

MEMORANDUM ON COPYRIGHT LAW AND COMPLIANCE

As educators, authors and creators of copyrightable works, members of the University community have a duty to respect the copyright in

B. Infringement of Copyright

In order to protect the exclusive rights of copyright owners, the Copyright Act provides that “(a)nyone who violates any of the exclusive rights of the copyright owner...is an infringer of the copyright or right of the author, as the case may be” (see 17 U.S.C. § 501). Normally, an infringer is liable to the copyright owner for the actual losses sustained because of the unauthorized use or copying of the work and for any additional profits of the infringer (see 17 U.S.C. § 504). Where the monetary losses are normal, the copyright owner usually will claim statutory damages instead of the actual losses (see 17 U.S.C. § 504). These statutory damages may reach as high as \$30,000 per occurrence, or up to \$150,000 per occurrence if the infringement is willful. However, the Copyright Act specifically exempts from statutory damages any employee of a non-profit educational institution, library, or archives, who “believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under Section 107.” In addition to suing for monetary damages, a copyright owner can usually prevent future infringement through obtaining a court injunction (see 17 U.S.C. § 502).

A member of the University community who has sought permission to use a copyrighted work and has not received such permission (or has received permission contingent upon conditions that the faculty or staff member considers inappropriate) may request a review of the matter by the Office of General Counsel. If upon review the General Counsel determines that the proposed use of the work is permitted by the copyright law, the General Counsel will so advise the faculty or staff member.

Under Section 6.8 of the Bylaws of the Board of Regents pertaining to legal defense and indemnification of faculty and staff members, the University may reserve its rights or refuse to provide a defense to a faculty or staff member if the claim or demand does not arise out of an alleged act or omission in the course or scope or duties of employment of the requesting individual or that the act or omission complained of amounted to malfeasance in office or willful and wanton neglect of duty. The failure of a faculty or staff member to secure the permission of a publisher of copyrighted material in a situation where this policy would clearly indicate that securing such permission would be necessary will be viewed by the Office of General Counsel as such an example of unprotected conduct.

II. PUBLIC DOMAIN

Works that are no longer protected by copyright are in the public domain, meaning that they are free for anyone to use without the consent of the author or prior owner of the copyright to the work. However, if the copyrs ,

publications are documents prepared by an official or employee of the government in an official capacity. Government publications include the opinions of courts in legal cases, Congressional Reports on proposed bills, testimony offered at Congressional hearings and the works of government employees in their official capacities. Works prepared by outside authors on contract to the government may or may not be protected by copyright, depending on the specifics of the contract. In the absence of copyright notice on such works, it would be reasonable to assume they are Government works in the public domain. It should be noted that state government works may be protected by copyright (see 17 U.S.C. § 105). However, the opinions of state courts are not protected. Furthermore, the U.S. Government is the grantee of numerous bequests of copyrighted works, and these works do carry copyright protection.

Copyright Office Circular 22 explains how to investigate the copyright status of a work. One way is to use the search engine found at the Copyright Office website at <http://www.copyright.gov>. Alternatively, one may request the Copyright Office to conduct a search of its registration and/or assignment records. The Office charges an hourly fee for this service. One needs to submit as much information as possible concerning the work in question, such as the title, author, approximate date of publication, the type of work or any available copyright data. Another useful resource for information regarding copyright term and the public domain is Peter B. Hirtle's extensive chart at the Cornell University Copyright Information Center at http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm.

III. THE DOCTRINE OF FAIR USE

From time to time, the faculty and staff of the University of Nebraska may use copyrighted works to supplement research and teaching. In many cases, such use can facilitate the University of Nebraska's mission; that is, the development and transmission of information. Included within the Copyright Act is the doctrine of "fair use" which allows, under certain conditions, the copying of copyrighted material without the prior permission of the owner. It is critical for members of the University community to understand and not abuse the rights of use allowed under the doctrine of fair use. The following guidelines explain the University's position concerning the "fair use" of copyrighted materials by members of the University community – faculty, staff, administration and students.

A. Definition and Purpose of Fair Use

As previously noted, the Copyright Act defines the rights of a copyright owner and how they may be enforced against an infringer. The doctrine of fair use essentially provides for the limited use of copyrighted materials without the consent of the owner for certain socially important purposes such as scholarship, research, education, commentary, criticism and news reporting.

