

COPYRIGHT AND FAIR USE GUIDELINES

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INTRODUCTION

Copyright is defined in federal law (Title 17, U.S. Code), and provides protection to creative and intellectual works. Copyright gives the copyright holder (usually the creator), certain exclusive rights for a period of time. Copyright law is supported by case law, judicial decisions, and additional state and local statutes.

Xavier University makes every effort to comply with the provisions of the Copyright Act, and provides this policy statement to assist the individual members of the Xavier community in understanding and complying with copyright.

The Copyright Act offers certain provisions for educational enterprises. These are referred to as Fair Use provisions and can be found in Section 107 of the Copyright Act of 1976 (<http://www.copyright.gov/title17/92chap1.html#107>). They allow educators to use copyrighted works without permission, for nonprofit instruction, research, or scholarly activities. These provisions are described here for the benefit of the Xavier community.

Copyright law and fair use directly influence many traditional practices in higher education, such as the use of course reserves, distribution of handouts, and the publication of faculty and student research, as well as the use of video, multimedia and internet resources in teaching and scholarship.

COPYRIGHT BASICS

What is copyright?

The Copyright Act of 1976 provides authors of original works protection for their intellectual property in any work exhibiting minimal creativity and fixed in a tangible mode of expression. Copyright applies automatically; a copyright notice (©) is **no longer** required for a work to

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receive copyright protection. The Copyright Act embraces published or unpublished intellectual property in all formats and media.

What rights do copyright owners have?

The Copyright Act of 1976 gives copyright owners the **exclusive right** to do and to authorize others to do the following:

- *Reproduce* the work;
- *Prepare derivative works* of the work;
- *Distribute copies or recordings* of the work;
- *Perform* the work publicly, including by means of a digital audio or video transmission;
- *Display* the work publicly.

What is copyrighted?

Copyrightable works include the following categories:

- Literary or prose works, including not only books, articles, anthologies, but also software programs and their accompanying documentation;
- Musical works, including any accompanying words;
- Dramatic works, including any accompanying music;
- Pantomimes and choreographic works;
- Pictorial, graphic, and sculptural works (including maps, paintings, drawings or sculpture);
- Motion pictures and other audiovisual works;
- Sound recordings; and
- Architectural works (including the plans, drawings, and sculptural works, as well as the buildings themselves).

What is NOT copyrighted?

Works that are not copyrightable include:

- Works that are not fixed in a tangible mode of expression (e.g., an extemporaneous speech);
- Familiar symbols or designs, mere listings of contents, and short phrases and slogans (e.g., “no smoking” signs);
- Ideas, procedures, methods, systems, processes, concepts, principles, discoveries, or devices, as distinguished from a description, explanation, or illustration;
- Works consisting entirely of information that is common property and containing no original authorship (e.g., standard calendars and height and weight charts); and
- Works in the public domain.

How long does copyright last?

Copyright terms are lengthy, but limited, and eventually every copyright will expire. When a copyright term expires, the work then passes into the “public domain.” Works in the “public domain” may be used freely and without restriction. A work enters the public domain under the following circumstances:

- The term of copyright has expired without renewal;
- The author intentionally placed the work in the public domain;
- The work is a product of the U. S. government officials or printed by the Government Printing Office;
- The work was **published** before 1923;
- The work was unpublished by an author who died more than 70 years ago;
- For works for hire, and for anonymous and pseudonymous works (unless the author's identity is revealed in Copyright Office records), the duration of copyright will be 95 years from publication or 120 years from creation, whichever is shorter.

For more information about how long copyright lasts, please see the chart Copyright Term and the Public Domain in the United States (http://www.copyright.cornell.edu/public_domain/), made available by Cornell’s Copyright Information Center (<http://www.copyright.cornell.edu/>).

FAIR USE

What is Fair Use?

The Copyright Act established some limitations to the rights it reserves for copyright owners. The limitation most allied with educational uses is the doctrine of “fair use” found in Section 107 of the Copyright Act of 1976 (<http://www.copyright.gov/title17/92chap1.html#107>).

