

DUKE UNIVERSITY COPYRIGHT GUIDELINES FOR ELECTRONIC COURSE CONTENT

Duke University expects all members of the University community to respect copyright law (Title 17 of the United States Code). The principles of copyright law that apply to electronic course content are the same as those that apply to printed course material, regardless of whether the electronic content is textual or audio-visual, or where it is stored (e-reserves, AFS, Blackboard, iTunesU, for example). If permission would be required for a print use, it will be required for an analogous electronic use.

Duke also affirms that the exceptions to a copyright owner's exclusive rights that are provided by the law, especially the fair use provision, are integral to the balance between exclusive rights and productive, socially beneficial new uses of works. Fair use requires a fact-specific analysis that should be considered carefully whenever deciding whether or not permission is required.

The digital age has made potential course content available in a wide variety of ways, and faculty can often choose amongst several formats to make reading, viewing and listening materials available to students. If it is possible to link to material that is either publicly available on the Web or available to the Duke community through a database licensed by the University Libraries, further permission is not needed to use that material.

When it is necessary to make a copy of the material, rather than simply linking to it as described above, permission is not needed if the works are in the public domain (generally, material published before 1923) or are offered freely under a Creative Commons license. For other material, a fair use analysis should be considered; if fair use is determined not to apply to the specific use, permission must be obtained.

A fair use analysis is based on four factors found in section 107 of the Copyright Act: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the entire work and the effect of the use on the potential market for or value of the copyrighted work. A detailed explanation of the application of these factors is available at <http://library.duke.edu/blogs/scholcomm/copyright-in-teaching/> and the attached checklist can help guide a reasonable decision about fair use. For many activities at Duke, these circumstances will be especially important when relying on fair use:

- Your use is nonprofit and educational,
- You are using only a small part of a work and no more than is needed to accomplish your teaching objective, and
- Access to the portion of a copyrighted work is restricted to students registered for the specific class in which it is needed.

For each use for which fair use is claimed, a copy of the completed checklist can be retained to show the good faith of that claim; this is especially important when all of the above circumstances do not apply to a particular use.

When relying on fair use, materials should be attributed properly and marked to indicate that they are subject to copyright protection. As noted above, copyright protected course content should be kept behind password barriers so that only students in the class can access it. Information about creating password protection for electronic course content can be found at <http://cit.duke.edu/ideas/how/copyright.html>. Materials should remain available only for a limited time, usually no longer than necessary for a particular class use.

When permission is needed, for example where a large portion (several chapters) of a book is used, the Copyright Clearance Center (<http://www.copyright.org>) can usually assist in obtaining and collecting fees for the necessary authorization. If analogously large portions of audio or video recordings are used, similar collective permission organizations may exist, or the distributor can be contacted directly. When permission is not available after reasonable efforts or a rights holder can not be found (so-called “orphan works”), a persuasive fair use analysis becomes more likely.

Questions regarding these Guidelines may be directed to Kevin Smith, Duke University Libraries (<mailto:kevin.l.smith@duke.edu>), or Henry Cuthbert, Associate University Counsel (<mailto:henry.cuthbert@duke.edu>).

CHECKLIST FOR FAIR USE ANALYSIS

This checklist is a tool to assist you as you apply the fair use balancing test to specific situations in which you want to use copyrighted materials. If a particular use is fair use, it may proceed without authorization from the copyright owner; if the use does not fall within fair use, permission is necessary.

The fair use analysis is always circumstantial and never entirely certain. For each of the four fair use factors below, determine whether each listed circumstance favors or disfavors fair use based on the specific material in question and the use desired. Where the circumstances favoring fair use outnumber those against it, you can feel comfortable in relying on the fair use exception. Where less than half the circumstances favor fair use, you should seek permission or consider alternatives to using the work as planned. If the factors appear evenly split or you have questions about interpretation, please feel free to contact Kevin Smith, Duke University Libraries (<mailto:kevin.l.smith@duke.edu>), or Henry Cuthbert, University Counsel's Office (<mailto:henry.cuthbert@duke.edu>).

FACTOR ONE – PURPOSE OF THE USE

Favoring Fair Use

- Educational
 - Teaching (including multiple copies for classroom use)
 - Research
 - Scholarship
 - Criticism
 - Comment

- Transformative or Productive use (Changes the work to serve a new purpose)

- Nonprofit use.

Disfavoring Fair Use

- Commercial, entertainment or other use.

- Verbatim or exact copy, not transformative.

- Profit generating use.

FACTOR TWO – NATURE OF THE COPYRIGHTED MATERIAL

Favoring Fair Use

- Factual, nonfiction, news

- Published work

Disfavoring Fair Use

- Creative or consumable work. (art, music, feature film, fiction; workbook, case study or test)

- Unpublished work

FACTOR THREE – AMOUNT COPIEDFavoring Fair Use

- Small quantity used (e.g. single chapter or journal article, other short excerpt (less than 10-15% of the whole work)).
- Portion used is not central to work as a whole.
- Amount is appropriate to the educational purpose.

Disfavoring Fair Use

- Large portion or entire work.
- Portion used is central or the “heart” of the work.
- Includes more than necessary for educational purpose.

FACTOR FOUR -- EFFECT ON THE MARKET FOR THE ORIGINALFavoring Fair Use

- No significant effect on the market or potential market for the copyrighted work.
- One or few copies made and/or distributed.
- No longer in print; absence of licensing mechanism.
- Restricted access (limited to students in a class or other appropriate group).
- One-time, spontaneous use (no time to obtain permission).

Disfavoring Fair Use

- Cumulative effect of copying would be to substitute for purchase of work.
- Numerous copies are made and/or distributed.
- Reasonably available licensing mechanism for obtaining permission exists (CCC license or off-prints for sale)
- Copy will be available on the Web or otherwise broadly distributed.
- Repeated or long-term use.