

**Draft 11/26/07**

## **Simmons College Copyright Policy**

### Introduction

#### Copyright Law Overview and Policies

- What is protected by copyright law?
- What are the exclusive rights of a copyright owner?
- Is copyright registration required for protection?
- What works are in the public domain?
- How does copyright apply to works posted on the Internet?
- What are the anti-circumvention requirements of the Digital Millennium Copyright Act?
- What are the copyright exemptions that might apply to uses of copyrighted works by educational institutions?
  - Fair Use
    - Photocopying Hardcopy Materials for Classroom Use
    - Placing Copyrighted Materials on Reserve with the Simmons Library
    - Using Copyrighted Materials on a Course Website
  - The Face-to-Face Classroom Teaching Exemption
  - The TEACH Act Exemption
- How may a faculty member use copyrighted materials on a course website if fair use, the Face-to-Face Classroom Exemption, and the TEACH Act do not apply?

## **Introduction**

As a community of scholars, Simmons College subscribes to the belief that intellectual property rights should be respected and honored, and that fair and appropriate use of copyrighted materials is both a legal and an ethical obligation that all members of the Simmons community should observe.

It is the policy of the college that all members abide by the copyright laws of the United States (17 U.S.C. § 101, et. seq.) (see <http://www.copyright.gov/title17/>).

The intent of the Simmons College Copyright Policy is to encourage teaching, learning, research, and scholarship conducted in the spirit of the honest pursuit and communication of knowledge, within the boundaries of the law. Using the works of others obligates scholars to comply with the requirements of copyright law and to acknowledge such use in accord with accepted standards of academic ethics.

Disregard of another's intellectual property rights can be a serious matter. Willful disregard or ignorance of the law may result in personal liability for claims of copyright infringement, and/or disciplinary action in accordance with the Simmons Faculty Policy Manual and/or the Simmons Employee Handbook. Legal penalties for copyright infringement may be severe. A court may award up to \$30,000 for each infringed work, and up to \$150,000 for each infringed work in cases of willful infringement. Certain types of infringement may also be a federal crime. Simmons College will support faculty members who can demonstrate they have made reasonable, good faith efforts to comply with copyright law and this policy if they are alleged to have engaged in copyright infringement.

The Simmons College community also should be aware that reproducing and distributing music, television shows, movies, video games, software programs and other copyrighted material through peer-to-peer file sharing networks, without the permission of the copyright holder, constitutes copyright infringement. In accordance with the Simmons College Acceptable Use Policy, repeated instances of copyright infringement will lead to the termination of all user privileges (see <http://my.simmons.edu/services/technology/policies/acceptable-use.shtml>).

The information appearing below is intended to assist members of the Simmons College community as they use materials for teaching and research that others have produced. The copyright laws cited in the Simmons College Copyright Policy can be challenging to interpret and understand. The changing environment in electronic technologies makes compliance with copyright law in this area a particular challenge.

**The U.S. Copyright Act does not contain a blanket exemption for educational uses of copyrighted materials.** As discussed below, however, the Copyright Act does contain several exemptions that apply to academic uses of copyrighted works: (1) fair use, (2) the Face-to-Face Classroom Teaching Exemption; and (3) the TEACH Act. To determine whether one of the exemptions applies, a faculty or staff member must analyze whether the use of each work meets all of the statutory requirements, or, in the case of fair use, whether the use of each work qualifies as fair use under the required balancing test. If none of these exemptions applies, the faculty or staff member may make the work available only through one of the following means: (1) using a copy of the work licensed to the Library (see <http://my.simmons.edu/library/services/fulltextlinks.shtml#links>); (2) linking to a legally available copy of the work available on the Internet in accordance with the website's applicable policies; or (3) obtaining permission to use the work through the Copyright Clearance Center, the publisher or the copyright holder.

If a faculty or staff member needs advice regarding copyright, several staff on campus may be helpful. Please feel free to contact: the Director of Libraries (ext. 2754) or the Director of Academic Technology (ext. 2665).

This policy does not address ownership of intellectual property rights to works created by Simmons College faculty, staff or students.

