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Sincerely yours,

A handwritten signature in black ink that reads "J. Steven Brown".

Dr. J. Steven Brown
Vice Provost and Dean of Graduate Studies



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Copyright Guidelines from the CUA Office of General Counsel

(counsel.cua.edu)

I. Introduction

The copyright law of the United States (Title 17, United States Code) provides legal protection for authors of original works, including literary, dramatic, musical, artistic, and other intellectual products. An author's copyright in a work arises at the moment the work is created. Publication is not essential for copyright protection. The copyright symbol (©) is also not required for copyright protection to occur, although use of the symbol does grant certain advantages to an author in the event of litigation. An author may transfer copyright ownership to another party. Section 106 of the copyright law grants a copyright owner the exclusive right to do and to authorize others to do the following;

- **Reproduce** copies of the work.
- **Prepare derivative works** based on the copyrighted work.
- **Distribute** copies of the work by sale, rental, lease, or lending or by electronic means.
- **Publicly perform** literary, musical, dramatic or choreographic works, pantomimes, and motion pictures and other audiovisual works.
- **Publicly display** literary, musical, dramatic or choreographic works, pantomimes and pictorial, graphic or sculptural works, including individual motion picture or audiovisual images.
- **Publicly perform** copyrighted sound recordings by means of a digital audio transmission.

However, for an author and/or a copyright owner, these rights are not absolute. They are subject to “fair use” limitations, which apply to all media, and medium-specific limitations.

In addition, authors of works of fine art have certain other rights including the right to prevent intentional distortion, mutilation, or modification of their works. These rights are specific to the author of the work and are not transferable.

II. The Public Domain

Works that are considered in the "public domain" may be used (i.e., copied) freely. The following categories of publications are generally considered to be in the public domain; that is, their use is not protected by copyright law:

- works where the creator has expressly disclaimed a copyright interest;

- works where the copyright has expired. To determine public domain status see the interactive app at <http://www.librarycopyright.net/resources/digitalslider/> and the chart at [Copyright Term and the Public Domain in the United States](#)
- works created by the federal government, for example, data files from the 2010 Census.

III. Licensed Works

CUA, as a member of the Washington Library Research Consortium, pays a fee to provide the campus community with online access to a number of licensed databases. Different databases have different terms, conditions and features. Copyright notices must be maintained on any of the licensed materials.

Reprinting of licensed materials has nothing to do with fair use or the public domain, but is instead based on the contract CUA has with the provider of the materials. If the article you wish to use is not in the licensed database, then you need to consider if the work is in the public domain, if use of the work would be a fair use, or if permission is necessary.

IV. Fair Use.

The doctrine of "fair use," embedded in Section 107 of the copyright law, addresses the needs of scholars and students by allowing use of copyrighted material without obtaining permission from the copyright owner in certain limited circumstances. **However, what constitutes fair use is expressed in the form of guidelines rather than explicit rules.** To determine fair use, one must consider all of the following four factors, and no one factor can trump all the others.

A. First Factor

The **purpose and character** of the use, including whether the copied material will be for nonprofit, educational, or commercial use. Personal, nonprofit or educational usage tips the balance in favor of a finding of fair use. Commercial usage weighs against a finding of fair use. Criticism, commentary, news reporting and teaching are considered "core" fair uses, and thus weigh in favor of a finding of fair use. Copying excerpts into an electronic reserve system for use by students in a particular class is an example of a use which would be favored as a fair use.

A transformative use of a work is likely to qualify as fair use. Those uses most likely to qualify as transformative are those that repurpose the material borrowed, by placing it in a new context, using it with a different audience from the one it was originally created for, or criticizing it, commenting upon it, or otherwise taking issue with it. For example, a parody of a copyrighted work is considered a "transformative" work.

B. Second Factor

The **nature** of the copyrighted work, with special consideration given to the distinction between a creative work and an informational work. Creative works, like fiction and poetry, are granted greater copyright protection under the fair use test.

For example, copies of a newspaper or newsmagazine column are more likely to be considered a fair use than copies made of a musical score, or a short story. Imaginative and unpublished works are granted greater protection than factual and published works.

