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What you need to know about Copyright Law and University of Denver Fair Use Guidelines pertaining to electronic information technology

At the request of John Coombe, Vice Chancellor for Intellectual Property and Events, on October 20, 2001, the Board of Trustees approved a set of University guidelines that establish particular expectations for electronic posting of images and excerpts that are held in copyright by others. The full text of these guidelines is available at:

http://www.du.edu/intellectualproperty/fair_use.html

At the Board meeting, I voiced my concern that these guidelines, which directly affect all faculty using web-based learning, had not been discussed in FEAC (the Faculty and Educational Affairs Committee of the Board of Trustees) or more broadly with faculty. I challenged this top down process with concern that approval of University policies without the necessary communication that drives effective implementation is meaningless and potentially dangerous for the faculty. Such action further widens the divide between the

“corporate University” and the faculty who are the “true University.”

On November 14, 2001, a subset of the Senate Executive Committee met with Vice Chancellor Coombe. From this conversation we understand that more substantial discussions are being planned (possibly in the form of a Fair Use workshop/seminar). But in an effort to facilitate publication of this information to you in a more timely fashion, portions of the Fair Use guidelines are presented below with some comment about interpretation and application.

Four general guidelines are built into copyright law that help one determine whether or not one’s use of another’s proprietary material qualifies as Fair Use. These rules apply to both electronic media and more traditional means of presentation.

Copyright Law Guidelines:

1. *“The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. This first factor usually weighs in our favor because we are a nonprofit university and we are making nonprofit educational uses of materials copied for teaching purposes.”*
2. *The nature of the copyrighted work. There is a spectrum of analysis relating to the nature or character of the work. Generally, the more factual or information oriented the work, the more easily it fits into a fair use context. Conversely, the more fanciful or creative the work, the less easily a fair use argument can be made. This factor may, however, be outweighed by other factors.*
3. *The amount and substantiality of the portion used in relation to the copyrighted work as a whole. Generally, one may only use a “small” portion of the work to be copied. This factor may weigh against fair use if each article or component is considered a whole work. Generally, as the amount copied increases, fair use decreases, but our status as a nonprofit entity has a mitigating effect upon this factor.*

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4. *The effect of the use upon the potential market for or value of the copyrighted work. Use of the Excerpt must not act as a material detriment to the potential market or value to the owner of the original work. This factor is changing as the market for permissions and reprints grows. This factor may weigh against a finding of fair use if publishers can show that they are losing licensing and royalty fees as a result of copying.*

(Fair Use – University of Denver Guidelines)

As approved by the Board of Trustees, the University's Fair Use Guidelines stipulate four requirements for use of electronic media to display or transmit proprietary materials such as excerpts from written text, music, photographs, or motion pictures/video clips in class related presentations. The use of images is a particularly sensitive issue and should be carefully considered.

Fair Use Requirements:

1. *“These guidelines for use of Excerpts are distributed to faculty, students, and relevant staff members involved in the course or project and notice must be provided to students that Excerpts used in connection with the course may be subject to copyright protection. When possible, a “click-through” feature will be required to register the user’s understanding and agreement to comply.*
2. *The performance or display of the Excerpt is made by, at the direction of, or under the actual supervision of the instructor as an integral part of a class session or assignment, and thus, the performance or display is directly related, and of material assistance, to the teaching mission.*
3. *The transmission is made solely for, and the reception of such transmission is limited to, students officially enrolled in the course for which the transmission is made (i.e. Web sites are password protected with access limited to students enrolled in the class).*
4. *Retention of the work in accessible form by all recipients is limited to the length of the class session term.”*

(Fair Use – University of Denver Guidelines)

The Vice Chancellor, on behalf of “the University”, is quick to remind us that we have personal liability for infringement. For assistance in interpreting a particularly difficult Fair Use issue, you are instructed to “contact your Department or Division Head or the office of the Vice Chancellor for Intellectual Property and Events. You may also

contact the office of the Dean of our library system if the matter pertains to the reserve system.”

What do these guidelines mean in more practical terms for electronic transmission to students?

Requirement #1:

We are required to acknowledge copyright with a mechanism by which the user acknowledges his/her compliance to Fair Use guidelines. The Senate has expressed its concern that these electronic modules must be made available to faculty at no cost. Provision of these modules becomes the “University’s” responsibility.

Requirements #3 and #4:

Faculty must be careful with what is posted with open access through a personal homepage on the DU server. Web sites that are open and freely accessible to anyone should contain ONLY ORIGINAL WORK. If excerpts (especially images) are used, the access must be limited to enrolled students only for the duration of the class term. In most instances, Blackboard may be the best tool to satisfy this requirement.

Finally, Department Chairs and Deans of our various schools and programs must get involved, since they bear responsibility for the implementation of these guidelines.

I invite each of you to carefully consider your responsibilities in this matter.

Susan E. Sadler,
Faculty Senate President