B. Application of Fair Use

The doctrine of fair use does not give members of the University community a blanket exemption to use copyrighted works, and it should not be viewed as a license or affirmative grant of rights to use a copyrighted work. Rather, a determination of whether or not the use of a work

constitutes a fair use hinges on an analysis of the proposed use under a four-factor test codified at 17 U.S.C. § 107. Unfortunately, while the Act lists these four general factors under the heading of “fair use,” it provides little in the way of specific directions for what constitutes fair use. These four factors are rather vague and any analysis of fair use will depend largely on the facts of each particular case. Each of the four factors is to be given equal weight, and in some instances, two individuals applying the same facts to these four factors can reach opposite conclusions regarding whether or not the use is fair.

The following four factors are set forth in 17 U.S.C. § 107:

1. What is the purpose and character of the use?

In other words, is the use of the work commercial in nature or is the use for non-profit, educational purposes? Commercial uses are generally not favored under fair use, whereas non-profit educational uses are favored. However, the simple fact that a use is of a non-profit, educational nature does not in and of itself mean that the use is fair. A more important determination involves whether or not the use is transformative, or makes use of the work in a manner other than that for which it was created. A use is transformative if it adds something new to the work, with a further purpose or of different character.

will be made of a work, or if the use would significantly impair the market for the work, this factor will not favor fair use. However, if there is no efficient or affordable licensing mechanism available for the work, if the use would have no significant effect on the market or potential market for the work, if the work is not commercially available in the necessary format (i.e. digital) and/or if the user has lawfully obtained a copy of the work, this factor will weigh in favor of fair use.

Given the vagueness of the doctrine of fair use, the Copyright Act contains specific provisions which grant additional rights to libraries and insulate employees of non-profit educational institutions, libraries, or archives from statutory damages for infringement where the infringer believed or had reasonable ground to believe the photocopying was a fair use of the material (see 17 U.S.C. § 504 (c) and (2)). While the fair use provisions are admittedly ambiguous, any employee who attempts to stay within these guidelines should have an adequate good faith defense in the case of an innocently committed infringement.

Appendix A of this Memorandum contains a checklist to be used when analyzing the use of a work under the doctrine of fair use.

6. To the extent technologically feasible, measures must be taken to protect the work from further distribution outside the class and to prohibit retention of the work by the students; and
7. Copies of the work can only be made available to students for so long as is reasonably necessary to complete the transmission of the information to the students (for example, the duration of a class session).

All material displayed under the TEACH Act must contain the following notice:

The materials on this course website are only for the use of students enrolled in this course for purposes associated with this course and may not be retained or further disseminated. The materials on this course website may be protected by copyright, and any further use of this material may be in violation of federal copyright law.

The TEACH Act does not permit the following:

punishment for a violation of the DMCA. However, the anti-circumvention language of the DMCA only applies to digital content to which a technological protection measure has been applied. University faculty and staff are encouraged to make use of analog media or to use only

The use of computing resources for any purpose other than a purpose for which they are intended is an act of misconduct. Misuse of computers shall include: ... Violating copyright laws or license restrictions with respect to the copying or use of computer programs, data, materials or information.

2. University of Nebraska-Omaha

Paragraph 8.e. of the UNO Student Code of Conduct defines “computer related misconduct” as including the following:

Violating copyright laws or license restrictions with respect to the copying or use of computer programs, data, materials or information.

3. University of Nebraska-Kearney

Paragraph 17.b. of the UNK Student Code of Conduct defines “unauthorized use of computing resources” as including the following:

Unauthorized transfer of a file.

4. University of Nebraska Medical Center

UNMC’s Policy on Appropriate Use of Information Technology Resources prohibits the use of UNMC computing resources for the unauthorized downloading of copyrighted materials from the internet. In addition, the UNMC Student Handbook states the following:

Students are required to observe appropriate use of computers. Downloading music, video and text without permission is not allowed.

VIII. OBTAINING PERMISSION TO USE COPYRIGHTED MATERIAL

Unless a work is in the public domain or the use of the work for educational purposes is clearly allowable under fair use, the TEACH Act or face-to-face teaching activities, permission to use the work must be obtained from the owner or copyright holder. A request to use a copyrighted work can usually be sent to the permission department of the publisher of the work. The request can be in the form of a letter and should contain the following information, if known:

1. Title, author and/or editor, and edition of the work;
2. Exact material to be used;
3. Number of copies to be made;
4. Intended use of the work (e.g. educational, non-profit);
5. Form of distribution (e.g. photocopies, digital distribution via internet, etc...);
6. Whether the material will be sold as part of a coursepack; and

7. The duration of the use (e.g. academic semester, term of years, etc...).

The request should be acknowledged and agreed to by the author or owner before the work is used. All documentation of permissions received should be maintained at the academic department in accordance with University policies.

Please contact the Office of General Counsel at 472-1201 or your campus copyright specialist with any questions you have regarding this Memorandum or copyright issues in general.

