

APPENDIX C: Copyright and the Fair Use Exception Policy
Approved 08/24/2011

The Basics

Nature of Copyright

Under the U.S. Copyright Act of 1976 (as amended, the “Copyright Act”), copyright protection subsists in “original works of authorship fixed in any tangible medium of expression. A work is an “original” work of authorship when it is independently created by the author (as opposed to copied from other works) and possesses at least some minimal degree of creativity. Mere facts do not have the requisite originality: for example, a list of names and numbers in a phone book or a basic calendar are not protected by copyright. Artwork illustrating a directory or calendar, however, is sufficiently creative. A work is fixed in any tangible medium of expression when it is preserved in such a manner that it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Copyright protection does *not* extend to any “idea, procedure, process, system, method of operation, concept, principle or discovery.”

Works of authorship include the following categories:

- (1) literary works, including computer programs;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound, and
- (8) architectural works.

A work need not be published in order to be copyrighted (i.e., protected by copyright). Likewise, since March 1, 1989, a copyright symbol © is not necessary to copyright a work. Nor is registration of the copyright with the Library of Congress necessary for a work to be copyrighted. Copyright arises automatically on creation of a work, provided the work meets the requirements of originality and fixation described above.

Rights of Copyright Owners

Under Section 106 of the Copyright Act, and subject to the exceptions in Sections 107-121, the owner of copyright has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly, and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Copyright Duration and the Public Domain

In addition to the exceptions in Sections 107 – 121, the rights enumerated in Section 106 are also limited in duration. The duration of copyright varies depending on the type of work and the date on which the work was first created, registered or published. In general, works created after 1977 have a copyright term of the life of the author plus 70 years.

Once a work's copyright term expires, the work enters the public domain. This means that it may be copied or modified without permission. Some works automatically fall into the public domain. These include:

- (1) Ideas and facts;
- (2) Words, names, numbers, symbols, signs and rules of grammar and diction;
- (3) Scientific principles, theorems, mathematical formulae, laws of nature;
- (4) Works of the United States Government produced by government employees, including speeches of the President, IRS forms, court rulings and legislation, and
- (5) Works in which the copyright owner expressly waives copyright.

The University assumes that anyone who wishes to pursue whether a work has entered public domain will do so themselves. If you cannot determine if an item is in the public domain, assume it is not. If you wish to use a work not in the public domain, you may still do so in some circumstances, because of the fair use doctrine.

For a chart outlining copyright duration and the public domain in the United States, see <http://www.copyright.cornell.edu/resources/publicdomain.cfm>.

Infringement

A copyright owner has the right to institute legal action against individuals who violate any of the exclusive rights of the copyright owner. Although not required for creation of copyright, registration of copyright with the Library of Congress is generally required for litigation and other enforcement of copyright. In addition to liability to the copyright owner, an infringer may also be criminally liable under certain circumstances.

Working with Fair Use

Section 107 of the Copyright Act allows “*fair use*” of copyrighted material under limited circumstances without infringing copyright. According to the law:

The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by [section 106], for purposes such as criticism, comment, news reporting, *teaching* (including multiple copies for classroom use), *scholarship*, or *research*, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -

1. The *purpose* and *character* of the use, including whether such 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 potential market or value* of the copyrighted work.

At St. Catherine University, potential users of copyrighted works must make their own fair use analysis in good faith. Each factor can be analyzed on a continuum:

1. *Purpose and Character*: Non-profit and educational use is most fair, while for profit use is least fair.
2. *Nature of the copyrighted work*: Factual, non-fiction, documentary and published works are most fair; highly creative, fiction, poetry, art, and unpublished works are least fair.
3. *Amount and Substantiality*: Use of a small amount or an excerpt that is not the heart of the work is most fair, while copying of an entire work or the “heart of the work” is least fair.
4. *Effect on the market*: A use that is transformative (i.e. uses the work in a new way and/or serves a new market from the one the original was intended to serve) is most fair, while a use that competes with, or takes away sales from, the original is least fair.