C. Third Factor

The **amount, substantiality, or portion** used in relation to the copyrighted work as a whole. This factor requires consideration of the proportion of the larger work that is copied and used, and the significance of the copied portion. While there is no exact percentage limit in the law per se, the only court case on electronic reserves in an educational setting suggests 10% as an appropriate percent when dealing with nonprofit educational uses of nonfiction works.

Following the court's formula, a use is likely to be found fair if it is no more than 10% of a book undivided into chapters, or for a book that contain nine or fewer chapters. If a book has ten or more chapters, one chapter of a nonfiction work would be a fair use. This is the case regardless of whether or not digital copies are available for licensing when the use is of nonfiction in a not for profit educational setting. All pages of a book including front material and index are counted as part of the book for the application of the percentage test.

Note that going a bit over 10% does not exceed fair use if all other factors considered weigh in favor of fair use. An example might be copying a portion of an out of print orphan work, i.e. a work where there is no owner from whom to seek permission and there is no market to consider.

This numerical limit would not be applicable to transformative uses. In that case, other guidelines should be consulted. See <http://counsel.cua.edu/copyright/publications/index.cfm> for guidance on fair use in general and in particular with respect to images, poetry, streaming of films and documentary film making.

D. Fourth Factor

The effect of the use on the **potential market** of the copyrighted work. With respect to the fourth factor, the user must determine whether or not a readily available and reasonably priced license exists for the type of use envisioned. For non-profit educational uses of nonfiction works where the use is more than the 10% limit set forth above, procuring the license is strongly indicated. When there is little or no demonstrated demand for a book or for excerpts from it, there will not be a realistic expectation of lost potential revenue from failure to license excerpts. However, the user may not always have this type of data and thus the availability of a license will continue to be a strong factor against a finding of fair use.

Use of content created and marketed primarily for use in courses such as a textbook or workbook is unlikely to be a fair use.

E. Summary of four factor fair use test

Whether or not a particular use is fair under the law is a determination to be made by the person proposing the use.

When relying upon fair use for e-reserves, only students in the class (or other qualified persons such as TAs) should have access to the materials, and access to the materials should be limited in time to the duration of the course. There should always be a clear articulable nexus between the instructor's pedagogical purpose and the kind and amount of content involved. Full attribution to the author should be included, and students should receive a notice about copyright and their responsibilities and rights with respect to course content.

Summary of four factors as it relates to copying of non-fiction for non-profit educational purposes

In analyzing the first two factors, nonprofit educational uses of nonfiction works will favor a fair use finding almost every time. When analyzing use of nonfiction works for course reserves, if the 10% limit is followed, the first three factors will weigh in favor of fair use, and even the availability of a license will not change the analysis. There is no longer a limit on repeated usage over multiple semesters. The Classroom Guidelines from 1976 are considered outdated.

Summary of four factors as it relates to creative materials

Transformative uses are often amenable to a wider scope of fair use, even if the amount used is the entirety of the work, such as a poem. A short hand version of the four factor test here is to ask 1) Is the use transformative? 2) If yes, is the amount taken appropriate to achieve the transformative purpose?

V. Seeking Permission

If the work is not in the public domain, CUA does not license the work, and fair use does not apply, or it is not clear if fair use applies, then seeking permission is necessary. The University Book Store (UBS) on campus will obtain permission from the copyright owners for electronic reserves for use in a course as long as enough lead time is given to UBS. Note that if permission is sought for materials the University has already licensed, the student will in essence pay for use of the material twice. The Library can advise if materials are licensed for use by the University.

VI. Copyright Permission Checklist

Here is a checklist to follow when seeking to reproduce, prepare derivative works, distribute copies, publicly perform or publicly display material that may be protected under copyright law.

- Is the work in the public domain? If yes, then no permission is necessary.
- Is the work licensed through the Washington Library Research Consortium for the particular use in question? If yes, then no permission is necessary.
- If the work is not in the public domain or licensed, may fair use be invoked instead of obtaining permission? If yes, then no permission is necessary.

