

Primer on Copyright Use

I. PURPOSE AND SCOPE.

The Primer on Copyright Use is designed to elaborate on the Copyright Use and Ownership Policy of the University of North Carolina and to provide examples to educate the reader about copyright use issues and aid the reader in applying the copyright use policies.

This primer is to be used in conjunction with the Copyright Use and Ownership Policy. The Policy takes precedence over everything written below. Because this primer cannot cover all situations, questions should be addressed to the delegated institutional administrator and institutional counsel.

II. PERSPECTIVE.

The university community, as a whole, uniquely reflects the entire spectrum of copyright interests from copyright creator and holder to users of copyrighted works. Importantly, the mission of the research university to create, disseminate, and preserve access to information for the advancement of society is entirely consistent with the primary purpose of the copyright act as embodied in Article 1, Section 8, of the United States Constitution. That section states that the purpose of copyright is “to promote the Progress of Science and useful Arts, by securing for limited times to Authors . . . the exclusive Right to their . . . writings.”

In order to achieve the goal of advancing human knowledge, the Copyright Act provides creative incentives to authors and inventors by providing a limited monopoly over the use of their works. Creators of copyrighted works get a bundle of exclusive rights that are restricted by a series of limitations that advance the primary purpose of the Copyright Act.

Specifically, the current Copyright Act sets forth major limitations on the rights granted to copyright holders in favor of nonprofit educational purposes:

- Section 107-the Fair Use Doctrine
- Section 108-the Library Exemptions
- Section 110-the Classroom Exemptions
- Section 504(c)(2) the Good Faith Fair Use Defense

III. COPYRIGHT BASICS.

A working understanding of basic copyright law is necessary before university users can make reasoned decisions regarding their proposed use of copyrighted material.

Copyright protection extends to original works of authorship, applies to any tangible medium of expression in which the author produces the work, and attaches whether or not a work is published or registered with the U.S. Copyright Office. This protection begins the moment the work is first fixed in a tangible medium of expression. Facts and ideas contained in a copyrighted work cannot be protected by copyright but the “expression” of the facts or ideas can be.

The copyright notice (©, name, date) is not required for works published after March 1, 1989. Therefore, lack of notice does not mean the work is within the public domain.

Unpublished works are fully protected by copyright but will begin to enter the public domain beginning December 31, 2002, if the creator of the work has been deceased for at least 70 years on that date and the work has remained unpublished.

A. *Rights of the Copyright Holder.*

The copyright holder possesses the following exclusive rights with respect to his/her work.

The rights are divisible and include:

1. the right to reproduce the work,
2. the right to prepare derivative works based on it,
3. the right to distribute it (or copies of it),
4. the right to perform it publicly,
5. the right to display it publicly, and
6. the right to perform publicly a sound recording by means of digital transmission.

“Copies” are material objects, other than phone records, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

Unless one or more of the statutory exemptions (some of which are discussed below) apply, permission must be obtained from the copyright holder before any of the above uses may be made of the copyrighted work.

B. *Works Which May Be Freely Used.*

Copyright protection does not extend to works in the public domain. These include the following categories of works, for which copyright permission is not required:

1. works for which the copyright has expired;
2. works for which the copyright was lost;
3. works produced by a federal government employee within the scope of his/her employment;
4. works which lack sufficient originality to qualify for copyright such as standard calendars, standard height/weight charts, rulers, etc.

C. *Length of the Copyright Term.*

WHEN WORKS PASS INTO THE PUBLIC DOMAIN
Includes material from new Term Extension Act, PL 105-298

DATE OF WORK	PROTECTED FROM	TERM
Created 1-1-78 or after	When work is fixed in tangible medium of expression	Life + 70 years ¹ (or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation ²)
Published before 1923	In public domain	None
Published from 1923 - 63	When published with notice ³	28 years + could be renewed for 47 years, now extended by 20 years for a total renewal of 67 years. If not so renewed, now in public domain

Published from 1964 - 77	When published with notice	28 years for first term; now automatic extension of 67 years for second term
Created before 1-1-78 but not published	1-1-78, the effective date of the 1976 Act which eliminated common law copyright	Life + 70 years or 12-31-2002, whichever is greater
Created before 1-1-78 but published between then and 12-31-2002	1-1-78, the effective date of the 1976 Act which eliminated common law copyright	Life + 70 years or 12-31-2047 whichever is greater

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¹ Term of joint works is measured by life of the longest-lived author.

