



Copyright Law and Copyright Infringement Policy

New York Law School is issuing the following Policy in relation to its implementation of the federal Higher Education Act (specifically, 20 U.S.C. § 1092(a)(1)(P) and regulations issued in furtherance thereof, codified at 34 C.F.R. § 668.43 (a)(10). This Policy describes the basics of federal copyright law; steps that must be taken to avoid copyright infringement, which is a concern on any campus; and the legal penalties and school disciplinary penalties and procedures for violation of this Policy. Please be mindful of the information contained herein throughout your law school career and employment, and please contact the Office of the General Counsel if you have any questions.

Under copyright, authors have the right to control the use of their work subject to exceptions permitted under the law. If the use exceeds such exceptions, this is considered copyright infringement, which can result in the infringer paying money damages to the copyright owner (civil liability) and/or going to prison (criminal liability).

Copyright infringement is the act of violating any of a copyright owner's exclusive rights (see **Basics**) granted by the federal Copyright Act. Three elements must be in place for infringement to occur:

1. The copyright holder must have a valid copyright.
2. The alleged infringer must have access to the copyrighted work.
3. The duplication of the copyrighted work must be outside the exceptions (see **Fair Use**).

The legal penalties for copyright infringement may include:

1. The infringer pays the actual dollar amount of damages and profits.
2. The law provides a range from \$200 to \$150,000 for each work infringed.
3. The infringer pays for all attorney's fees and court costs.
4. A court can issue an injunction to stop the infringing acts.
5. A court can impound the illegal works.
6. The infringer can go to jail.

Community members found engaging in the unauthorized distribution of copyrighted material also may be subject to discipline consistent with the New York Law School Student Code of Conduct or policies and procedures governing workplace misconduct.

Copyright is all about balancing the rights of authors with the rights of the public to use the work without seeking permission or paying royalties.

To understand your rights and responsibilities under the copyright law, review the basics and the exceptions.

The Basics

What is copyright?

Copyright is a federal law codified at [Title 17 of the United States Code](#). Copyright is the right of authors to control the use of their work for a limited period of time. A copyrighted work must be an original work of authorship which is fixed in a tangible medium of expression.

Where did copyright law originate?

Copyright law originated with the United States Constitution. Article I, Section 8 of the Constitution states that "Congress shall have the power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

- The [U.S. Copyright Office of the Library of Congress](#) is responsible for overseeing the administrative functions of the copyright law.
- Congress enacts copyright laws.
- The Federal courts interpret and enforce the copyright law.

Why is copyright law important?

Copyright law provides exclusive rights to authors to protect their work, but these rights are for a limited period of time. The Framers of the U.S. Constitution wanted to incentivize authors to create new works which would promote learning, but also balance the authors' rights with the rights of the public to use the works freely under certain conditions.

When does a work become copyrighted?

Under the U.S. Copyright Act, a work is protected if it is original and when it is fixed in a tangible medium of expression. After March 1, 1989, works were no longer required to include a copyright notice (© or the word "copyright," the author's name, and the year of publication). However, it is advisable to affix a copyright notice to works so that the owner of the copyright can be easily identified. Copyright registration is also no longer required, although the copyright owner has the option to register their work with the [U.S. Copyright Office](#).

What can be copyrighted?

The following categories of works are copyrightable:

- Literary, musical, and dramatic works
- Pantomimes and choreographic works
- Pictorial, graphic, and sculptural works
- Sound recordings
- Computer programs
- Architectural works

What cannot be copyrighted?

The following categories of works are not copyrightable:

- Ideas, procedures, methods, systems, and processes are not copyrightable (e.g., the list of ingredients for recipes are not copyrightable, but the recipes' instructions are protected).
- Titles, names, short phrases, and slogans are not copyrightable (e.g., Nike's slogan "Just Do It" is not copyrightable, but a slogan can receive trademark protection).
- Facts, news, and research are not copyrightable (e.g., a standard calendar).
- Works in the public domain are not copyrightable. As of 2022, this includes works published in the United States prior to 1927. The public domain also comprises works created by United States government employees that are a result of what they were hired to do.
- Works that are not fixed in a tangible medium of expression (e.g., extemporaneous speeches that are not written or recorded).

What are the copyright holder's exclusive rights?

The owner of a copyright has six exclusive rights:

- To reproduce the work
- To distribute the work
- To create derivative works
- To publicly perform the work
- To publicly display the work
- To publicly perform sound recordings by means of a digital audio transmission

How long does copyright last?