VII. Computer Software

There is both civil and criminal liability for infringement of the rights of a software copyright owner. Copying software without permission may be a crime even if the person copying the software does not intend to violate the law. Copying an entire software program is highly unlikely to qualify as a "fair use." CUA negotiates site licenses with selected software vendors for products that are extensively used at the university, since these arrangements provide the CUA community with efficient access to computer programs that support the curriculum while assuring the copyright owner a fair royalty.

To find out if a program is licensed, check with the Center for Planning and Information Technology. Operate on the assumption that software is copyright protected even if the software has no copyright symbol. Do not make copies of software or install unless permission is sought from the copyright owner, the copying is permitted under a CUA licensing agreement, or the program is clearly "freeware".*

In those rare instances where it is impossible to determine who the copyright owner is, it may be permissible to copy the software. Libraries are permitted to lend software, but only for temporary use, not for copying or installation. If the borrower transfers, copies or installs the software the program must be uninstalled when the borrowed item is returned. Specific restrictions with respect to different software may vary widely. A warning of copyright must be affixed to the packaging that contains the copy of the computer program which is the subject of a library loan to patrons, by means of a label durably attached to the copies or the container for the copies. The form of the copyright notice is as follows:

NOTICE: Warning of Copyright Restrictions

The copyright law of the United States (Title 17, United States Code) governs the reproduction, distribution, adaptation, public performance, and public display of copyrighted material.

Under certain conditions specified in law, nonprofit libraries are authorized to lend, lease, or rent copies of computer programs to patrons on a nonprofit basis and for nonprofit purposes. Any person who makes an unauthorized copy or adaptation of the computer program, or redistributes

the loan copy, or publicly performs or displays the computer program, except as permitted by Title 17 of the United States Code, may be liable for copyright infringement.

This institution reserves the right to refuse to fulfill a loan request if, in its judgment, fulfillment of the request would lead to violation of the copyright law.

* Even if freeware some restrictions may apply.

VIII. Digitization Projects

Both [§107](#) and [§108](#) of copyright law, as well as other considerations, such as the rights conveyed in a deed of gift, may be relevant when considering digitization projects in the library. This section of the Copyright Guidelines sets forth relevant questions to consider (in order) when considering digitizing and posting of materials in the library's collection.

A. Is the item in the public domain? If the document was published before 1923, or unpublished and the author has been dead for 70 years, or published between 1923 and 1989 but without a copyright symbol, or published between 1923 and 1964 with no copyright renewal, then the work is in the public domain. Foreign works are subject to special rules, but U.S. law governs the exercise of copyright rights within the U.S. See the [copyright slider](#) to determine public domain status of a work. If the item is in the public domain, the item may be digitized and posted.

B. Was there a written instrument of gift? For items created by the donor, look at the written instrument. Sometimes the written instrument of gift is not a deed of gift but simply a letter or memorandum of understanding from a donor. The donor may have granted copyright to the library or otherwise specified his/her intent with respect to use of the document.

C. Is the proposed use a fair use? For documents not in the public domain, and for which the deed of gift is not relevant (i.e. letters written *to* the donor) the four factor fair use test should be considered when analyzing what may be done with a document or other artifact. If there is doubt about the copyright status of a work, consider limiting use to individuals within a certain department or the university community. This may strengthen a fair use argument in that the use of the work will not have a negative effect upon the market, if one exists for the type of use you contemplate.

D. Does the 20 years rule apply to the proposed use?

Section 108 (h), which addresses reproduction by libraries and archives, contains a provision that allows reproduction and distribution of a work that is in the last 20 years of any term of copyright, for the purposes of scholarship, preservation or research as long as the work is not subject to normal commercial exploitation, a copy of the work cannot be obtained at a reasonable price, or no notice has been given by the copyright owner or agent that either of these two conditions applies to the particular work.

E. Has permission been obtained?

Assess who the publisher of the work is, and if they are still in business. Has the copyright

reverted to the author? If an owner of the copyright can be identified, permission should be sought for works not in the public domain or subject to fair use or the last 20 years rule.