Fair use excludes from the limits of copyright law the use of intellectual property for purposes such as criticism, commentary, news reporting, teaching, scholarship or research. This allows educators to use copyrighted materials, in certain circumstances, without having to get permission from the author or copyright owner.

However, what constitutes fair use is expressed in the form of guidelines rather than explicit rules. To determine fair use, consider the following four factors.

1. The **purpose and character** of the use, including whether the copied material will be for nonprofit, educational, or commercial use. If the work is to be used for nonprofit educational use, this weighs on the side of fair use. This factor at first seems reassuring;

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but unfortunately for educators, several courts have held that absence of financial gain is insufficient for a finding of fair use.

2. The **nature** of the copyrighted work, with special consideration given to the distinction between a creative work and an informational work. For example, photocopies made 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. Duplication of material originally developed for classroom consumption is less likely to be a fair use than is the duplication of materials prepared for public consumption. For example, a teacher who photocopies a workbook page or a textbook chapter is depriving the copyright owner of profits more directly than if copying one page from the daily paper.
3. The **amount, substantiality, or portion** used in relation to the copyrighted work as a whole. This factor requires consideration of 1) the proportion of the larger work that is copied and used, and 2) the significance of the copied portion. Using a large portion of a work, or using a very significant section of the work, could tend to oppose a fair use judgment.
4. The effect of the use on the **potential market** of the copyrighted work. This factor is regarded as the most critical one in determining fair use, and it serves as the basic principle from which the other three factors are derived and to which they are related. If the reproduction of a copyrighted work reduces the potential market and sales and, therefore, the potential profits of the copyright owner, that use is unlikely to be found a fair use.

Fair Use Summary chart

Factor	Favoring Fair Use	Opposing Fair Use
Purpose & character of the use	Nonprofit institution Education & teaching Research or scholarship Criticism or comment News reporting Transformative or productive use Personal Parody	For-profit institution Commercial Entertainment Bad faith behavior is involved Denying credit to the original author
Nature of the work	Published Factual or non-fiction	Unpublished Highly creative, imaginative work

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Factor	Favoring Fair Use	Opposing Fair Use
	Use important to instructional objectives	(artwork, graphics, music, novels, plays, commercial movies) Fiction
Amount used & substantiality of the portion used (portion used in relation to the whole)	Small quantity used Portion used is not central to the work (not the “heart of the work”) Amount used is appropriate for the educational purpose	A large portion or the entire work is used The portion used is central to the work or it is the “heart of the work”
Effect of the use on the market	User owns a lawfully acquired or purchased copy of the work One or a few copies are made Use has no significant effect on the market or potential market of the work There is no similar product marketed by the copyright holder There is no licensing mechanism	Use could replace the sale of the work Use impairs the market or potential market for the work There is a licensing mechanism or affordable permission available for the work Numerous copies are made Work is made available via the Internet There is repeated or long-term use

What can be used under Fair Use provisions?

Interpretation of the doctrine of fair use rests with the user of copyrighted works. Standards of educational fair use are not definitively outlined in the law. However, several organizations, as well as relevant case law and legislation, have given the academic world some basic markers to guide fair use decisions. For specific guidelines on precisely how much and what kind of material can be used according to fair use, consult the U.S. Copyright Office’s Circular 21: Reproduction of Copyrighted Works by Educators and Librarians which can be found at <http://www.copyright.gov/circs/circ21.pdf> or please contact Xavier’s Copyright Officer (filiatreaua@xavier.edu).

Acceptable fair uses include the following activities and media:

1. **Single copying for educators:** A single copy may be made of any of the following by or for an educator at his or her individual request for his or her scholarly research or use in teaching or preparation to teach.
 - o A chapter from a book;

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- An article from a periodical or newspaper;
 - A short story, short essay, or short poem, whether or not from a collective work; or
 - A chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper.
2. **Multiple copies for classroom use:** Multiple copies (not to exceed in any event one per student in a course) may be made by or for an educator giving the course for classroom use or discussion at a non-profit educational institution provided that:
- The copying meets the definitions of brevity and spontaneity as stated below;
 - It meets the cumulative effect definition as stated below; and
 - Each copy includes a notice of copyright.
3. **Coursepacks:** A course pack is a compilation of various reproduced copyrighted works (e.g., articles from journals, chapters from textbooks, and various other readings) that an instructor assembles, and that students generally purchase at the campus bookstore, although some professors arrange to sell them in class or in a certain department. In addition to paper coursepacks, electronic coursepacks are increasingly being used in distance learning and electronic teaching programs.