Works created on or after January 1, 1978 are protected for a term of the life of the author plus 70 years. If it is a corporate author, then the protection is for the shorter of 95 years from publication or 120 years from creation. Works created and published prior to 1978 may be protected for different lengths of time.

What is the public domain?

The public domain consists of all works that never had copyright protection and works that no longer have copyright protection. As of 2022, this includes works published in the United States prior to 1927.

The public domain also includes most works created by the United States government. For example, census reports, which are compiled and published by the United States government, are in the public domain.

All works in the public domain are free for the public to use.

Definitions

The [U.S. Copyright Act](#) provides definitions of many terms used in the law. The following are some examples of the definitions.

- **creation**

A work is created when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

- **derivative works**

A derivative work is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consists of editorial revision, annotation, elaboration, or other modifications, which, as a whole, represent an original work of authorship, is a derivative work.

- **display**

To display a work means to show a copy of it, either directly or by means of a film slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

To perform or display a work publicly means:

- to perform or display it in a place open to the public or at any place where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered; or
- to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public by means of any device or process, whether the members of the public are capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

- **fixed**

A work is fixed in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

- **perform**

To perform a work means to recite, render, play, dance, or act it, either directly or by means of any device or process, or, in the case of a motion picture or other audiovisual work, to show images in any sequence or to make the sounds accompanying it audible.

To perform or display a work publicly means:

- to perform or display it in a place open to the public or at any place where a substantial number of persons outside of a normal circle of family and its social acquaintances is gathered; or
- to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public by means of any device or process, whether the members of the public are capable of receiving the performance or display it in the same place or in separate places and at the same time or at different times.

- **publication**

Publication is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

Fair Use

Fair use is one of the **exceptions in copyright** which allows use of copyrighted materials without obtaining permission as long as the use can be considered fair.

There is a four-factor analysis which must be applied to each use to determine whether the use is fair. Each factor is given equal weight. The goal is to achieve a balance between the rights of the copyright holder and the rights of the public. Fair use is also technologically neutral so the same analysis may be applied to any medium.

It is important that the four factors be understood and applied diligently. Should someone claim that their copyright has been infringed, the court can reduce the amount of money damages if the alleged infringer can show that they understood the fair use analysis and made a good faith determination that their use was fair.

- **Factor 1: Purpose and Character**

The first factor addresses the character and purpose of the use of the work. The “Tipping Factor” uses, when combined with any of the uses in the “Favors Fair Use” category, strengthens the balance in favor of fair use.

Favors Fair Use

- Nonprofit
- Teaching
- Commercial

Tipping Factor

- Teaching
- Research
- Scholarship
- Criticism
- Commentary
- News Reporting

Favors Permission

- Commercial
- Entertainment
- For Profit

- **Factor 2: Nature of the Work**

The second factor looks at the creativity of the work. Creative works have more protection than factual ones, so the more creative a work is the less likely the use will be considered fair under this factor.

Fair use tends to favor published works more than unpublished works. The rationale for this is that authors should be able to decide when to publish their work.

Favors Fair Use

- Fact
- Published

Favors Permission

- Fiction
- Unpublished

- **Factor 3: Amount**

The third factor looks at the amount of the work that is being used. A small amount generally weighs in favor of fair use, while a large amount would weigh more in favor of requesting permission. However, there are times when the use of even a small amount of a work can be too much if it can be considered the “heart” of the work. There are many published guidelines by various groups with specific amounts recommended, but they can be misleading and provide a false sense of security. New York Law School neither recognizes nor endorses any such guidelines. There is no magic number or formula which determines an acceptable amount.

Favors Fair Use

- Small amount
- Amount used is not significant to work

Favors Permission

- Large amount
- Amount used is heart of work

- **Factor 4: Market Effect**

The fourth factor considers how the intended use would impact the market for the work. Generally, the more restricted the use, the less impact on the market. The use of some works such as standardized tests or workbooks are very rarely found to be fair use because the works are considered consumables which are meant to be purchased.

Favors Fair Use

- No major impact
- Licensing/permissions unavailable
- Limited/restricted access to work
- User/institution owns legal copy

Favors Permission

- Major impact
- Licensing/Permissions available
- Work is made available to the world
- Use is repeated or long term

New York Law School gratefully acknowledges Donna L. Ferullo, J.D., Director, University Copyright Office, Purdue University, who authored the above policy and graciously agreed to permit New York Law School to adapt it for the benefit of our community.