If the analysis comes down heavily on the side of fairness in all four factors, go ahead and copy or reproduce the portion of the item needed (but no more than needed). In most cases, however, the analysis will reveal a mixed or unclear situation. Discretion should be exercised, keeping in mind that the concept of fair use was intended to further research, education, and scholarship, and it needs to be exercised or its domain will shrink, to the detriment of society. But remember, an educational use is only one factor, so *fair use does not offer free reign to unlimited copying for those at educational institutions, including St. Catherine University.*

Many resources are available to aid in the fair use analysis. For example, see <http://copyright.lib.utexas.edu/copypol2.html>.

Classroom Copying Guidelines

When the *Copyright Act of 1976* was passed, it was apparent that guidelines were needed for educational institutions and their fair use of copyrighted works. Congress asked a variety of groups including librarians, educators, publishers, and authors to create workable guidelines for educators, and the “Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions” was created. These guidelines are not laws, but agreed upon interpretations of the law, representing a reasonable compromise between the needs of educators and librarians vs. those of publishers and authors.

As digital technology has entered the academic landscape, the various interested parties have continued to attempt to create agreed upon guidelines in these new electronic realms, with mixed success. This process is ongoing, and future differences may eventually be determined through case law. At this point in time, non-profit academic institutions that have made good faith efforts to follow the following guidelines have not faced legal recriminations. At St. Catherine University the guidelines delineated in the sections below should be followed.

Print Materials

A *single copy* of the following items may be made for a teacher's scholarly research or use in teaching or preparation to teach a class:

- A chapter from a book;
- An article from a periodical or newspaper;
- A short story, short essay or short poem, whether or not from a collective work, and
- A chart, graph, diagram, drawing, cartoon or picture from a book, periodical or newspaper.

Multiple copies (not to exceed more than one copy per pupil in a course) may be made by or for a teacher giving a course for classroom use or discussion, provided that:

- The copying meets the tests of *brevity* and *spontaneity* as defined below; and
- Meets the *cumulative effect test* as defined below, and
- Each copy includes a notice of copyright.

Brevity

1. Poetry (a) A complete poem if less than 250 words and if printed on not more than two pages or (b) an excerpt of not more than 250 words from a longer poem.
2. Prose (a) Either a complete article, story or essay of less than 2,500 words or (b) an excerpt from any prose work provided the excerpt is 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 "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or an unfinished prose paragraph.)
3. Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

4. "Special" works: Certain works in poetry, prose or "poetic prose" which often combine language with illustrations and are intended for children and/or a more general audience fall short of 2,500 words in length. Such "special works" may not be reproduced in their entirety. However, an excerpt comprising not more than two of the published pages and not more than 10% of the words found in the text may be reproduced.

Spontaneity

1. The copying is at the instance and inspiration of the individual teacher, 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

1. The copying of the material is for only one course in the school in which the copies are made.
2. Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
3. There shall not be more than nine instances of such multiple copying for one course during one class term. (The limitations stated in "ii" and "iii" above shall not apply to current news periodicals, newspapers and current news sections of other periodicals.)

Prohibitions

1. Copying may not be used to create, replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts there from are accumulated or are reproduced and used separately.
2. There shall be no copying of or from works intended to be "consumable" in the course of study or teaching – such as workbooks, exercises, standardized tests, test booklets and answer sheets.
3. Copying may not
 1. substitute for the purchase of books, publisher's reprints or periodicals;
 2. be directed by higher authority,
 3. be repeated with respect to the same item by the same teacher from term to term.
4. No charge may be made to the student beyond the actual cost of the photocopying.

Any classroom copying that falls outside these guidelines requires permission from the copyright holder. See the Bookstore or one of the campus libraries for help with this process.

Course Packs

Course packs are outside of the fair use guidelines and thus permission is required to include each item in a course pack (unless it is in the public domain). The Bookstore obtains these permissions and handles all royalty payments. As all copyright needs to be cleared before the

packet is printed, it is critical to follow Bookstore deadlines. The Bookstore communicates directly with the professor in cases of denied or delayed items.

*Copyrighted Materials Made Available Using Course Management Software
(e.g., BlackBoard, Moodle, or D2L)*

Copyrighted works made available on Blackboard or other similar course management software systems must follow the same rules as those for in-person classroom copying. The same rules of *spontaneity* and *brevity* are in effect as those outlined above in the classroom copying of print materials section. Uses on *BlackBoard* beyond those allowed in the classroom copying guidelines above need the permission of the copyright holder.

