyrighted works published before March 1989** were required to bear notice of copyright. This notice could be found on the title page or the reverse side of the title page for a book; and on the title page, the first page of text, or the masthead for a periodical publication. Such notice states the person to be contacted if it is determined that permission is required to copy the work.
 - If published without notice and without subsequent registration within 5 years, you will not be liable for infringement because it is in the public domain due to failure to comply with required formalities. However, if it was published without notice but subsequently registered within 5 years, permission is required for copying or derivative use.
- **For works published after March 1989**, no notice of copyright is required. Thus, in the absence of notice of copyright for such a work, it must be assumed that permission is required for copying or derivative use.
- There are special rules for works published outside the United States. See <https://copyright.cornell.edu/publicdomain> for more information.

2) Unpublished Works:

Such as dissertations and theses, may be protected by copyright.

- **Works in the public domain as of January 1, 2021** from authors who died before 1951 are protected for the life of the author plus 70 years.
 - **Unpublished anonymous and pseudonymous works** and works with corporate authorship created before 1901 are protected for 120 years from the date of creation.
 - **Unpublished works when the death date of the author is unknown** and created before 1901 are protected for 120 years from the date of creation.

3) Public Domain Materials

“Public domain” refers to creative materials that are not protected by intellectual property laws, including copyright laws. These materials may be reproduced without permission.

- **Determining Public Domain Status:**
 - Works published in the U.S. before 1924 are in the public domain.
 - Works published in the U.S. after 1923 but before 1964 are in public domain if not renewed during the 28th year of the term.
 - Works published in the U.S. after 1923 but before March 1, 1989: Generally, the work is in public domain if work was published without copyright notice and law does not provide exception for omitting the notice.
- **U.S. Government Publications:** All U.S. government publications may be copied without restrictions, except to the extent they contain copyrighted materials from other sources. U.S. government publications are documents prepared by an official or employee of the government in an official capacity. Note that federally commissioned works can be copyrighted, and that state government works may be protected by copyright.
 - It must also be noted that a commercial compiler or publisher of government materials (such as the West’s reference series) may properly claim copyright protection for independently authored notes and other materials accompanying such official declarations, as well as the sequence and organization of the official declarations themselves, but may not claim copyright of page numbering. See *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693 (2d Cir. 1998) (holding that star pagination did not infringe publisher’s copyrights); but see *West Publishing Company v. Mead Data*, 799 F.2d 1219 (8th Cir. 1986) (holding that West’s particular arrangement of legal decision was entitled to copyright protection, specifically the wholesale appropriation of pagination).
- **Judicial Opinions:** The literal word order of judicial opinions is in the public domain, and may be used without restriction. This includes the text of judicial opinions contained in material prepared by commercial reporters or compilers, such as West’s. However, within such commercial publications, there is copyright protection covering the arrangements of cases, headnotes, annotations, and syllabi. As such, permission may be required in order to make multiple copies of judicial opinions in full that include syllabi, headnotes, key numbers, or other copyright protected materials.
- **Official Transcripts and Court Records in Litigated Cases:** These are generally considered to be public documents when filed and classroom use of

the materials is permissible without obtaining permission. Be aware, however, that some law firms may assert copyright ownership for court documents that they have prepared and filed with the court on behalf of their clients.

- **State Statutes, Regulations, Ordinances, and Municipal Codes:** These materials are in the public domain, and reproduction of portions of their official text may be freely made without permission. However, if the text of a statute or of a regulation is taken from a commercial source (e.g. BNA, Patent, Trademark & Copyright Journal), then you should exercise care to copy only the text of the statute or regulation. Editorial comments and explanatory material are within the scope of the publisher's copyright protection and you may need to seek permission to make multiple copies.

Fully Copyrighted Materials:

- These are: Textbooks, Casebooks, Treatises, "Nutshells", and Commercial Outlines; Newsletters; and Periodicals.
- Some periodicals published by tax-exempt educational institutions, such as some law journals, expressly grant the right to copy for classroom use, subject to three conditions:
 - Copies must be distributed to students at or below cost;
 - The author and the journal must be identified on the copies; and
 - The named copyright owner must be notified of the use.