F. Is this an orphan work?

If no one can be found who can grant permission, then the work is an orphan work. While there is some legal risk to digitizing and posting an orphan work, the risk is minimal, and can be weighed against the value of including the item in the project.

G. Other Factors

Other legal factors may also need to be considered, such as invasion of privacy.

IX. Performances

A. In the Classroom

Section 110 of the Copyright Law is very clear that the scope of performance rights in the classroom is very broad. The only limitation is that a legitimate copy must be used.

B. Transmission

When discussing the use of the web to augment the delivery of classroom materials, or in connection with distance education, all portions of a non-dramatic work may be transmitted as long as the display is an integral part of the class and teaching content, the transmission is solely for students in the class, and technological measures are implemented that prevent retention of the work in accessible form and prevent further dissemination of the work. With respect to dramatic works, only a reasonable portion of the work may be transmitted.

C. Public Performances Outside the Classroom

Copyright permission must be obtained for all public performances of dramatic literary or musical works that are not in the public domain and that are not part of classroom instruction.

The showing of a movie on campus to the public without a license is permitted in the following circumstances:

- The movie is shown in the course of face to face teaching and the copy being shown is a legitimate copy;
- The movie came with an express license authorizing the showing or
- The movie is in the public domain.

If one of the above exceptions cannot be met, then a license is needed whenever a movie is being shown to other than a small group of friends or your family *or* the movie is being shown in a public place such as the Pryzbyla Center. A license is needed even if you are not charging for the movie. See the [RISD Copyright Guidelines for Exhibiting Movies and other Audiovisual Works](#) for a chart on this topic.

Note that fair use may still apply in one of the above contexts. An example might be showing a film on campus (but not in the classroom) when the film to be shown is an orphan work and the copyright owner cannot be determined. In this instance, fair use is likely to apply. See the four factor test codified at [Section 107](#) of the copyright law.

D. Definitions:

Nondramatic works exclude audiovisual works but includes works such as poetry, short story, and non-dramatic musical works. Musical compositions are considered non-dramatic musical works.

Dramatic works includes all audiovisual works such as films, videos, opera, music videos, and musicals.

To "**perform**" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

X. Penalties for Violation of the Law

If it is determined that an employee willfully disregarded Copyright Guidelines, the employee might not be defended by the university if subject to an infringement claim. If the work is not in the public domain, not licensed by CUA, and fair use does not apply, then the user must obtain permission from the copyright owner. See also the [Know Your Copy Rights Chart](#) for answers on the above for different types of uses.

The Digital Millennium Copyright Act requires universities who wish to obtain the liability protection available under the law to adopt and implement a policy that provides for the termination of the computer privileges of users who are repeat infringers with respect to online copyright violations. In accord with that law, students who display a pattern of conduct in their use of the CUA computer network that creates legal liability for the university may have their computer privileges terminated. Students and staff should be aware that unauthorized distribution of copyrighted material may subject the staff or student to civil and criminal liabilities. For faculty and other staff, including graduate students performing a research or teaching function, the process the university will be advised to use to determine whether or not a pattern of conduct creates legal liability for the university will be as follows:

- If the university receives formal notification of copyright infringement due to the actions of a CUA employee using the CUA network, the university will notify the employee of the claimed infringement.
- It will be the burden of the employee to show that the alleged infringement is not a violation of the law.
- If a willful violation is found, the computer privileges of the user may be suspended or terminated by the cognizant authority or other disciplinary action may be taken.

In any case where doubt exists as to whether or not an activity is copyright infringement, the Office of the General Counsel should be consulted.

XI. Resources

Numerous best practice documents are available for reference based upon the type of material being copied. Best practices exist for use of images, poetry, incorporating image and sound media into lectures, streaming video and also best practices for documentary filmmakers. See <http://counsel.cua.edu/copyright/publications/index.cfm> for these resources. Specific resources for librarians are also on this page, along with guidance on peer to peer file sharing and staying within the confines of the law.