Court rulings have established the rule that you **must** obtain permission before reproducing copyrighted materials for an academic coursepack, whether print or electronic. Many campuses are now affiliated with established clearance services or are prepared to obtain clearance on behalf of instructors. Most publishers grant "clearances" for coursepacks--that is, for a fee, publishers give permission for their books or articles to be copied and distributed in educational contexts. Such clearances normally last for one semester or for one school term. After that, the instructor must seek clearance again.

The Xavier University Bookstore offers coursepack services for faculty through XanEdu (<http://www.xanedu.com/>).

4. **Electronic & traditional reserves:** Educators may place copyrighted works on reserve, or submit electronic documents for e-reserves provided that:
- They meet the definitions of brevity and spontaneity as stated below;
 - They meet the cumulative effect definition as stated below;
 - They include a notice of copyright;
 - They include citation information or an attribution to the source;
 - Access is limited to students enrolled in the class;

- Access is terminated at the end of the class term; and
 - The educator obtains permission if these materials are to be used again for the same class.
 - It is preferable to link to electronic content rather than uploading it, if possible.
5. **Distance learning:** The TEACH Act (Revised 17 U.S.C. § 110(2)) is a new section of the copyright law meant to facilitate distance learning. It allows for unprecedented use of digital works in distance education, online classes, and digital course management systems, but has strict limitations as well. North Carolina State University's TEACH Act Toolkit (<http://www.lib.ncsu.edu/dspc/legislative/teachkit/>) has both information and technology tools to help you take better advantage of the benefits of the TEACH Act. Educators may use a copyrighted work for electronic classroom use provided that:
- The use must be part of mediated instructional activities, i.e., part of a specific lesson, and not simply supplementary materials;
 - The use must be limited to a specific number of students enrolled in a specific class, and access must be terminated at the end of the lesson or course;
 - The use must either be for 'live' or asynchronous class sessions and can be for online-only courses or "hybrid" courses, where some class sessions are in-person and some are online;
 - The educator or library possesses a legal copy of the work;
 - The use must not include the transmission of textbook materials, materials "typically purchased or acquired by students," or works developed specifically for online uses;
 - The institution must have developed and publicized its copyright policies, specifically informing students that course content may be covered by copyright, and include a notice of copyright on the online materials;
 - The institution must implement some technological measures to ensure compliance with these policies, beyond merely assigning a password;
 - Only "reasonable and limited portions," such as might be performed or displayed during a typical live classroom session, may be used;
 - The TEACH Act permits digital clips of video works to be shown, but in reasonable and limited portions. Streaming video is recommended to prevent students from downloading the video, unless licensed to do so.
6. **Blackboard™ and other online course management systems:** Placing copyrighted materials on any university-supported course management system (CMS) such as Blackboard raises challenging questions about copyright. For Fair Use to apply, the educator must generally work under the same limitations and conditions as with electronic reserves (above).

The TEACH Act provides some additional latitude to educators using copyrighted digital materials for Blackboard, but there are many restrictions. The American Library Association's TEACH Act Best Practices Using Blackboard gives more information about this.

