

# *IS MY USE LAWFUL?*

## **COPYRIGHT PROBLEM ANALYSIS AND RISK ASSESSMENT**

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In order to determine whether your use of material is lawful ask the following questions:

### **1. Is the content protected by copyright? If the work is not protected your use is lawful under the copyright law.**

▶ Some content is not protected by the copyright law:

■ Works lacking the requisite “creative” authorship such as facts (data), an alphabetical listing of names or a title are not protected by copyright for example (though a title or a phrase may be protected by trademark).

■ Works of the federal government and works for which the copyright has expired (works published before 1923 for example) are in the public domain.

Caution: Copyright protection restored for qualifying foreign works!

▶ Does the work appear to be original?

▶ Does the work fall into the following categories: ● literary works including computer programs, ● musical works (nondramatic), ● dramatic works (including music), ● pantomimes and choreographic works, ● pictorial, graphic and sculptural, ● motion pictures and other audio-visual works, ● sound recordings, ● architectural works, ● compilations, collective and derivative works.

▶ Is the work fixed in a tangible medium, i.e., written down, recorded, etc.?

If the answer to each of the preceding three questions is yes, proceed to question 2.

### **2. Is my use in conflict with an exclusive right of the copyright owner? If not in conflict with an exclusive right, e.g., a private performance of a DVD in your living or dorm room, your use is lawful under the copyright law.**

▶ Are you **reproducing** the work (photocopying, scanning, downloading a textbook)?

▶ Are you making a **public display** of the work (showing a protected map or graph within a PowerPoint presentation on multiple workstations in the lab or on D2L, Blackboard, Moodle, etc.)?

▶ Are you making a **public performance** of the work (singing a song to your class or playing a DVD on a cafeteria monitor).

▶ Are you making a **derivative** use of the work (developing a Harry Potter trivia game or rearranging a musical score so it is easier to play by the freshman jazz ensemble)? The right to make derivative works is a right of the copyright owner! To

impact the derivative right the use must result in the creation of a work, see question 1. For example, singing a song on stage implicates the public performance right in the musical work, to make a recording of the performance, implicates the derivative right. Some works are not derivative based on the recent case law: book review, outline, guidebook, or lexicon.

▶ Are you making a **public distribution** (“akin” to publication but includes circulation of both unpublished and published content, i.e., passing out a draft paper prepared by a colleague to each student)?

If you are making any of the above uses, i.e., your answer is yes to one or more of the above uses, proceed to question 3.

**3. If so, is there a specific exception in the copyright law to allow for the use? If so then your use is not infringing and allowed under the copyright law.**

▶ Section 109 allows faculty, staff and students (and their libraries) to make a public distribution of a work if the copy or phonorecord of the work is lawfully made. (You may need to apply fair use, see below, in order to make that determination.)

▶ Section 110(1) allows faculty and students to make public displays and performances of a work in a F-2-F classroom, subject to certain conditions: ●use of the work is related to the class subject matter for a specific class or course (the Nursing Club does not qualify, but NURS 259, Principles of Community Health Nursing (SXU) does qualify), ●is use of the work integrated into the instructional moment and ●performance of an audiovisual work (VHS, DVD, etc.) must be from a lawfully made copy.

▶ Section 110(2) allows faculty and students to make public displays and performances of a work in a P-2-P, broadcast, streamed or other online classroom setting, i.e., posting material on the campus D2I, Blackboard, etc. system or on a faculty member’s web site, subject to certain conditions: ●use of the work is related to the class subject matter for a specific class or course (the Nursing Club does not qualify, but NURS 351, Pathophysiology and Psychopathology I (Decker School of Nursing) does qualify), ●is integrated into the instructional moment, ●use must be from a lawfully made copy (you may need to apply fair use or section 112(f), see below, in order to make that determination), ●content must employ password protection or other mechanism to ensure only those students in the class have access to that particular content.

■Other institutional requirements apply: ●the entity must be accredited, ●adopt and implement policies, ●provide copyright information and outreach, ●use copyright notices and ●employ technological protection measures such as Real Player “secret handshake” or similar technology to restrict further retention and dissemination.

■Do not display more than you would in the F-2-F classroom, and performance of dramatic works (including music), pantomimes and choreographic works, motion pictures and other audio-visual works, sound recordings must be limited to a “reasonable and limited amount” (in the words of the statute), i.e., something less than 100%.

■Do not undertake any activity that could to an outside observer be reasonably expected to interfere with technological protection measures already in

place to prevent further retention and dissemination, e.g., disable the CSS code on a DVD.

■ E-course-packs, textbooks or in the words of the legislative history “unrelated background material” are not covered by section 110(2)!