For more information about copyright and course management software, see <http://www.copyright.com/Services/copyrighthoncampus/content/cms.html>

Use of Materials Printed from the Internet for Classroom Use,
or Copied and Pasted Into Blackboard Courses

Assume that the content of internet web sites is copyrighted, and then follow the same guidelines for copying from the site that you would for traditional print copies for classroom use.

Linking to Web Sites in Syllabi, Course Management Software, Emails, Web Pages, etc.

Unless a web site specifically forbids users to link to it, links may be included in an educator's syllabi, Blackboard materials, emails to students, college or personal web page, etc. Making the link itself is not a violation of copyright law because no copy has been made. If the *content* of the web page is copied and pasted into syllabi, Blackboard, emails, etc., however, the guidelines for traditional print copies for classroom use apply.

Use of Videos and DVDs in the Classroom

Section 110(1) of the Copyright Act grants a specific exemption from the exclusive rights of a copyright owner for instructors showing motion pictures or other audiovisual works in the course of face-to-face teaching, so long as the instructor or institution uses a lawfully-purchased or rented copy. Instructors are prohibited from editing, expurgating, or modifying the content, though the instructor may show selections from a work, rather than the entire work. Other uses of videos or DVDs should be analyzed under the fair use doctrine.

Streaming Video

St. Catherine University purchases a number of streaming video subscriptions for classroom use. Contact Media Services on your campus for help identifying what is available.

Off-Air Taping of Television Programs for Classroom Use

The “Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes” state that, in general, a copy of a television program must be shown to a class within ten days after the copy is made. The copy can be kept an additional 35 days for evaluation, but then must be erased. It may only be used for one class and for one term, and cannot be transferred or re-taped for further use. The copy cannot edit the program or remove any advertisements, and it may be used for educational purposes only. A copyright notice must be included on the copy shown. Contact the Media Services Department with any questions.

For more information on the use of television programs in the classroom, see http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter0/0-e.html

Online Distance Education and the TEACH Act

The Technology, Education and Copyright Harmonization Act (“TEACH Act”) of 2002 amended the Copyright Act of 1976 to give educators at accredited nonprofit educational institutions certain rights to use copyrighted works and performances in connection with distance learning classes. Under the TEACH Act, the following are explicitly:

1. Performances of non-dramatic literary works;
2. Performances of non-dramatic musical works;
3. Performances of any other work... in “reasonable and limited portions,” and
4. Displays of a work in an amount comparable to that which is typically displayed in the course of a live classroom session.

Several conditions must be met in order to take advantage of the TEACH Act, including that St. Catherine University have a copyright in place. The Act also has several limitations.

For further information, see <http://copyright.lib.utexas.edu/teachact.html> and <http://www2.lib.udel.edu/subj/copyright/resguide/policy.pdf>.

Note: The TEACH Act does not substitute for fair use or the guidelines for classroom copying, which may also be applied to an online classroom setting.

Reproduction of Works in Alternate Formats to Accommodate Disabled Individuals

The Chafee Amendment to the Copyright Act of 1976 allows an authorized entity to reproduce or distribute copies or phonorecords of previously published, nondramatic literary works if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities “Authorized entity” is defined as “a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities.

Staff of the University’s O’Neill Learning Center in St. Paul and the Campus Learning Center in Minneapolis coordinates the production of works in alternate formats.

For more information on the Chaffee Amendment, see <http://www.loc.gov/nls/reference/factsheets/copyright.html>.

Use of Music Materials at the College

Copyright for music is extremely complex. In 1976, several groups met and agreed upon fair use guidelines for the use of printed music for educational purposes. These are known as “Guidelines for Educational Uses of Music” and allow:

1. Emergency copying of sheet music when purchased copies have not arrived in time, provided purchased replacement copies are substituted “in due course”;
2. For academic purposes other than performance, multiple copies of excerpts of works, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a section, movement or aria, but in no case more than 10% of the whole work.
3. For academic purposes other than performance, a single copy of an entire performable unit (section, movement, aria, etc.) that is (1) confirmed by the copyright proprietor to be out of print, or (2) unavailable except in a larger work may be made by or for a teacher solely for the purpose of his or her scholarly research or in preparation to teach a class.
4. Printed copies that have been purchased may be edited or simplified, provided that the fundamental character of the work is not distorted, that the lyrics (if any) are not altered, and that no lyrics are added, if none exist.
5. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.
6. A single copy of a sound recording (such as a tape, disc or cassette) of copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher. (This permitted copying pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