² Works for hire, anonymous, and pseudonymous works also have this term. 17 U.S.C. § 302(c).

³ Under the 1909 Act, works published without notice went into the public domain upon publication. Works published without notice between 1-1-78 and 3-1-89, effective date of the Berne Convention Implementation Act, retained copyright only if, e.g., registration was made within five years. 17 U.S.C. § 405.

Notes courtesy of Professor Tom Field, Franklin Pierce Law Center
Last updated 10-9-99

D. *The Statutory Exemptions.*

There are primarily four sections of the Copyright Act which accrue to the benefit of nonprofit educational users in the university community. The sections discussed below contain rights for users of copyrighted material. The “good faith fair use defense” is a very important section for employees of nonprofit educational institutions who have made a reasoned fair use analysis with respect to their proposed use.

1. *Section 107: THE FAIR USE DOCTRINE*

The purpose of the fair use doctrine is to allow limited use of copyrighted material without requiring prior permission from the copyright holder. The statute lists four factors to be weighed when analyzing the proposed use in order to determine whether it is a fair one. Consideration of all factors is required although all factors do not have to be in favor of a use to make it a fair one.

A fair use analysis is necessarily a fact-driven one. Each unique set of facts regarding a proposed use leads to its own reasoned conclusion. Reasonable individuals may come to different conclusions concerning the same set of facts, but the operative word is “reasonable.” If an employee of a nonprofit educational institution has made a rational and reasonable fair use determination, he or she is not likely to be targeted for an infringement lawsuit because of § 504(c)(2), the good-faith fair use defense. Under this section, a court must remit statutory damages to zero in any case where an infringer believed, and had reasonable grounds for believing, that his or her use of the copyrighted work was a fair use, if the infringer was an employee of a nonprofit educational institution, library, or archive acting within the scope of his or her employment.

Fair use applies in the digital environment and encompasses not only the right of reproduction but also the rights of performance, display, modification, and distribution.

A fair use analysis can be a difficult process. For the convenience of members of the university community, please see the accompanying Fair Use Worksheet, which should be used only in conjunction with this primer. Additionally, for reference and general guidance only, see the “Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals,” HR 94-1476, which was incorporated into the legislative history, although not the actual text, of the 1976

Copyright Act. These guidelines only address copying print materials for classroom use.

The four fair use factors are as follows:

- (1) The purpose and character of the use, including whether the 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.

a. The First Fair Use Factor: *Purpose and Character of the Use.*

This factor will generally weigh in favor of fair use if the proposed use is a nonprofit educational one as opposed to a commercial use. Most uses at the University can probably be characterized as nonprofit educational uses. But educational use alone does not automatically result in a finding of fair use, just as a commercial use is not always an infringing one. A nonprofit educational use would likely result in this factor favoring a finding of fair use, but remember that the other three factors must also be considered.

Additionally, with respect to the reproduction right, the purpose-and-character-of-the-use factor is more likely to weigh in favor of fair use if the use is transformative (i.e., transforms the work) rather than verbatim copying.

b. The Second Fair Use Factor: *Nature of the Copyrighted Work.*

This factor will generally weigh in favor of fair use if the work to be used is factual in nature (scholarly, technical, scientific, etc.) as opposed to works involving more creative expression, such as plays, poems, fictional works, photographs, and paintings. Some works have no fair use rights attached, such as standardized tests and workbooks, works that are meant to be consumed.

The case for fair use becomes even stronger when there are only a few ways to express the ideas or facts contained in a factual work. The line between unprotected "facts and ideas," on the one hand, and protected "expression," on the other, is often difficult to draw. If there is only one way, or very few ways, to express a fact or an idea, the expression is said to have merged into the fact/idea and there is no copyright protection for the expression.

As previously stated, unpublished works are currently fully protected by law. Nevertheless, fair use applies to them as it does to published works, but the author's rights of first publication may restrict fair use.

c. The Third Fair Use Factor: *Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole.*

Although there are no numerical or percentage limits for use, the larger the amount one uses, the less likely it will be a fair use. This deliberate flexibility in the statute allows each situation to be judged on its specific facts and allows the doctrine to be practical in the higher education setting.

This factor also takes into consideration the quality of the portion taken as well as the quantity. Sometimes, even if only a small amount is taken, this factor weighs against fair use if the portion can be justly characterized as "the heart of the matter."

