

Bard College Copyright and Fair Use Policy

Bard College is a liberal arts institution fully committed to the intellectual and creative endeavors of its faculty, staff, and students. As part of this commitment, Bard College recognizes the importance of balancing the use of copyrighted works for educational purposes with the need to protect such works in accordance with the applicable provisions of the law. This Copyright and Fair Use Policy (the “Policy”) is intended to provide instruction regarding the use of copyrighted works at Bard College.

The copyright law of the United States is contained in Title 17 of the United States Code and serves the purpose of promoting “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,” a mandate imposed on Congress by the United States Constitution. The Copyright Act of 1976, confers upon authors of copyrighted works the exclusive rights to do and authorize any of the following:

1. To reproduce the copyrighted work;
2. To prepare derivative works based on the copyrighted work;
3. To distribute copies of the copyrighted work to the public by sale or other transfer of ownership;
4. To perform the copyrighted work publicly; and
5. To display copyrighted work publicly.

Copyright protection is conferred as soon as an “original work of authorship is fixed in a tangible medium of expression.” This means copyright protections apply as soon as the work can be shown to others, through visual (written) or audio means. However, many copyright owners also choose to register their works with the United States Copyright Office, which confers a number of protections, as well as the ability to sue for copyright infringement.

I. Applicability of this Policy

This policy applies to all full-time and part-time faculty, visiting faculty, staff, students, student employees, graduate students, as well as any individual using college resources and facilities (the “Bard College Community”). All members of the Bard College Community must comply with applicable copyright laws and obtain proper permissions from copyright owners as required.

II. Overview of Copyright Protection

Copyright protection is conferred automatically to expressive or creative works. Works subject to copyright protection include literary works, musical works (including accompanying words), dramatic works (including accompanying music), pictorial/graphic/sculptural works, choreography, motion pictures and other audio-visual works, sound recordings, architectural works, computer programs, and compilations and derivative works.

However, the following are examples of things not protected by copyright:

1. Ideas, procedures, principles, methods, systems, discoveries, and devices;
2. Titles, names, short phrases, slogans;

3. Works that are “unfixed,” that is, not fixed in a tangible form of expression (for example, improvisational speeches or performances that have not been written or recorded);
4. Information that is common property with no original authorship (calendars, height and weight charts, rulers).

See Works Not Protected by Copyright, <https://www.copyright.gov/circs/circ33.pdf> (last accessed August 7, 2024).

III. Fair Use

Use of a copyrighted work by anyone other than the owner generally requires the explicit permission of that copyright owner. This should be in the form of a license agreement, or some other form of written agreement. However, permission is not required if the use falls within the Fair Use Doctrine, which provides a defense to copyright infringement.

Whether use of a copyrighted work constitutes “fair use” is determined by the specific facts of such use. There are four factors that must be considered when analyzing whether the use of a work is permissible under the Fair Use Doctrine. No single factor is determinative, but rather, the factors must be considered together:

1. The purpose and character of the use. For example, whether the use is commercial (weighing against a finding of fair use) or educational (weighing in favor of a finding of fair use).
2. The nature of the copyrighted work being used. For example, whether the work being used is of a highly creative nature (weighing against a finding of fair use).
3. The amount or substantiality of the portion of the work being used. For example, whether the entire copyrighted work being used (weighing against a finding of fair use) or just a small excerpt (weighing in favor of a finding of fair use).
4. The effect of the use on the market for, or value of, the work. For example, whether the use of the work being examined as part of the fair use analysis would have an impact on the sales of that work (weighing against a finding of fair use).

These factors must be balanced and weighed together when making an assessment of whether a use would fall under the Fair Use Doctrine. It is important to note that, while using copyrighted works for an educational purpose generally weighs in favor of a fair use finding, because all four factors must be considered, it is possible that a use is not permissible even in an educational setting.

All members of the Bard College Community must make a good faith effort to understand the basis of the Fair Use Doctrine and to take reasonable efforts to assess whether Fair Use applies to their anticipated use of a copyrighted work.

The Bard College Fair Use Checklist, attached as Appendix A, should be completed as a guide by members of the Bard College Community when making such a fair use analysis.

IV. Display/Performance of Films, Television Shows and Music in the Classroom and on Social Media

A. Films and Television Shows

Under the Fair Use Doctrine, a legally purchased full-length movie may generally be shown in an in-person classroom setting for educational purposes. However, full-length movies cannot be shown in the classroom if the copy being shown has been “ripped” from a source such as a DVD, even if the source was legally purchased. “Ripping” even legally purchased digital copies of films is a violation of the Digital Millennium Copyright Act (“DMCA”).