(<http://www.ala.org/Template.cfm?Section=distanceed&Template=/ContentManagement/ContentDisplay.cfm&ContentID=34705>)

7. **Multimedia projects:** In 1996, a Congressional subcommittee on intellectual property published a report called the Fair Use Guidelines for Educational Multimedia (MMFU Guides which can be found at <http://ccumc.org/node/210>). While these guidelines are not law, they have become commonly accepted standards followed by educational institutions and the courts. Under these guidelines you may make fair use of copyrighted digital media for specific educational tasks under certain limitations. Because digital media is so much easier to reproduce and distribute than other media, the fair use limitations on digital media are more stringent than fair use guidelines for other media. Educators and students may use copyrighted works for classroom use or discussion at a non-profit educational institution or for peer conference presentations provided that:
 - They meet the definitions of brevity and spontaneity as stated below;
 - They meet the cumulative effect definition as stated below;
 - They include a notice of copyright;
 - They include citation information or an attribution to the source;
 - The educator or library possesses legal copies of the works;
 - Access is limited to students enrolled in the class;
 - The educator uses works for only two years after the first use.

8. **Photographs and images:** For information on fair use of photographs and images, please see our detailed document Copyright Guidelines for Use of Digital Images (http://www.xavier.edu/library/help/fair_use_images.pdf).

9. **Films and videos:** For information on fair use of films and videos, please see our detailed document Copyright Guidelines for Use of Film and Video (http://www.xavier.edu/library/help/copyright_video.pdf).

Definitions and Conditions on Fair Use

The U.S. Copyright office has developed guidelines stating the *minimum standards* of educational fair use for classroom copying, placing guidelines for limits based on tests of brevity, spontaneity, and cumulative effect. They are not meant to be comprehensive and are not part of the copyright law, per se, but are only guidelines to help educators.

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Brevity

For fair use provisions to be applicable, in many cases only brief sections of a work should be used. The examples below indicate what is generally acceptable, defined as “brevity,” as interpreted in copyright law and litigation.

1. Poetry:

- A complete poem, if less than 250 words and if printed on not more than two pages or
- From a longer poem, an excerpt of not longer than 250 words.

2. Prose:

- Either a complete article, story or essay of less than 2,500 words,
- An excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event, a minimum of 500 words. (Each of the numerical limits stated in "1" and "2" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.)

3. Illustrations:

- No more than 5 images by one artist or photographer and no more than 15 images or 10%, whichever is less, from a collective work (Lehman, 1998, p.54).

4. “Special” works:

- “Special” works are defined in copyright law as certain works in poetry, prose or in “poetic prose” that fall short of 2,500 words in their entirety and which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience. “2” above notwithstanding, such “special works” may not be reproduced in their entirety. However, an excerpt comprising not more than two of the published pages of such special works and containing not more than 10% of the words found in the text thereof, may be reproduced.

5. Other kinds of works (film, photographs, music and sound recordings, digital works):

- The definition of “brief” for these materials varies greatly, depending on how the material is being used. Consult:
 1. Copyright Guidelines for Use of Digital Images
http://www.xavier.edu/library/help/fair_use_images.pdf
 2. Copyright Guidelines for Use of Film and Video
http://www.xavier.edu/library/help/copyright_video.pdf
 3. Fair Use Guidelines for Educational Multimedia (MMFU Guides)
<http://ccumc.org/node/210>
 4. U.S. Copyright Office’s Circular 21: Reproduction of Copyrighted Works by Educators and Librarians
<http://www.copyright.gov/circs/circ21.pdf>

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5. Xavier's Copyright Officer
filiatreaua@xavier.edu

Spontaneity

For fair use provisions to be applicable, in many cases the use must be "spontaneous." The examples below indicate what is generally considered "spontaneous" as interpreted in copyright law.

1. The copying is at the instance and inspiration of the individual educator, and
2. The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect

For fair use provisions to be applicable, it is not permitted for an educator's use to create a negative cumulative effect on a copyright owner (e.g., to affect an author's sales negatively). The following are guidelines to help educators avoid creating a negative cumulative effect:

1. The copying of the material is for one course only in the school in which the copies are made.
2. During one class term an entire short poem may be used, but no more than three short poems by one poet or five short poems by different poets from a single anthology. For poems of greater length, an excerpt up to 250 words may be used but no more than three excerpts by one poet or five excerpts by different poets from a single anthology (Lehman, 1998, p. 53).
3. No more than nine items in total may be copied for one course during one class term.