The Guidelines prohibit:

1. Copying to create or to replace or substitute for anthologies, compilations or collective works.
2. Copying of or from works intended to be "consumable" in the course of study or of teaching such as workbooks, exercises, standardized tests and answer sheets and like material.
3. Copying for the purpose of performance, except as in #1 above.
4. Copying for the purpose of substituting for the purchase of music, except as in #1 and # 2 above.
5. Copying without inclusion of the copyright notice which appears on the printed copy.

Guidelines on the use of musical or spoken word recordings in the classroom, performance rights for copyrighted musical works, or permission to include copyrighted music in multi-media

productions are too complex to be covered in depth in the *St. Catherine University Intellectual Property Policy*. For further information, contact the Media Services Department.

Reproduction of Visual Art

The Copyright Act of 1976 protects works of art including sculptures, graphic art, or photographs. The rules covering art works are the same as those for print as to ownership, fair use, and what falls in the public domain. Exact reproductions of visual art in the public domain are not protected by copyright. If, however, the reproduction contains *additional* indicators of originality, such as a choice of color tones, lighting, camera position and background, the photograph may be original enough to acquire copyright. Thus, the fair use analysis should be performed each time you seek to copy any work that has reproduced an artistic work in the public domain.

Library Copyright Issues

The University follows the guidelines set forth by the National Commission on New Technological Uses of Copyrighted Works (CONTU). They address library photocopying, e-reserves and interlibrary loans.

Library Print and Electronic Reserves

- Books owned by the library or by the course instructor may be placed on reserve in the library, at the request of the instructor. There is no limit on how many books may be placed on reserve for an individual course.
- A single copy of each article will be placed on reserve for a class, unless the class size is extremely large, whereupon up to three copies may be made and placed on reserve by the library for that course. The spontaneity guideline means that the item will be placed on reserve for a maximum of one semester, after which time it will need to be granted copyright permission in any future teachings of that same course. This copyright clearance process is initiated by the library, and transacted by the Bookstore, using the Copyright Clearance Center which obtains permissions and collects royalties from most publishers.
- The library's policy is that a limit of nine of these first-time use photocopied items may be placed on reserve without asking for permission in any given semester. More than nine may be placed on reserve if the academic department to which the course belongs is willing to pay the costs of clearance, which have ranged from free to \$50 per item, depending on the publisher.
- Electronic reserves follow the same guidelines as #s 2-3 above for articles, with the addition that password protection must prevent outsiders from accessing the copied materials.
- Only up to 15% of a particular book can be scanned and put into electronic reserves for any particular course, and only one time. If permission is granted from the publisher, a larger percentage of the book may be scanned into electronic reserve.

- When a course is over, access to the materials on reserve must be removed, though electronic reserve materials may be archived so they will not have to be re-scanned for future usage.

Interlibrary Loan

The library may loan books to other libraries for use by their patrons. The library may also copy from its collection of articles for use by users of other libraries if a copyright notice is attached both to the user's initiating request and to the copied item sent to him/her.

Limits have been agreed upon as to the amount of copying allowed under this circumstance of fair use. For copyrighted journal articles published in the past five years, no more than five articles from a particular journal title may be requested by a library annually. For a sixth or subsequent request, the library must obtain permission to copy from the copyright holder, often paying royalties. Copyright Clearance Center (CCC) is a source commonly used by St. Catherine for obtaining permission.

Library Photocopying and Notices

Photocopying of library materials by the campus community is allowed in the library, as long as a specified notice of copyright is posted at each copy machine and printer, and the use complies with the notice.

Archival Copies

Section 108 of the Copyright Law of 1976 allows libraries to make up to three archival or preservation copies of the materials they own that are copyrighted but are deteriorating, lost, or stolen. Copies must include a copyright notice and be available to those who wish to use the material for research. If the preservation is done in digital form, the new digital copies may not be distributed electronically outside of the library.