It is not difficult to see how this factor and the fourth factor, market effect, work in tandem. The more taken in amount and substantiality, the greater the negative impact on the market for the copyrighted work.

d. The Fourth Fair Use Factor: *The Effect of the Use on the Market for or Value of the Copyrighted Work.*

This factor examines the effect of the use on the publisher's market. If the proposed use were to become widespread and would negatively impact the market for or value of the copyrighted work, this factor would weigh against fair use. This factor is often cited as the most important of the four although, again, the factors all interrelate and must be evaluated in conjunction with each other. In fact, this factor often becomes problematic because it can easily lead to circular reasoning: the purpose of the fair use analysis is to decide whether or not a permission fee is required; but the existence of a market for permissions should not determine whether a fee is necessary in the first place.

2. *Section 108: THE LIBRARY EXEMPTIONS.*

Libraries exist to facilitate access to and preserve information and so are rightfully granted specific exemptions under copyright law. While libraries can always avail themselves of fair use under §107, their specific exemptions are grouped in §108 of the Copyright Act.

The §108 exemptions deal primarily with the copyright holder's right to control reproduction of the work. Most, if not all, of the libraries within the UNC system qualify for the §108 exemptions because they are open to the public, make reproductions for patrons on a nonprofit basis, and include notices of copyright with the reproduction. If the work contains a copyright notice, that notice must be included with the reproduction. If no notice can be found for the work, a statement indicating that the work may be protected by copyright is sufficient.

a. *Library Reproduction of Unpublished Works.*

The library may reproduce an unpublished work in its collection for preservation or security purposes. It may also reproduce such a work for deposit in another qualifying library for research purposes.

b. *Library Reproduction of Published Works.*

The library may reproduce a published work in its collection only to replace a work that is damaged, deteriorating, lost, stolen, or obsolete, and then only if the library has determined after a reasonable effort that an unused replacement cannot be obtained at a fair price.

c. *Library Reproduction for Patrons.*

The library may reproduce small portions of a copyrighted work or one article or contribution to a copyrighted collection for a patron if:

- (1) The reproduction becomes the property of the patron;
- (2) The library has no notice that the reproduction will be used for something other than private study, scholarship, or research; and
- (3) The library has a display notice and order form which include the "Warning of Copyright" as prescribed by the Register of Copyright.

That warning should read as follows:

Warning of Copyright

The copyright Law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material. Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement. This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

The library may reproduce entire works or substantial parts of entire works for a patron if a reproduction of the work cannot be obtained at a fair price and if conditions c(1) through (3), above, are met. Reproductions for patrons may be made in any medium, including electronic.

d. *Self-Service Reproduction.*

The library is not liable for copyright infringement by patrons that may occur at unsupervised self-service reproducing machines as long as a notice is posted on the machine that the making of a reproduction may be subject to the copyright law.

e. *Audiovisual News Programs.*

The library may make a limited number of reproductions of an audiovisual news program (local, regional, and national network newscasts; interviews concerning current events; and on-the-spot news coverage of news events) for retention by the patron or by the library for lending.

f. *Systematic Reproduction.*

The single reproductions authorized by §108 are limited to "isolated and unrelated" reproduction and exclude copying where the library or its employee "is aware or has substantial reason to believe" that it is engaging in the related or concerted reproduction or distribution of multiple reproductions of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group. However, nothing prevents a library from participating in interlibrary arrangements that do not have, as their purpose or effect, the substitution for a subscription to or purchase of the work.

g. *Exclusion of Nonverbal Works.*

Reproducing musical, pictorial, or graphic works is not authorized under §108 except in the following two circumstances:

Where a musical, pictorial, or graphic work is to be copied under conditions defined as preservation or replacement (see sections 2a and 2b, above); or

Where a pictorial or graphic work published as an illustration, diagram, or similar adjunct to a work is to be copied as a part of the larger work under conditions for reproducing portions of works or entire works (see section 2c, above).