Copyrighted movies or television shows may not be shown outside of the classroom or for non-educational purposes without having obtained permission from the copyright owner. Please be advised that the terms of many streaming services, such as Netflix and Hulu, generally prohibit the showing of content in the classroom, subject to very limited exceptions.

Student clubs and groups that wish to show a film or television program must obtain permission from the copyright owner.

B. Music

Music is also protected by copyright law, and services such as Apple Music and Spotify should not be used to promote events. Any member of the Bard College Community that wishes to play or perform music at any college sponsored event must obtain permission from the copyright owner.

There may be songs available to you for use under the College’s agreement with ASCAP. Please contact Frank Corliss, Director, Bard College Conservatory of Music, at corliss@bard.edu for more information.

C. Social Media

Copyrighted music or any other content protected by copyright should not be included in any social media postings. Permission from the copyright owner should be obtained prior to using copyrighted content in any such posting.

Individuals permitted to post to Bard College owned and affiliated social media accounts should also not share or repost any postings that contain potentially copyrighted content.

V. The TEACH Act and Online Learning

The 2002 Technology, Education and Copyright Harmonization Act (the “TEACH Act”) addresses the use of copyrighted material in the virtual classroom setting.

In an online classroom setting, the TEACH Act permits:

1. The performance of nondramatic literary works or nondramatic musical works in their entirety (i.e., reading of books and poetry).
2. The showing of limited and reasonable portions of other works (i.e., clips of a movie).

However, under the TEACH Act, faculty teaching an online course are prohibited from performing or showing an entire dramatic literary or musical work (play, opera, musical, television show, movie, etc.).

Moreover, any content used in the online classroom setting must:

1. Be legally obtained;
2. Be limited in access to the instructor and students enrolled in the course;
3. Be displayed under the supervision of the course instructor as a regular aspect of instruction;
4. Be accompanied by a notice that the materials are under copyright protection and may not be distributed; and
5. Reasonable controls must be used to prevent dissemination and retention (i.e., streaming rather than allowing the download of a video).

VI. Copyright Exceptions for Persons with Disabilities

Section 121 of the Copyright Act (the Chafee Amendment) permits certain authorized entities (nonprofit organizations or governmental agencies that have a primary mission of providing specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities) to reproduce and distribute published literary or musical works in accessible formats for use exclusively by print-disabled persons. While there have been questions about whether colleges qualify as authorized entities, educational institutions argue they qualify due to their obligations under the Americans with Disabilities Act (ADA).

The Chafee Amendment does not apply to other types of accommodations (such as those to accommodate deaf persons) and thus, for all other instances of reproducing and distributing copyrighted materials for accessibility purposes (including the addition of captioning), the principles of “fair use” must be considered.

VII. Obtaining Copyright Permission

All members of the Bard College Community are responsible for obtaining copyright permission when necessary. Circumstances that may require copyright permission include, but are not limited to the following: use of materials or digital media in an in-person classroom setting, online (remote) learning, for posting on any Bard College or course website, research, for use in on-campus club activities, or for any Bard College-affiliated social media account. If you need assistance locating the proper individual(s) or entities to contact for such permissions, please contact the Dean of Libraries. It is recommended that permission be sought as soon as the determination to use a copyrighted work is made, as such permission may take time to obtain.

VIII. Enforcement of this Policy

Members of the Bard College Community who do not comply with this Policy or the applicable copyright laws or fail to act in good faith when making Fair Use determinations are liable for their own actions. Failure to comply with this Policy may result in disciplinary action.

IX. Interpreting and Implementing Authority

The Office of the Dean of Libraries and the Office of the Dean of the College will be jointly responsible for the interpretation and implementation of this Policy.

Appendix A
FAIR USE CHECKLIST

Name:
Project/Class:
Date:
Prepared by:

INTRODUCTION TO THE CHECKLIST

The Fair Use Checklist and variations on it have been widely used for many years to help educators, librarians, lawyers, and many other users of copyrighted works determine whether their activities are within the limits of fair use under U.S. copyright law (Section 107 of the U.S. Copyright Act). The four factors form the structure of this checklist. Congress and courts have offered some insight into the specific meaning of the factors, and those interpretations are reflected in the details of this form.

BENEFITS OF USING THE CHECKLIST

A proper use of this checklist should serve two purposes. First, it should help you to focus on factual circumstances that are important in your evaluation of fair use. The meaning and scope of fair use depends on the particular facts of a given situation, and changing one or more facts may alter the analysis. Second, the checklist can provide an important mechanism to document your decision-making process. Maintaining a record of your fair use analysis can be critical for establishing good faith; consider adding to the checklist the current date and notes about your project. Keep completed checklists on file for future reference.