II. THE FAIR USE DOCTRINE: WHEN PERMISSION IS NOT NEEDED TO COPY

A. Fair Use Doctrine

What is "fair use"?

The "Fair Use" doctrine allows you to copy copyrighted material and prepare a derivative work without the copyright owner's permission. The doctrine permits the use of copyrighted material in a "reasonable manner" without consent. Teaching, scholarship, and research are deemed reasonable.

How do you determine fair use?

There are four factors that are to be considered in determining Fair Use, and in each case faculty members must determine for themselves the factors which weigh in favor of and against Fair Use. These factors are:

- 1) the purpose and character of the use, including whether such use is commercial in nature;
- 2) the nature of the copyrighted work;
- 3) the amount and substantiality of the portion used in relation to the copyrighted work; and
- 4) the effect of the use upon the potential market for or value of the copyrighted work.

See [17 U.S.C. § 107](#) for more on Fair Use.

1) Purpose and Character of the Use

- Does it advance a socially beneficial activity?
 - Including: criticism, comment, news reporting, teaching, scholarship, or research
- Is the use commercial or noncommercial?
 - Noncommercial use (such as for nonprofit educational purposes) weighs more in favor of fair use than commercial use.
- Is the use “transformative”?
 - A use is transformative if it “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).
 - Ex: using a quotation in a critical literature essay to illustrate a point. This is transformative because while the original purpose of the quote was for art, the purpose of the quote in the essay is for scholarship and critique.
 - However, a use does not need to be transformative to be deemed as fair use.
 - Ex: reproducing multiple copies for classroom use in appropriate circumstances.
- Is the use reasonable and customary practice?
- Did the putative fair user act in bad faith or deny credit to the author of the copyrighted work?

2) Nature of the Copyrighted Work

- Is the work published or unpublished?
 - Unpublished works have more protection because the author has the right to decide when his or her work will be made public. However, the fact that it is unpublished in itself will not bar fair use.
 - An out of print published work may tend to weigh in favor of fair use since the work is not otherwise available.
- Is it creative or factual?
 - A creative work will weigh against fair use while a factual work weighs for fair use since the purpose of a copyright is to protect expression rather than facts.
- Note: this second factor is generally the least important in making a fair use determination.

3) Amount and Substantiality of the Portion Used In Relation to the Copyrighted Work as a Whole

- What percentage of the original work has been used?
 - Quantitative approach: higher the percentage, more likely that this factor will weigh against fair use.
 - Qualitative approach: even if the percentage is small, if the portion of the work taken is at the “heart” of the work, this will also weigh against fair use. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985)
- What is the nexus between the purpose of the fair use and the portion of the copyrighted work taken?
 - If you take more of the copyrighted work than is necessary to accomplish the purpose, it will weigh against fair use.
 - However, this third factor is neutralized if the amount used is necessary for a transformative purpose.

4) The Effect Upon the Potential Market for or Value of the Copyrighted Work

- Does the use adversely affect the market for the original work?
 - A use that results in lost sales to the copyright owner will weigh against fair use.
- Does the use adversely affect derivative or potential markets?
 - The market is not limited to the original but also derivative markets and “potential markets” (courts look to whether it would be “reasonable” or likely to be developed by copyright owners).
 - Ex: market for movie rights for a novel.
- Does the use decrease demand for the original work by criticizing it?

- Courts have stated there is no protectible market for criticism or parody.
 - Ex: A negative film review will have no impact on the fourth factor.