Fair Use Rules in the Non-Educational Context

Not all uses of copyrighted materials by members of the University involve classroom or educational uses. If copyrighted items are copied for business purposes, fund-raising or other such activities by University administrators, their use may not be a "fair." In that case, permission must be obtained.

Showings of Commercial Films for Entertainment Purposes

Copyright issues also arise outside of the classroom or the library, especially in the area of on-campus entertainment, such as the showing of commercial videos or DVDs to audiences of students in public or quasi-public spaces. For example, clubs and other student organizations may wish to screen movies rented from video outlets. Generally, a performance license is required.

Peer-to-Peer File Sharing (“P2P”)

Members of the St. Catherine University community who use the internet to engage in substantial P2P file sharing of copyrighted materials like recorded music or commercial motion pictures may be subject to serious liability. The University assumes no responsibility for, and does not defend, members of the University who engage in illegal file sharing using the University’s computers or computer network. Repeat offenders of this policy may have their computer privileges revoked by the University.

For more information on file sharing issues see <http://www.riaa.com> or <http://www.educause.edu/Resources/P2PPolicyUpdatesFromCampustoCo/162976>.

Computer Software

Commercially purchased software is often licensed to the purchaser for use on only a limited number of computers, often one. Loading this software onto other machines is illegal, and the University will not support this illegal copying. It may also be illegal to reproduce computer manuals or documentation. For more information on copyright and computer software, see <http://www.siaa.net>.

Digital Millennium Copyright Act

The Digital Millennium Copyright Act (“DMCA”) of 1998 amended the Copyright Act of 1975 to address copyright issues raised by the internet. For more information about the DMCA, see <http://www.copyright.gov/legislation/dmca.pdf> and <http://gseis.ucla.edu/iclp/dmca1.htm>.

Among other provisions, the DMCA protects web site owners and operators who comply with its terms against claims of copyright infringement for publishing otherwise infringing materials on their web sites. To comply with the DMCA, the University must post on its website the procedures for notifying the University’s designated agent of an infringement claim, and the University’s agent must remove the infringing material when it receives a complaint. **[Note: The SCU Intellectual Property Officer or its designated copyright agent must be identified, and the procedures posted on the website. The agent must also be registered with the Copyright Office.]**

Obtaining Copyright Permissions

St. Catherine University holds an Annual Copyright License from Copyright Clearance Center (CCC) that enables everyone at St. Catherine to reproduce and distribute copyrighted content, in both print and digital form, across campuses. For permission to use materials not included under the policy, St. Catherine participates in contractual arrangements with several intermediary companies that can quickly obtain copyright permissions and arrange royalty payments when fair use limitations are exceeded. These arrangements are handled through the Bookstore and the Library.

For more information about CCC at St. Catherine University go to <http://libguides.stkate.edu/copyrightlicense>.

Appendix C Addendum: Public Domain Status of Published Works

| Time of Publication | Conditions | Public Domain Status |
|----------------------------|-------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------|
| Before 1923 | None | Already in public domain |
| 1923 - 1978 | Published without a © copyright notice | Already in public domain |
| 1978 - 1/3/1989 | Published without a © notice, and without subsequent registration | Already in public domain |
| 1978 - 1/3/1989 | Published without © notice, but with subsequent registration | 70 yrs after death of author, or if work of corporate authorship, the shorter of 95 yrs. from publication, or 120 yrs. from creation |
| 1923 - 1963 | Published with © notice, but copyright was not renewed | In public domain |
| 1923 - 1963 | Published with © notice, and copyright was renewed | 95 yrs after publication date |
| 1964 - 1978 | Published with © notice | 95 years after publication |
| 1978 - March 1, 1989 | Published with © notice | 70 yrs after death of author, or if work of corporate authorship, the shorter of 95 yrs from publication, or 120 years from creation |
| After 1 March 1989 | None | 70 yrs after death of author, or if work of corporate authorship, the shorter of 95 yrs from publication or 120 yrs from creation |

Thus, for example, anything published before 1923 is in the public domain, and can be used at will. For items published between 1923 and 1963 the number which have fallen into the public domain is estimated at over 85%, but each item would need to be checked with the U.S. Copyright Office to ensure that it is free to copy (Carrie Russell, *Complete Copyright: An Everyday Guide for Librarians*. Chicago: American Library Association, 2004, p.10).