THE CHECKLIST AS A ROAD MAP

As you use the checklist and apply it to your situations, you are likely to check more than one box in each column and even check boxes across columns. Some checked boxes will favor fair use and others may oppose fair use. A key issue is whether you are acting reasonably in checking any given box, with the ultimate question being whether the cumulative weight of the factors favors or turns you away from fair use. This is not an exercise in simply checking and counting boxes. Instead, you need to consider the relative persuasive strength of the circumstances and if the overall conditions lean most convincingly for or against fair use. Because you are most familiar with your project, you are probably best positioned to evaluate the facts and make the decision.

CAVEAT

This checklist is provided as a tool to assist you when undertaking a fair use analysis. The four factors listed in the Copyright Statute are only guidelines for making a determination as to whether a use is fair. Each factor should be given careful consideration in analyzing any specific use. There is no magic formula; an arithmetic approach to the application of the four factors should not be used. Depending on the specific facts of a case, it is possible that even if three of the factors would tend to favor a fair use finding, the fourth factor may be the most important one in that particular case, leading to a conclusion that the use may not be considered fair.

PURPOSE

Favoring Fair Use

- The use is for the purpose of teaching in a non-profit educational institution (including multiple classroom copies).
- Criticism, comment, news reporting, or parody or transforms the presentation or use.
- The use is necessary to achieve an intended educational purpose.
- Access restricted to students enrolled in course.

Opposing Fair Use

- The use is for commercial purposes.
- The use is non-transformative, verbatim/exact copy without criticism, comment, news reporting, or parody or transformation of presentation or use.
- The use is not necessary to achieve an intended educational purpose.
- Distribution is not limited or controlled.

NATURE

Favoring Fair Use

- The work is published.
- The work is non-fictional or factual in nature and the author's voice does not dominate the work.
- The work is a "non-consumable" (published book or similar).
- Essential for learning objectives.

Opposing Fair Use

- The work is unpublished.
- The work is non-fictional in nature, and the author's voice dominates the work.
- The work is a consumable work (workbook or test).
- The work is a highly creative work (art, music, novels, films, plays).

AMOUNT

Favoring Fair Use

- A small amount of the work is used (e.g., a single article, a chapter, or other excerpt less than 10% of the work taking into consideration the nature of the total work).
- Portion used is not central to entire work as a whole.
- Amount is appropriate to education purpose.

Opposing Fair Use

- Large portion or entire work.
- Portion used is central or the "heart" of the work.
- Includes more than necessary for education purposes.

EFFECT ON THE MARKET

Favoring Fair Use

- User owns lawfully purchased or acquired copy of original work.
- One or few copies made/distributed.
- No significant effect on the market or potential market for copyrighted work.
- No similar product marketed by the copyright holder.
- Lack of licensing mechanism.

Opposing Fair Use

- Could replace sale of copyrighted work.
- Numerous copies made.
- Significantly impairs market or potential market for copyrighted work or derivative.
- Reasonably available and affordable licensing/permission mechanism available.
- It was made accessible via the Web or other public forum.
- Repeated or long-term use.

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Appendix B

Copyright Notification and Potential Penalties for Infringement

The Higher Education Opportunity Act (HEOA) requires Bard College to make an annual disclosure informing students that the illegal distribution of copyrighted materials may lead to civil and/or criminal penalties.

Bard College strictly prohibits the unauthorized distribution of copyrighted material. This includes illegal downloading and peer-to-peer file sharing. The Bard College Student Handbook and the Bard College Computing Policies prohibit students from using Bard College computing resources to act in violation of applicable copyright laws. Violations include:

- Using peer-to-peer applications that violate copyright laws; and
- Making unauthorized copies of copyrighted files or software or violating any software licensing agreements or copyright laws.

Any violation of these policies may result in disciplinary action and/or the loss of the ability to use Bard College computing and technology resources. Violations may also result in employee disciplinary action and potentially the discharge of employment. Additionally, individuals who violate these policies may face criminal and civil liabilities, from Bard College, individuals or entities whose rights are infringed and/or harmed, and/or law enforcement officials or agencies.

Civil Penalties for Violation of Federal Copyright Laws

Copyright infringement occurs when a work protected by copyright is used in violation of the owner's exclusive rights under Section 106 of the Copyright Act (Title 17 of the United States Code). These include the unauthorized distribution and copying of a copyrighted work or downloading or uploading substantial parts of a copyrighted work without permission.

Copyright infringement may result in civil and criminal penalties. These include actual damages or statutory damages in an amount not less than \$750 and not more than \$30,000 per work infringed. If infringement is found to be "willful", the award may be up to \$150,000 per work infringed. An infringer may also be ordered to pay costs and attorneys' fees at a court's discretion. See Title 17, United States Code Sections 504 and 505 for further details.

Criminal penalties can be imposed in an amount of up to \$250,000 per offense, and imprisonment of up to five years.