Weighing the factors

- There are no bright line rules. Courts assess factors together and consider the totality of the circumstances.
- Keep in mind weighing the factors should reflect the purpose of copyright law which is to “promote the progress of science and useful arts.” (U.S. Const., art. I, § 8, cl. 8).
- See <https://copyright.gov/fair-use/> for a searchable database of court opinions organized by category and type of use to help you determine what courts have considered to be fair use. Note this is not a substitute for legal advice.
- See also <https://fairuse.stanford.edu/overview/fair-use/cases/> for summaries of fair use cases which are divided by text, artwork/visual arts/audiovisual, internet, music, and parody.
- Use this checklist from the Columbia Copyright Advisory Office to help you consider the factors and subfactors of the fair use analysis:
<https://copyright.columbia.edu/content/dam/copyright/Precedent%20Docs/fairusechecklist.pdf>

B. Miscellaneous

Photocopying of Course Materials

- Congress declined to adopt a specific exemption for photocopying of copyrighted material for educational and scholarly purposes, leaving this to be addressed under the fair use doctrine.
- Congress published Classroom Guidelines leading up to the enactment of the 1976 Copyright Act. See H.R. Rep. 94-1476, pages 65-74.
 - These guidelines are not part of the copyright legislation nor are they legally binding, but they may be helpful in determining Congress's intent in interpreting fair use.
 - The Guidelines for Classroom Copying can be found at:
<https://www.copyright.gov/circs/circ21.pdf>
- “Safe Harbor” Rules from the Guidelines:
 - Single Copying for Teachers: Guidelines liberally permit teachers to make a single copy for teaching or research.
 - Multiple Copies for Classroom Use: Guidelines require:
 - Brevity: limits on amount of material that may be copied
 - Spontaneity: requires that there be no time to secure permission between decision to copy and use in class

- Cumulative effect: limits aggregate amount of copying
 - Fair Use Analysis: factors a court might take into account in determining whether photocopying course material constitutes fair use:
 - 1) Purpose and Character of Use:
 - Will the material be used for commentary, criticism, explanation? If it supports or enables new meaning, it is more likely to qualify as “transformative” and support fair use.
 - Is the material important to a lecture or classroom discussion? Nonprofit educational purpose weighs in favor of fair use.
 - Was there little or no time to obtain permission? An affirmative answer will weigh in favor of fair use.
 - Were the copies distributed to non-students? Distribution to others could weigh against finding use for nonprofit educational purpose. Should restrict copies to enrolled students unless there is a compelling education reason to do otherwise.
 - Are students charged for copies for profit and not to recover costs? Commercial nature will weigh against fair use.
 - 2) Nature of the Work:
 - Is the material unpublished or *published*? If the work is unpublished, it is more likely to be accorded stronger copyright protection than published work.
 - Is the material factual in nature or creative? If the work is factual, it is more likely to qualify as fair use.
 - Is the material readily available for purchase? Is it in print or out of print? If the material is out of print and unavailable for purchase through normal channels, it is more likely to qualify for fair use copying for educational purposes unless permission to photocopy may be readily purchased.
 - Was the material prepared primarily for the higher educational market—e.g., a textbook? If it was originally targeted for an educational market, it is less likely to qualify for fair use since copying would hurt this market more than another work that targeted another market.
 - 3) Amount Copied:
 - How much of the copyrighted work is being copied? The smaller the portion, the more likely the copying will qualify as fair use. A small portion includes but is not limited to: one chapter of a book, one article from a periodical or newspaper, and one short story, essay, or poem. Copying more than a small portion will likely require strong showing on other factors to support fair use.

- Is the copied portion at the “heart” of the work? If the portion is the most important or commercially valuable part of the work, it will weigh against fair use even if it is a small portion.
 - 4) Effect on the Market:
 - Will the photocopying result in lost sales of copies of the copyrighted work? A result in lost sales will weigh against finding fair use.
 - Can permission to photocopy the material in question readily be purchased through the Copyright Clearance Center (the “CCC”) or another efficient licensing mechanism, such as the publisher? If the material can be readily purchased, it is less likely to qualify as fair use.
 - Is the price of permission prohibitive—i.e., so high that the instructor would reasonably forego educational use of the material in question rather than pay it? If so, the societal value of the educational use may tend to counter the potential harm to the market for the work in proceeding without buying permission.
 - Other Considerations:
 - Is any copyright notice on the original reproduced on the photocopy? You should include appropriate citation and attribution to the source as well as reproducing the copyright notice so that users know the work is in copyright.
 - Is this the first time this instructor has photocopied this excerpt for course use? DO NOT assume that “first use is fair.” Each use (first or later) will be evaluated on its own merits.
 - How extensive is the reliance on fair use in providing materials for this course? Copying that substitutes altogether for materials that are purchased or for which a license or permission has been acquired will be less likely to qualify for fair use.