## **Copyright Law Overview and Policies**

### **What is protected by copyright law?**

The Copyright Act protects nearly all original works, including books, music, movies, audiovisual works, photographs, plays, choreography, sculpture, graphics, and architectural works. Changing technology gives rise to new works protected by copyright law, including websites, software, video games, multimedia works, and other digital creations.

It is important to note that copyright law protects the expression of facts or ideas as embodied in a work, but not the underlying facts or ideas themselves. For example, copyright law would protect a writer's description of a historical event, but not the facts underlying the description. Members of the Simmons Community are expected to adhere to academic standards related to proper citation of the works of others, regardless of whether their use of such works implicates copyright considerations.

### **What are the exclusive rights of a copyright owner?**

The owner of a copyright in a work has the exclusive right to:

- make copies of the work,
- distribute the work,
- display or perform the work publicly,
- and create derivative works from the original work (such as adapting a novel into a movie, translating it, or abridging it).

The copyright owner may authorize others to exercise some or all of these rights on an exclusive or non-exclusive basis. The rights of a copyright owner are subject to certain limited, statutory exceptions set forth in the Copyright Act, including fair use.

### **Is copyright registration required for protection?**

The copyright in a work comes into existence automatically as a matter of law, when the work is “fixed in any tangible medium of expression.” A work that is written, recorded, filmed, or coded onto a computer is “fixed” under the Copyright Act. Works do not have to be registered with the U.S. Copyright Office for the copyright to be effective, although registration confers certain benefits such as the right to sue in federal court for copyright infringement. A copyright symbol or notice is not required for a new work to receive protection, but the copyright notice helps to identify the copyright owner. For works owned by Simmons College, the copyright notice should read: © [year of creation] Simmons College.

### **What works are in the public domain?**

Certain works are not protected by copyright, and therefore may be freely copied and used without permission. These works are in the “public domain.” Works in the public domain include:

- Works published in the United States prior to 1923.
- Works published by the U.S. Government (but not state or local government works).
- Works published or copyrighted before December 31, 1963, if their copyright was not renewed with the Copyright Office or, in some cases, if they were published without a copyright notice. Researching the copyright status of such a work is complex. For more information, see “Duration of Copyright: Provisions of the Law Dealing with the Length of Copyright Protection” at <http://www.copyright.gov/circs/circ15a.pdf>

For more information on the public domain, please consult this chart compiled by Lolly Gasaway at the University of North Carolina (<http://www.unc.edu/~uncclng/public-d.htm>).

### **How does copyright apply to works posted on the Internet?**

Copyright law applies equally to works electronically available on the Internet. The fact that website users can view, download or print text and graphics does not mean that the material is unprotected. Nor does it mean that website users are free to disseminate that work to others either electronically or in hard copy.

If the copyright holder of a work posted on the Internet is unidentified, unknown or cannot be located, the work most likely is protected by copyright law, especially if the work was recently created. Do not assume that a work is in the public domain simply because it is available on the Internet without reference to its author or source.

### **What are the anti-circumvention requirements of the Digital Millennium Copyright Act?**

The Digital Millennium Copyright Act (“DMCA”), enacted in 1998, prohibits the circumvention of digital rights management (“DRM”) systems, defined in the law as “technological measure[s] that effectively controls access to a work protected [by copyright law].” The DMCA also prohibits the development or trafficking of any DRM circumvention device or technology. Violations of the DMCA anti-circumvention provisions may result in severe civil or criminal penalties. The DMCA does not recognize or allow for circumvention in order to reproduce or otherwise access materials to which fair use applies. If, for example, a faculty member wants to copy a clip from a DRM-protected DVD in order to show the clip during a classroom discussion, the faculty member would be prohibited from circumventing the DRM system – except in limited circumstances discussed below.

The U.S. Copyright Office has recognized only very limited exemptions to the anti-circumvention requirements of the DMCA. (See “Rulemaking on Exemptions from Prohibition on Circumvention of Technological Measures that Control Access to Copyrighted Works” at [www.copyright.gov/1201/](http://www.copyright.gov/1201/)). From November 2006 to until October 27, 2009, the Copyright Office has approved an exemption to anti-circumvention requirements for “audiovisual works included in the educational library of a college or university’s film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.” (For the full text of the regulation, see <http://www.copyright.gov/fedreg/2006/71fr68472.pdf>.) This exemption does not apply to faculty in any disciplines other than film or media studies.