▶ Section 112(f) allows a faculty or student to reproduce a copy or phonorecord in order to facilitate a section 110(2), see above, use, subject to certain conditions: ● the copy or phonorecord is retained and used within the institution, ● no further copies or phonorecords are reproduced and ● the copy or phonorecord is “used solely for transmission authorized under section 110(2).

■ If the work is digitized (initial format was analog and the work was for example, scanned), then in addition the amount reproduced is limited to the amount authorized to be displayed or performed under section 110(2), see above.

■ If the work is digitized (initial format was analog and the work was for example, scanned), digitization may occur only if there is no digital version available to the institution, i.e., check the marketplace (the statute does not indicate where to check but this logical interpretation is made by the author) or the only version that is available is subject to technical protection measures (like the CSS code on a DVD that prevents reproduction).

If the sections above do not apply, proceed to question 4.

#### **4. Does the use qualify as a fair use? If so then your use is not infringing and is allowed under the copyright law.**

▶ Section 107 allows faculty, staff and students to make a fair use of any work. To assess whether fair use applies, ask the following questions (the four fair use factors).

■ What is the purpose and character of the use: is the use commercial vs. non-commercial use; if it is commercial is the use transformative rather than substitute or supersede the need for the work? Based on recent case law, the following purposes are transformative: ● parody, ● satire, ● illustration, ● example or historical reference point, ● criticism, ● review, ● evaluation or assessment (but not to “try it before you buy it”), ● detection of plagiarism, and ● archiving.

■ What is the nature of the work: use of fact-based works (“thin” copyright) such as a news article does favor fair use, whereas use of very creative works (“thick” copyright) such as a David Mamet play does not favor fair use; and use of published works (text of the *Crucible*) favors fair use whereas use of an unpublished work (private letters of Arthur Miller) does not favor fair use.

■ What is the amount and substantiality of the work taken: if the use is transformative are you limiting the amount used to that which is necessary in order to accomplish that “good” purpose (analyze not rationalize!); if the use is not transformative stay within ranges established by the case law, e.g., 5% or less of non-dramatic literary works; do not take the “heart of the work” of the work, e.g., the surprise ending of a “who-done-it” mystery.

■ What is the effect of the use on the present or potential market or value of the work: consider primary (buying the book) and secondary (reprinting the book) including derivative (turning the book into a stage play) markets. Some markets may be more sensitive than others, e.g., educational or documentary film

markets. (Remember, transformative uses tend not to impact a derivative market. For example, a book review is a complimentary rather than a transformative use, though in a negative sense. A book review does impact a likely market of the copyright owner, even though the review might affect sales.)

■All four factors must be considered. Consider relationships between the factors such as factors 1 and 3 and 1 and 4 and the interrelationship between a “good” or in the alternative a “bad” purpose (first factor) and the third or third and fourth factors.

If fair use does not apply, proceed to question 5.

**5. Are other options available: contract (check license provisions for allowances as well as additional restrictions compared to the copyright law!) or obtain permission? If not then proceed to question 6.**

**6. If other options are not viable, risk of infringement remains. Assess the level of risk and your comfort level with that risk, including whether your use is subject to the reasonable belief standards (non-infringing or fair use reproduction) of section 504 (general: partial damage remission and specific: complete damage remission) and general good faith that might otherwise limit your damage liability? One approach to risk assessment is represented by the following three questions**

▶ Legal Risk is a combination of several factors: the potential for liability, the likelihood of litigation (or threat of litigation as well as the possibility of settlement) and the impact of that litigation (or settlement).

■What is the potential for liability (“Can I be sued?”): ●Direct and vicarious liability are strict liability. ●Contributory liability requires knowledge or awareness of the infringement on your part?

■How likely is litigation (“Will I be sued?”). ●Practical: What is the likelihood that the infringement will be discovered? ●Legal: Is the work registered?

■What remedies are available (“What’s the bottom line?”): ●Consider actual or statutory damages and the timing of registration. ●Consider costs and attorneys fees and the timing of registration.

▶ Determining the so-called “bottom line” asks “what remedies are available to the copyright owner” and how likely is that award to be made? What mechanisms or circumstances might mitigate those awards?

■Is damage remission (partial or complete under section 504 or foreclosure of all monetary compensation including costs and attorneys fees under section 512) possible?

■Can other demonstrations of good faith influence the decision-maker(s) (judge and/or jury) to reduce the award of statutory damages or costs and attorneys fees, or in the alternative enhance statutory damages for willful infringement (quintuple damages!)? (Assessing the potential monetary outcome is critical as this may persuade to pursue or dissuade a copyright owner from pursuing legal remedy.

■Use this knowledge to your advantage!