3. *Section 110: THE CLASSROOM EXEMPTIONS FOR PERFORMANCE AND DISPLAY.*

Section 110 contains the exemptions for the performance and display of works (not reproduction) essential to the functioning of a nonprofit educational institution.

a. *Face-to-Face Classroom Setting.*

Educators and students may perform or display a copyrighted work in the course of face-to-face teaching at a nonprofit educational institution in a classroom or other place normally devoted to instruction. Face-to-face teaching is defined as simultaneous presence of students and teachers in the same location. All other modes of instruction are governed by section b, below. There are no restrictions on the type or length of work, and the copyright holder's permission is not necessary.

b. *Distance Education and Other Instructional Transmissions.*

If the work performed or displayed is to be transmitted by an educator or student, additional conditions must be met. Any work may be displayed, but only nondramatic musical works and nondramatic literary works may be performed in their entirety. Nondramatic literary works do not include audiovisual works. Furthermore, even those works allowed above can be transmitted only if:

- (1) the performance or display is a regular part of the systematic instructional activities of a nonprofit educational institution; and
- (2) the performance or display is directly related, and of material assistance, to the teaching content of the transmission; and
- (3) the transmission is made primarily for
 - reception in classrooms or similar places normally devoted to instruction; or
 - reception by persons to whom the transmission is directed because special circumstances prevent their attendance in classrooms or similar places.

Even with these restrictions, however, small portions of works such as audiovisual works might be transmitted as a fair use. See Section E, above, under Library Exemptions.

4. *Damages for Copyright Infringement and the Good-Faith Fair Use Defense.*

The copyright holder may sue for infringement of the work and seek the following remedies:

- a. Temporary and permanent injunction against infringement;
- b. Impoundment of infringing copies;
- c. Destruction or other reasonable disposition of the infringing copies and any masters of negatives of infringing copies;
- d. Actual damages to the owner;
- e. Profits of the infringer attributable to the infringement;
- f. Court costs and reasonable attorney's fees; and
- g. Statutory damages.

In lieu of actual damages and profits a copyright holder may seek through the

court statutory damages ranging from \$750 to \$150,000 per infringement, depending on the presence or absence of willfulness of the infringement. Statutory damages, once awarded by the court, though, may be reduced to a figure as low as \$200 where the court finds that the infringer "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright"; i.e., that the offender was a "good-faith" infringer. And, for employees and agents of the University (including its librarians and archivists) and its public broadcast entity, statutory damages may be completely "remitted" (cancelled) if the court finds that the infringement occurred in the course and scope of employment and that "the infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107."

5. *Process for Defense.*

Several North Carolina statutes working in tandem provide insurance coverage and defense costs for University employees. There are, however, several prerequisites to this coverage that must be borne in mind when asking whether a specific, infringing action or activity will be covered. First, the act (or omission) must be made within the scope of the employee's University duties. For example, if a faculty member is preparing a coursepack for his or her class and decides to use part of a copyrighted work in that packet, the action of selecting that work will probably be considered "within the course and scope" of his or her teaching duties. Second, the act or omission must not be fraudulent, malicious, or corrupt. Third, the defense of the action must not create a conflict between the state and the employee. Such a situation might arise if the faculty member selected a copyrighted work for which the copyright was owned by the University. In these situations, often the state will employ outside counsel to represent the faculty member. And, fourth, the defense of the action must not place the state in the position of defending an act that would not be in its best interests. This fourth prerequisite is rarely at issue and should not be problematic if the other three factors are not at issue.

A fifth factor underlies these four statutory predicates; that is, was the action being challenged taken in good faith? In summarizing what this means, it is often stated that the action was or was not reasonable in light of the circumstances surrounding it and that it was or was not in compliance with University policies. Thus, to take the example above, of the course pack, if the faculty member selected an entire book to copy for his course pack, knew that the book was copyrighted, did not check University policies (or related guidelines) on which uses might be considered fair use, and did not seek from the copyright owner permission to use the work, the action probably would not be found to have been in good faith.

Of course, few situations are this clear cut or obvious. On many occasions it will not be certain that a particular use is "fair" or that some other exemption might apply. It is by far the better course in these situations to review all University policies and guidelines carefully and to seek advice from University counsel. The University will provide both defense costs (the expense of defending an action and paying a judgment) and representation (an attorney to represent the faculty member) if the faculty member takes the steps described. The final decision to represent and defend in a particular case, though, rests with the North Carolina Attorney General.

As to the amount of coverage available, the institution provides \$500,000 of self-insurance for any claim that meets these prerequisites. Beyond this amount the State of North Carolina has secured a "second tier" of protection, an "excess insurance policy" that currently will cover up to \$50,000,000 of coverage for such a claim. (The policy is negotiated on an annual basis.) The monetary cushion is much more than adequate; indeed, we have never had a claim that came close to this limit.

Overall, then, the liability and monetary coverages are excellent. As long as University employees recall their job parameters, comply with University policies, and act reasonably and in good faith, they have little to fear from a copyright claim or litigation.