Copying for Interactive and Digital Classes

US copyright law gives teachers the right to use works for distance learning without permission under certain circumstances. This provision, which is sometimes called the TEACH Act, is codified at 17 U.S.C. § 110(2).

When teaching through distance programs and electronic (internet) courses, the following requirements must be met for the use of “nondramatic literary or musical work

or reasonable and limited portions of any other work or display of a work” which would normally be used in a live classroom:

- You must:
 - Be acting under direction or actual supervision of, an instructor in a class session offered by an accredited nonprofit educational institution or governmental body;
 - Use the material as an integral part of a class session;
 - Use the material that is directly related to and of material assistance to your teaching content; and
 - Use the copy of the work that was prepared lawfully, and the
- The copyrighted work
 - Must not be “produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks;” and
 - Must be transmitted solely to students officially enrolled in the course for which the transmission is made or officers or employees of governmental bodies as a part of their official duties or employment,
- Your use must be:
 - performing a nondramatic literary work (e.g., reading a short story aloud);
 - performing a nondramatic musical work (e.g., singing a song);
 - performing a reasonable and limited amount of any other work (e.g., playing an excerpt from a movie); or
 - displaying any work in an amount comparable to what would be used in a live classroom,
- And your institution must
 - institute a copyright policy;
 - provide information about copyright to faculty, students, and relevant staff members;
 - provide notice to students that materials used in connection with the course may be subject to copyright protection; and
 - if the transmission is digital, apply the required technological measures.

Using Third-Party Materials on Course Website

The guidelines below are meant to assist instructors in making decisions about posting materials on course websites. Note: these general measures do not substitute for the fair use test!

1) Purpose and Character of Use:

- Include your own comments, criticism and explanation, or otherwise make your use of the copyrighted material transformative.
- Don't incorporate material in your website in lieu of having students buy books or other such material.
- Limit access to students enrolled in the course and other qualified people (e.g., a professor's graduate assistants). Assuming access is provided over a network, require a password or PIN.
- Allow access only during the term in which the course is given, and disable student access thereafter.
- Alter others' works only where necessary to support specific instructional objectives.
- Wherever feasible, employ streaming formats and technological limits on copying, retention and further dissemination of the work by students.

2) Nature of the Work:

- Consider whether a license (permission) allowing the educational use of the material that you wish to make can readily be purchased. If it can, this fact generally will weigh against fair use, though it still may be possible to prevail on fair use depending on the other circumstances.

3) Amount Copied:

- Use copyrighted material in your course website only if the material is integral to the course curriculum and use only a limited portion (what is necessary for the educational purpose).
- Avoid taking many excerpts or portions from any one work.

4) Effect on Market:

- Be wary of using others' copyrighted material that is produced in digital form primarily for instructional use, or where your use would reasonably be expected to harm the market for the analog version of the material.
- Only incorporate portions from lawfully acquired copies of others' materials.
- Credit the sources fully and display the copyright notice from the original.
- Include a notice that material on the website is being provided under fair use, and that the material may only be used for personal, noncommercial educational purposes.

Additional Notes:

- Where possible, link to a legitimate online copy of the work instead of posting a copy of the work on your course website. US copyright law always permits you to link to a legitimate copy of the work hosted elsewhere, even when the work is protected by copyright.
- If you post a copy of the work, always include (and never remove) [copyright information](#) associated with it. For instance, be sure to include copyright notices (the c in a circle symbol, ©, and any information following it) as well as authors'

and publishers' names. You don't need to track down additional copyright information – you just need to retain what is already there.

