

**GOOD PRACTICES REGARDING FAIR USE OF INTELLECTUAL  
PROPERTY**  
**for members of the Muhlenberg College community,  
especially faculty and staff**

This document does not replace more extensive information on copyright available on the Trexler Library website;<sup>1</sup> it is intended rather as a handy introduction to important concepts and invitation to further discussion with public services librarians regarding good practices.

Copyright is a limited monopoly granted to holders over a work by law under an article of the U.S. Constitution. Copyright law recognizes a needed balance between the rights of copyright holders and society's need to use copyrighted works to advance learning. Copyright holders (typically authors and publishers) need protection for their rights in the market, but the open exchange of ideas is also crucial to education and an informed citizens. Copyright is essentially a marketing right granted exclusively to holders which must not be diminished by sale of other unauthorized copies.

Copyright law also expressly provides for "fair use" of copyrighted materials in education and research, *especially as mediated by libraries*. Basically "fair use" allows a copyrighted work to be used or copied for educational purposes so long as that use or copying is not solely a substitute for purchasing an authorized copy of a work.

Copyright law (statutes and court decisions) consists of an interrelated set of complex rules granting rights both to copyright holders and to fair users. Since the law is comprehensive (granting rights to both parties) and universal (should be followed by everyone), it follows that both holders and users have the duty to know the law and respects each others rights. The problem is to know the limits of the respective rights – the point of this document.

An additional problem is that "fair use" has never been exactly defined, even in statute. Basically, the copyright statute (17 USC 107) maintains an appropriate balance of rights between copyright holders and users; limits the monopoly power of the production of copies to marketing and does not extend to a work a copyright holder has sold; and establishes

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<sup>1</sup> <http://www.muhlenberg.edu/library/reshelp/studentcopyr.html> is meant primarily for students, and <http://www.muhlenberg.edu/library/reshelp/facultycopyr.html> meant primarily for faculty.

tests whether production of copies is done for sound pedagogical and research purposes, and not solely to avoid purchasing a copy of a work.

“Fair use” modifies the marketing monopoly of the copyright holder so that copyright can fulfill its constitutional purpose of promoting learning.

Given these basic terms, the principles at the end of this document help to clarify the responsibilities of copyright holders and users.

How do College faculty and staff make reasonable “fair use” of copyrights?

First, materials used under fair use should not substitute for purchased textbooks or course packs, but rather should be supplemental. Effect on the marketplace should always be a consideration.

Fair use in the photocopy and distribution of copyrighted works is contingent upon spontaneity, brevity (extent), and notice of copyright – single-time single-use photocopies are often “fair use” of copyright material, but photocopies handed out every semester may not be. Determining whether photocopied materials on reserve in the library, or photocopies of library materials, are “fair” is more complex, and consultation with library staff is recommended. In general, course reserves in a library setting are a safe harbor with a long history of no litigation. As a rule, the library or the instructor should own a copy of items placed on reserve.

One option to photocopying or traditional course reserves is the scanning and posting of articles online. This process holds the potential for copyright violation and should be carefully monitored by such processes as those found in library-supervised electronic reserves.

As yet another option, negating the need for fair use considerations altogether, faculty can simply link to the full text of articles available on library databases or open-access websites.

Videos (regardless of medium) owned by the library may fairly be used for class instruction (not entertainment of a group), but legalities regarding videos rented from an off-campus agent (whether a retail store or direct-mail agent) depend upon the contract the renter has signed, and provisions can and do vary; however, rental videos used in regularly scheduled course instruction are generally considered fair use.

Like recycling, the College assumes that faculty and staff will want to maintain “fair use” provisions of Copyright law because it’s the right thing to do. In addition, faculty members themselves are often the originators of copyrighted materials, and would not want their own copyrights infringed upon. Reasonable diligence and consultation with library staff can help faculty not only remain legal, but give assurance that faculty members can model the right behavior for their students.

Two FAQs can be helpful to suggest specific solutions in specific cases:

1. Examples illustrating Fair Use (from University System of Georgia):  
<http://www.usg.edu/legal/copyright/#part2>
2. Copyright and Fair Use Overview from Stanford University:  
[http://fairuse.stanford.edu/Copyright\\_and\\_Fair\\_Use\\_Overview/index.html](http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/index.html)

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## **NINETEEN PRINCIPLES TO HELP DETERMINE FAIR USE OF COPYRIGHT MATERIALS**

(Reproduced from “Regents Guide to Understanding Copyright & Educational Fair Use,” by the Office of Legal Affairs, University System of Georgia, <http://www.usg.edu/legal/copyright/>)