### **What are the copyright exemptions that may apply to uses of copyrighted works by educational institutions?**

#### **Fair Use**

Section 107 of the Copyright Act provides that “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright.” Fair use is an important “safety valve” of copyright law. It ensures that even if works are otherwise protected by copyright, they can under certain conditions be used for purposes that Congress considered desirable – including teaching and scholarship – without the need for obtaining permission from the copyright owner.

Although fair use is a vital part of copyright law in educational settings, it is also an amorphous principle. The law provides no black-and-white rules about which uses of copyrighted material

are infringements and which are fair. Instead, the law provides only four general guidelines about the factors to be considered:

1. *“The purpose and character of the use.”* Other things equal, a use is more likely to be fair if it is for nonprofit educational purposes than if it is of a commercial nature. In addition, a use is more likely to be fair if it transforms or builds on the copyrighted work, or uses it in a new way, rather than simply copying it or using it for its original purpose.
2. *“The nature of the copyrighted work.”* Other things equal, it is more fair to make use of a primarily factual work (such as a scientific chart or a news photograph) than a primarily creative work (such as a painting or a work of fiction).
3. *“The amount and substantiality of the portion used in relation to the copyrighted work as a whole.”* The smaller the portion of the work that is used – for example, a few sentences from a short story rather than the entire work – the more likely it is that the use will be deemed to be fair.
4. *“The effect of the use upon the potential market for or value of the copyrighted work.”* If the copyright owner has an accessible licensing program in place, the non-licensed use of the material is less likely to be fair use than if no such licensing were available. By helping oneself to the material without paying for a license, the user is impairing the market for the work.

None of the four fair-use factors is more important than the others, and all of them must be considered in each case.

The College’s policy is to require careful and good faith consideration of the fair use factors before the determination is made that a use is fair and that no permission is needed.

Although the fair use determination must always be made on a case-by-case basis, the following questions and answers help demonstrate the boundaries of fair use, as they have been established in court decisions:

Q: I make copies of material only for use in my classroom teaching and syllabi. Does that mean that these uses are fair and no permissions are needed?

A. No. Other things equal, uses for classroom teaching by a non-profit educational institution are more likely to be fair than the same uses would be if they were made commercially. But unlicensed classroom use is not always fair, especially when the other fair use factors tilt away from fair use.

Q: I would like to post a photograph from a newspaper on my course website. Do I have to obtain permission?

A. The answer will depend on a fact-dependent analysis of the fair use factors. Factor one: Will photograph be used in a transformative manner, meaning will it will be the subject of commentary and criticism on the course website? Factor two: is the photograph of a factual news event or is it creative and artistic? Factor three: One photograph is considered an entire work. Because the entire work is needed, this factor may be neutral, weighing neither in favor of nor against fair use. Factor four:

Does the newspaper or its website offer a license for use of the photograph for a reasonable fee? If so, copying and posting the photograph without obtaining a license may harm the market for the work, and thus weigh against fair use. If the fair use factors weigh in favor of fair use, the photograph should be posted as a low-resolution or “thumbnail” image, to the extent possible.

Q: I would like to distribute to my students an English translation of a French short story. I’ve translated it myself. Since I am “transforming” the work, is that fair use?

A: Not necessarily. One of the exclusive rights of the copyright owner is to make or license “derivative works” of the copyrighted work and that includes translations. Especially if there is an accessible licensing program in place, then you may be required to obtain such a license from the copyright owner.

#### *Photocopying of Hardcopy Materials for Classroom Use*

Although there is no general set of guidelines for what is fair use and what is not, there is a set of classroom guidelines in place that provides a generally recognized “safe harbor” for making photocopies of copyrighted work for class distribution. These guidelines include requirements for “brevity” (the amount of material that may safely be copied), “spontaneity” (providing greater leeway when an instructor decides to use material – say, a recent news article – shortly before the time of the class), and “cumulative effect” (limiting the overall amount of copying from any single source). Using an article for several semesters in a row generally would not be considered “spontaneous,” even if the decision to use the article came shortly before class. These guidelines for classroom use can be found here; [Copying and Distributing Hardcopy Copyrighted Material in Class or in Coursepacks](#). The classroom guidelines generally provide a safe harbor for what is likely to be deemed to be fair use. They do not provide a “ceiling,” however. In some cases, a reasonably strong case could be made that a particular use of photocopies in the classroom is fair, even if the use does not conform to the classroom guidelines.