- Even when copyright law permits your use of a work, it may be illegal to circumvent copy-prevention technology in order to make that use. For instance, it is generally illegal, under [17 U.S.C. § 1201](#), to circumvent the Content Scramble System that restricts access to works on some DVDs. However, the US Copyright Office creates specific exceptions to this law every three years. For information about the current exceptions, please consult the [2015 Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies \(PDF\)](#).

Performing a Musical or Literary Work, or Showing a Film or Video, in Class

- Under Section 110(1) of the Copyright Act: teachers may perform or display a copyrighted work, either live or recorded, “in the course of face-to-face teaching activities . . . in a classroom or similar place devoted to instruction.”
 - Note, however, that this special classroom dispensation applies to performance and display only. It does not authorize making copies.
- To record a class session in which you have performed or displayed others' copyrighted material and to transmit the video to remote students, you must abide by the requirements set out in the TEACH Act in 2002, Section 110(2) of the Copyright Act.
 - See <http://www.ala.org/advocacy/copyright/teachact/distanceeducation>.
 - Even if you cannot meet all of the TEACH Act requirements, you may be able to rely on fair use, or alternatively, you should obtain permission to use the copyrighted material in the video of your class session.

Absolute Restrictions

1. Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.
2. Works intended to be “consumable” in the course of studying or teaching shall not be copied. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.
3. Copying shall not:
 - a. substitute for the purpose of books, publishers' reprints or periodicals;
 - b. be directed by higher authority; or
 - c. be repeated concerning the same item by the same teacher from term to term.

4. No charge shall be made to the student beyond the actual cost of the copying.

III. OBTAINING PERMISSION TO USE OR COPY

If it is determined that a proposed use of copyrighted material does not fall under the Fair Use guidelines above or under the broader factors of Fair Use, and that permission is needed to copy a work, there are several ways to obtain it.

A. How to Obtain Permission from the Copyright Holder?

This may involve no more than locating another professor from available directories, such as the AALS directory for law professors, and contacting him or her.

B. How to Obtain Permission from the Publisher?

If the address of a publisher is not apparent from the work in question, it may be obtained from The Literary Marketplace (for books) or Ulrich's International Periodicals (for journals).

C. Central Licensing Organizations

You may contact **Central Licensing Organizations** which administer licenses and collect royalties.

- One is the Copyright Clearance Center, which handles over eight thousand publishers. For an agreed upon fee, protected material may be copied as needed. There are other such arrangements for permission among certain publishers and many college bookstores.
- The Copyright Clearance Center is located at 222 Rosewood Drive, Danvers, MA 01923. Telephone: (508) 750-8400; FAX: (508) 750-4410.
- See <http://www.copyright.com/>

D. Generally

Requests for permission should be sent with a stamped, self-addressed envelope, and should include:

- the title, author and/or editor, and the edition of the work to be duplicated;
- the exact material to be used, giving amount, page numbers, chapters, and if possible, a photocopy of the material;
- the number of copies to be made;
- the use to be made of the duplicated materials; the form of distribution (classroom, newsletter, etc.);

- whether or not the material is to be sold; and
- the type of reprint to be used (ditto, photocopy, offset, typeset, etc.).

IV. INFRINGEMENT

- Normally an infringer is liable to the copyright owner for the actual losses sustained because of the copying and any additional profits of the infringer.
 - Where the monetary losses are nominal, the copyright owner usually will claim statutory damages instead of the actual losses.
 - The statutory damages may reach as high as \$20,000 (or up to \$100,000 if the infringement is willful).
- In addition to suing for money damages, a copyright owner can usually prevent future infringement through a court injunction.
- The Copyright Act specifically exempts from statutory damages any employee of a non-profit educational institution, library or archives who “believe and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under Section 107.”
 - While the fair use provisions are admittedly ambiguous, any employee who attempts to stay within the guidelines contained in this policy should have an adequate good faith defense in the case of an innocently committed infringement.

V. QUESTIONS

If you have questions regarding this policy, contact the Provost’s Office. These guidelines contain revisions approved as of January 2022.