1. Fair use is derivative of copyright and is complex in part because there are three kinds of copyright, each of which varies in the scope of copyright protection:
  - a. Creative copyright, for original works such as a novel, drama, painting, sonata, or poem (plenary copyright protection)
  - b. Compilation copyright, for a directory or anthology (limited copyright protection)
  - c. Derivative copyright, for works based on another work, such as a motion picture based on a novel (limited copyright protection)
2. Fair use applies to all copyrighted works regardless of the media in which they are fixed: print, electronic, or multimedia.
3. There are four kinds of use:
  - a. Personal use is the use of a copyrighted work for the purpose for which it was intended, e.g., reading a book.
  - b. Infringing use is a use that violates one of the rights granted to copyright holders in section 106 of the copyright statute.
  - c. Fair use is a use permitted by the copyright statute that might otherwise be infringing.

d. Constitutional use is the use of uncopyrightable, i.e., public domain, material and is protected by the U.S. Constitution.

4. Fair use is a right granted to users by section 107 of the copyright statute.

5. Fair use modifies the marketing monopoly of the copyright holder so that copyright can fulfill its constitutional purpose of promoting learning.

6. Everyone has a constitutional right to use public domain material without limitation, even if it is included in a copyrighted work.

7. One infringes a copyright, not a work, and fair use applies only to the use of the copyright. Therefore, determining if a use is fair requires making the following distinctions between a use of the work itself and a use of the copyright of the work:

a. One who copies a work to put it on the market uses the copyright, because the copyright holder has the right to market the work. Without permission, such a use is an infringing use.

b. One who copies from a work for study or research uses the work, not the copyright, because the use is a use for which the work was intended. Such a use is a fair use, not an infringement.

8. One may always use a work without permission; one may use a copyright only with permission or as a matter of fair use.

9. The threshold issue in determining fair use is whether the copying involves a use of the work or a use of the copyright because:

a. The use of the work is by definition a protected use.

b. The use of the copyright must be with permission or must fulfill fair use criteria.

10. Fair use normally entails copying and is of three kinds:

a. Creative fair use by authors who copy from other works to create their own work.

b. Personal fair use by individuals who copy from works for their own learning or entertainment.

c. Educational fair use by teachers, scholars, and students who copy for teaching, scholarship, or learning.

11. There are four nonexclusive statutory factors--all directed to the marketing of works-- to use in determining whether a use is fair. They are:

a. The purpose of the use, including whether such use is for commercial or for non-profit educational purposes. (Commercial purpose implies a use of the copyright; educational purpose, a use of the work.)

b. The nature of the work. (This requires a determination of whether the work is a creative work, a compilation, or a derivative work.)

c. The amount used in relation to the work as a whole. (The amount of the work used is a major factor in determining whether the use is merely a use of the work or a use of the copyright; the greater the amount used, the more likely the use will be a use of the copyright.)

d. The effect of the use on the market or potential market for the work. (The greater the market effect, the less the likelihood that the use will be fair.)

12. The four factors are not exclusive. Other factors that may be relevant are the availability of the work, the ability to determine whether the work is still under copyright, and the ability to locate the copyright holder.

13. The four factors are necessary because fair use is to be determined on a case-by-case basis in order to protect the constitutional rights of users.

14. Attempts to limit the fair use right with quantitative guidelines are without statutory authority.

15. The legal effect of quantitative guidelines is to provide a safe-harbor, i.e., copying within the guideline limits automatically qualifies as fair use. Such guidelines do not, and cannot legally, mean that copying in excess of the guidelines is infringement and not fair use.

16. The limitations on the copyright monopoly in sections 108-120 grant rights to non-copyright holders as to particular type uses; these rights, however, do not negate the general right of fair use, which permits uses in excess of the limitations if the additional uses are fair.

17. The location of the line between fair use and infringing use is determined by the market factor, that is, the extent to which the copy becomes a substitute for the purchase of the work.

18. The 1976 Copyright Act protects educational fair use with four different provisions:

a. The use of works for "teaching (including multiple copies for classroom use), scholarship and research" as exemplars of fair use (Sec. 107)

b. The distinction between commercial and nonprofit educational use (Sec. 107(1)), a superfluous distinction unless it means special protection for educational use

c. The provision that fair use overrides the limitations on library photocopying (Sec. 108(f)(4))

d. The good faith defense for employees of nonprofit educational institutions, libraries, and archives (Sec. 504(c)(2))

19. The copyright statute does not empower copyright holders to override the fair use right by overbroad copyright notices or other unilaterally imposed provisions

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Further information is available at the Copyright Clearance Center, "The Campus Guide to Copyright Compliance,"  
<http://copyrightoncampus.com>

The Copyright Clearance Center is a commercial copyright broker of international standing. The information on its website understandably tends to emphasize the interests of copyright holders and to minimize protected Fair Use of copyright materials in educational institutions.