#### *Placing Copyrighted Materials on Reserve with the Simmons Library*

The Simmons Library provides course reserves (in print or electronic format) for the sole purpose of facilitating student access to readings as they prepare class assignments and/or pursue independent study and research. Course reserves is an extension of traditional library services and will be provided in a manner that respects fair use rights, the rights of copyright holders, and current copyright law. Materials placed on print or electronic reserves must comply with fair use, if permission has not been obtained.

- All materials placed on course reserves will be at the initiative of faculty solely for the non-commercial, educational use of students.
- Only lawfully acquired materials (by purchase, license, fair use, etc.) may be placed on course reserves.
- Whenever possible, the Library will purchase print materials that it does not already own to scan for electronic course reserves.

- Longer works, such as complete books or substantial portions of works, or consumables such as workbooks, will not be scanned for course reserves without copyright permission.
- Library staff reserves the right to request that faculty obtain copyright permission, before placing materials on course reserve, if the nature, scope, or extent is judged to exceed the reasonable limits of fair use.
- Online searching and retrieval will be limited to course name, number, or instructor.
- Access will be limited to current Simmons College faculty, staff and students.
- A copyright notice will appear on photocopied works or on an intermediary screen for electronic reserve materials.
- There will be no charge for access to course reserve materials.
- Reserve materials will only be made available during the semester the course is being offered.

For more details regarding library reserves and copyright, see <http://my.simmons.edu/library/services/reserves.shtml#fairuse>. For questions about copyright and course reserves, contact the Access Services Librarian at 617 521-2782.

#### *Using Copyrighted Materials on a Course Website*

As is the case with photocopies of materials for classroom use, faculty and staff members must consider each of the four fair use factors for copyrighted work that may be posted on a course website:

- Material should not be digitized and posted on course websites in order to avoid obtaining permission or paying permission fees that would have been charged for including the same material in hardcopy course packs. For example, if you obtained permission to use an article in hardcopy form for one semester, you may not digitize it and post it on your course website after that semester.
- Material posted on course websites should be essential for the course and used in a transformative manner, as the subject of commentary or criticism, and not simply for decoration. Material that is being used for its intended purpose (such as a business school case study that is intended to be used for comment or criticism, or a chart or graph used solely to convey information contained within) generally is not being used in a transformative manner.
- Images of artwork or photographs in many instances should be presented as thumbnails or in a low-resolution format.
- Use only the portion of any copyrighted material needed to satisfy the educational needs of the course.

- Do not digitize and post “consumable” educational materials (such as work sheets) or material marketed for classroom or distance education use.

### **The Face-to-Face Classroom Teaching Exemption**

Section 110(1) of the Copyright Act allows teachers or students a wide leeway to perform or display copyrighted work “in the course of face-to-face teaching activities ... in a classroom or similar place devoted to instruction,” without having to obtain permission from the copyright holder. This section allows teachers in a classroom to show movies or television shows, display slides, perform plays, listen to music, or read from a book without limitation. This exemption does not protect performances or displays of motion pictures or other audiovisual material that the instructor knows or has reason to believe were not lawfully made. Faculty members should be aware that film or television clips posted by individual users on websites (such as YouTube) may not have been lawfully made. Faculty members should refrain from showing clips from such sites in their classrooms if they know or have reason to know that the clip was not lawfully made.

The legislative history accompanying enactment of Section 110(1) makes clear that the performance or display must be part of the instructional program, and not for entertainment or recreational purposes. The legislative history also states that classrooms or similar places include studios, workshops, gymnasiums, training fields, libraries, the stage of an auditorium, or the auditorium itself (if it is actually used as a classroom for instructional activities), “as long as the instructor and pupils are in the same building or general area.”