Additional prohibitions to single and multiple copying

Notwithstanding any of the previously mentioned, the following shall be prohibited:

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 of works are accumulated or reproduced and used separately.
2. There shall be no copying of works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and text booklets and answer sheets and like consumable materials.
3. Copying shall not:
 - o Substitute for the purchase of books, published reprints or periodicals;
 - o Be directed by higher authority;
 - o Be repeated with respect to the same item by the same educator from term to term.
4. No charge shall be made the student beyond the actual cost of photocopying.

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REQUESTING USE OF COPYRIGHTED MATERIALS

If the work you wish to use is protected, and your use is not a fair use or otherwise exempt from liability for infringement, and the work has not been licensed for your use, you need permission to use the work.

When a proposed use of photocopied material requires a faculty member to request permission, communication of complete and accurate information to the copyright owner will facilitate the request. The Association of American Publishers suggests that the following information be included to expedite the process:

1. Title, author and/or editor and edition of the material to be duplicated;
2. Exact material to be used, giving the amount, page numbers, chapters, and, if possible, a photocopy of the material;
3. Number of copies to be made;
4. Use to be made of the duplicated material;
5. Form of distribution (classroom, newsletter, etc.);
6. Whether or not the material is to be sold; and
7. Type of reprint (ditto, photocopy, offset, typeset).

For books

The request should be sent, together with a self addressed return envelope, to the permissions department of the publisher in question. If the address of the publisher does not appear at the front of the material, it may be obtained from:

- Literary Market Place
<http://xplora.xu.edu/search/a?searchtype=t&searcharg=Literary+Market+Place>
- Books in Print
http://www.xavier.edu/library/databases/b_databases.cfm#bip

For journal articles

Requests can be quickly processed through the pay-per-use permissions service (<http://www.copyright.com/ccc/viewPage.do?pageCode=ac14>) at the Copyright Clearance Center (CCC). Founded in 1978 as a not-for-profit company, the CCC offers licenses and permissions to content from many of the world's publishers. Alternatively, requests can be sent, together with a self addressed return envelope, to the permissions department of the publisher in question. If the address of the publisher does not appear at the front of the material, it may be obtained from the following sources:

- Cabell's Directories (business, education and psychology journals)
http://www.xavier.edu/library/databases/c_databases.cfm#cabells

- MLA Directory of Periodicals (literature)
http://www.xavier.edu/library/databases/m_databases.cfm#mladir
- Ulrich's Periodicals Directory (all academic disciplines)
http://www.xavier.edu/library/databases/tuv_databases.cfm#ulrichs

SECURING COPYRIGHT PROTECTION

Copyright is secured automatically when a work is fixed in some mode of expression. Legal registration is not required to secure legitimate copyright protection. Displaying of copyright notice in the work is also not required but is recommended if you want to secure "All rights reserved;" for example: © 1998 John Doe. Registration of copyright by the Federal Copyright Office, and/or use of a Creative Commons license (see below), is advisable when a work is published or otherwise made publicly available.

Federal copyright registration

Registration of copyright is secured by filing a request and a representation of the work with the Copyright Office:

Library of Congress
Copyright Office (<http://www.copyright.gov/register/>)
Register of Copyrights
101 Independence Avenue, S.E.
Washington, DC 20559 6000

Information regarding submittal requirements is available by calling (202) 707-3000 or at <http://www.copyright.gov/register/>.

Creative Commons

Creative Commons (<http://creativecommons.org/>) is a nonprofit corporation dedicated to making it easier for people to share and build upon the work of others, consistent with the rules of copyright.

Creative Commons provides free tools and ready-made licenses that let authors, scientists, artists, and educators easily mark their creative work with the freedoms they want it to carry. You can use Creative Commons to change your copyright terms from 'All Rights Reserved' to 'Some Rights Reserved.' With a Creative Commons licenses you keep your copyright but allow people to copy and distribute your work provided they give you credit — and only on the conditions you specify (<http://creativecommons.org/learn/licenses/>).

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CONTACT FOR MORE INFORMATION

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 Cincinnati, OH 45207

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