This exemption, however, does not cover reproducing copyrighted material in order to perform or display it. In order to digitize an image to display it in class, an instructor must rely on fair use, or obtain permission if fair use does not apply. In addition, this exemption does not cover distribution of copyrighted material in or out of a classroom, and it does not cover performances or displays of copyrighted material outside of a classroom. For example, this exemption will cover the display of copyrighted photographs, charts and graphs in a classroom PowerPoint presentation, but it will not cover the display of that same copyrighted material if the PowerPoint presentation then is placed on a course website or the slides are printed out for distribution.

### **The TEACH Act Exemption (for use of certain material on a course website or in distance education)**

Congress passed the TEACH Act (Section 110(2) of the Copyright Act) in 2002 to allow the transmission of certain types of copyrighted material in distance education and on course websites, subject to strict requirements. The TEACH Act is intended to allow transmissions of materials that an instructor would otherwise show during a live class session; it is not intended to allow transmission of material (like course packs or textbooks) that students would read outside of class. All requirements must be met in order for the TEACH Act exemption to apply. For more information on whether the TEACH Act applies to materials to be posted on the Simmons eLearning platform, please see the specific guidance sections below, contact the Director of Academic Technology (ext. 2665) or see the TEACH Act Toolkit compiled by North Carolina State University: <http://www.lib.ncsu.edu/scc/legislative/teachkit>

The TEACH Act allows for the following uses of certain material:

- the performance of an entire nondramatic literary work (such as readings from books or poetry) or nondramatic musical work (such as song but not opera or musical theater), or
- the performance of a reasonable and limited portions of any other work (such as a clip from a movie or television show), or
- display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session.

The TEACH Act does **not apply** to certain types of material:

- textbooks, course packs or other material that are typically purchased or acquired by students for their independent use and retention;
- performances of an entire dramatic literary or musical work (such as a play, opera or musical theater) or an entire movie or television show;
- Performances or displays of works that are created and marketed for use in distance education; or
- Performances or displays of works that were created or obtained illegally (such as film or television clips that have been posted by users on websites without the consent of the copyright holder).

The TEACH Act also requires:

- the performance or display of each work must be made by, at the direction of, or under the actual supervision of the instructor; and
- be an integral part of a class session; and
- be directly related and of material assistance to the course.

Technological restrictions required by the TEACH Act include:

- Access must be limited to students officially enrolled in the course;
- Works covered by the TEACH Act must be accessible only for the duration of the class session;
- To the extent possible, students must not be able to retain and disseminate works covered by the TEACH Act;
- and students must be notified that materials used in connection with the course may be subject to copyright protection.

To meet TEACH Act requirements, a course website should include the following notice: **This course website contains materials that may be protected by federal copyright law. Such materials are provided only for the educational use of students enrolled in this course for the purposes required by the course, and may not be retained or further distributed.**

The TEACH Act also allows for the digitization of analog works under these requirements:

- Faculty or staff may digitize only the amount of the analog work that meets all of the other TEACH Act requirements, if:
  - No digital version of the work is available to the institution; or
  - The digital version of the work that is available to the institution is subject to technological protection measures that prevent its use under the TEACH Act.
- For more information on this topic, see “When to Digitize” in the TEACH Toolkit by North Carolina State University at <http://www.lib.ncsu.edu/scc/legislative/teachkit/digitize.html>

**How may a faculty member use copyrighted materials on a course website if fair use, the Face-to-Face Classroom Exemption, and the TEACH Act do not apply?**

Faculty and staff members may not post copyrighted materials on course websites (available through Simmons eLearning or otherwise) or other Simmons College websites if fair use or the TEACH ACT does not apply, and permission has not been obtained. If permission fees were required to reproduce copyrighted material in a hardcopy course pack, then the Simmons College community should not attempt to avoid paying those fees by digitizing and posting the same material on course websites. Simmons faculty and staff should consider the following approaches for using copyrighted material to which fair use and the TEACH Act do not apply:

- **Use licensed resources obtained by the Simmons Library.** Faculty can obtain assistance from the Simmons Library to determine whether copyrighted materials are available through a licensed resource. The Simmons Library has obtained permission and implemented technology to allow faculty to make links in their Simmons eLearning Course pages to full text articles (many with images) from thousands of licensed scholarly journals and popular magazines, covering many subject areas. Faculty can link directly to articles following these directions: <http://my.simmons.edu/library/services/fulltextlinks.shtml>. Each member of the Simmons Community is responsible for complying with all license restrictions. Such license restrictions generally allow only authorized personnel to use the licensed material, prohibit modification of the licensed work, prohibit removal of copyright notices contained in the licensed work, and prohibit use of the licensed work for commercial purposes. Simmons Library's licensed resources may not be used by alumni (except in certain circumstances in which alumni use is expressly allowed) or by organizations or companies at which Simmons students are employed or serving as interns.
- **Link to a legally available copy of the work on a website, following the website's applicable policies.** Do not link to copies of the work that reasonably appear to be illegally copied.
- **Obtain written permission to use the work.** The Copyright Clearance Center ([www.copyright.com](http://www.copyright.com)) provides a centralized clearinghouse for permissions. Faculty also may obtain written permission from the publisher or the copyright holder directly. A sample permission letter is available here: [http://my.simmons.edu/library/services/Sample\\_permissions\\_letter.pdf](http://my.simmons.edu/library/services/Sample_permissions_letter.pdf).

## Copying and Distributing Hardcopy Copyrighted Material in Class or in Coursepacks

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### **Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals**

Published in House Report 94-1476

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under § 107 of H.R. 2233. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in § 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

#### **\* Guidelines \***

#### **I. SINGLE COPYING FOR TEACHERS:**

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

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

#### **II. MULTIPLE COPIES FOR CLASSROOM USE:**

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

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

#### **DEFINITIONS**

##### Brevity:

- i. Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or (b) from a longer poem, an excerpt of not more than 250 words.

ii. Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of 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 of an unfinished prose paragraph.]

iii. Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

iv. "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Spontaneity:

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

ii. 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:

i. The copying of the material is for only one course in the school in which the copies are made.

ii. Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, not more than three from the same collective work or periodical volume during one class term.

iii. 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 and newspapers and current news sections of other periodicals.]

**III. PROHIBITIONS AS TO I AND II ABOVE:**

Notwithstanding any of the above, the following shall be prohibited:

A. Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or are reproduced and used separately.

B. There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

C. Copying shall not:

- a. substitute for the purchase of books, publishers' reprints or periodicals;
- b. be directed by high authority;
- c. be repeated with respect to the same item by the same teacher from term to term.

D. No charge shall be made to the student beyond the actual cost of the photocopying.

AGREED

March 19, 1976

AD HOC COMMITTEE ON COPYRIGHT LAW REVISION

By Sheldon Elliott Steinbach

AUTHOR-PUBLISHER GROUP

AUTHORS LEAGUE OF AMERICA

By Irwin Karp, Counsel

ASSOCIATION OF AMERICAN PUBLISHERS, INC.

By Alexander C. Hoffman, Chairman Copyright Committee

## FOR INTERNAL USE ONLY

### Using Visual Images of Artistic Works in the Classroom and on Simmons eLearning

Some Simmons College courses (such as art history) require students to view large quantities of visual images, which are the subject of commentary, criticism, review and analysis. Faculty members who teach such courses should be aware of copyright issues related to artistic visual images, including issues related to the conversion of analog images (such as slides) to digital images, display of visual images in the classroom, and display of visual images on Simmons E-Learning websites.

#### Guidelines for Use of Artistic Visual Works

- 1. If a two-dimensional artwork is in the public domain, it may be digitized and posted on course websites without restriction.**
  - a. An artwork is in the public domain in the United States if:
    - i. It was created before the enactment of copyright laws (such as the Mona Lisa);
    - ii. It was published in the United States before 1923. “Publication” of an artwork may be difficult to determine. “Publication” of an artwork generally occurred when it was displayed and catalogues or copies were provided to the public. A private sale or a public display by itself may not constitute publication.
    - iii. It is a U.S. government work.
    - iv. **Photographs that are slavish copies of a two-dimensional, public domain artwork may be used without restriction.** Such photographs lack originality, and therefore do not qualify for copyright protection. (See [Bridgeman Art Library, Ltd. v. Corel Corp.](http://www.law.cornell.edu/copyright/cases/36_FSupp2d_191.htm), 36 F. Supp. 2d 191 (S.D.N.Y. 1999) ([http://www.law.cornell.edu/copyright/cases/36\\_FSupp2d\\_191.htm](http://www.law.cornell.edu/copyright/cases/36_FSupp2d_191.htm))). This doctrine applies to a photograph that is an exact copy of a Rembrandt, a Vermeer, or other paintings in the public domain.
  - b. **Note that copying all or most of the images from one book may implicate the copyright in the book as a collective work, even if the images are of art in the public domain.**
- 2. If an artwork is not in the public domain, it may be used in certain circumstances without permission if you determine in good faith that fair use applies.**
  - a. Fair use provides that a copyrighted work may be used in certain circumstances without the permission of the copyright owner. The fair use analysis rarely provides clear answers and should be conducted for each image:
    - i. *The purpose and character of the use:* This factor will weigh toward fair use if the image is being used solely for non-profit educational purposes, and it is being used in a transformative manner (for commentary or criticism). Using images for decoration or for other non-transformative purposes will weigh against fair use.

- ii. *The nature of the copyrighted work:* An image that is creative and artistic receives greater copyright protection than factual images (news photographs).
- iii. *The amount of the copying:* Since most images must be copied in their entirety, this factor often is neutral. Taking only the part of an image that is necessary weighs in favor of fair use.
- iv. *The effect of the copying on the market for, or the value of, the original work:* This is often a decisive factor. This factor will weigh against fair use if the image was recent, has a commercial market, will be used in a high-resolution format that can be copied or distributed to end-users, or was created by a company or individual for the educational or similar market. This factor will weigh in a favor of fair use if the image is old, out-of-print, has no commercial market, or is being used in a thumbnail, low-resolution format.

**b. If you determine in good faith that fair use applies to your use of a particular image, then:**

- i. You may copy the image from analog to digital format for display in the classroom only.
- ii. You may post the image on your Simmons E-Learning course website only if:
  1. the image is posted in low-resolution, thumbnail format that cannot be enlarged into useful, high-resolution images;
  2. access to the image should be password restricted to students enrolled in the course;
  3. appropriate copyright notices should be displayed;
  4. the website should be disabled when the course ends; and
  5. the following statement should be posted on the website: “This course website contains images that are protected by federal copyright law. Such images are provided only for the educational use of students enrolled in this course for the purposes required by the course, and may not be retained, copied or further distributed.”
  6. Images included in PowerPoint presentations should be reduced to low-resolution, thumbnail format before the PowerPoint presentation is posted on Simmons eLearning

**3. If the image is not in the public domain and fair use does not apply, seek permission from the copyright holder.**

- a. Some artistic visual images may be available for educational use under license terms from websites such as:
  - i. Google Digital Library directory:  
<http://directory.google.com/Top/Reference/Libraries/Digital/>
  - ii. New York Public Library:  
[http://digitalgallery.nypl.org/nypldigital/dghelp\\_using.cfm#conditions](http://digitalgallery.nypl.org/nypldigital/dghelp_using.cfm#conditions)
  - iii. The Metropolitan Museum of Art: <http://www.metmuseum.org/home.asp>
  - iv. Use of such images must comply with the license terms.

- b. When seeking permission from the copyright holder, consider whether one or two layers of permission must be obtained:** Images of artwork may contain several layers of copyright. For example, a photograph of a three-dimensional

artwork (such as a Alexander Calder mobile or a Henry Moore sculpture) implicates two copyrights – the copyright in the image of the underlying sculpture which may be owned by the artist or his or her estate, and the copyright in the photograph of the sculpture which may be owned by the photographer.

- i. A photograph that is a slavish copy of a two-dimensional, non-public domain artwork implicates the copyright in only the artwork itself.
- ii. A photograph of a three-dimensional, non-public domain artwork may implicate the copyright in the photograph and the copyright in the artwork.
- iii. For architectural works that are located in or ordinarily visible from a public place, copyright law allows the making, distributing and display of pictures, photographs, or other pictorial representations of the work. To post a picture of the Sears Tower on your website, for example, you should obtain permission from the photographer who took the picture of the Sears Tower, but not the owner of the copyright in the building itself.

- c. **Permissions should be obtained in writing and retained by the faculty member.**