

S96-11 FAIR USE OF COPYRIGHTED MATERIALS; INTELLECTUAL PROPERTY

Legislative History:

At its meeting of April 22, 1996, the Academic Senate approved the following Policy Recommendation presented by John Mitchem for Nancie Fimbel and Curriculum and Research Committee.

ACTION BY THE UNIVERSITY PRESIDENT

"Approved as University Policy" Signed Robert Caret, 5/30/96,

WHEREAS, There are no officially recognized campus guidelines regarding the use of copyrighted intellectual property for instruction and research; now be it therefore

RESOLVED That the attached document (Fair Use of Copyrighted Materials) be adopted as policy.

FAIR USE OF COPYRIGHTED MATERIALS

The fair use of copyrighted materials has been a part of American copyright law by judicial interpretation for nearly two centuries and has been a principle in statutory law for two decades. The emergence of new technologies that permit broad and immediate dissemination of materials has raised significant questions from the publishing community regarding the protection of creators (authors, musicians, painters, photographers, programmers, etc.) from unauthorized use of their works without compensation. At the same time, existing copyright law specifically reserves the privileges of fair use of copyright materials for "...criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research..." (Section 107, Copyright Act of 1976). San Jose State University encourages the broadest possible dissemination of information for these legitimate uses, and believes that appropriate protections of the rights of creators can be established for application within the new distribution technologies.

General Principles

San Jose State University subscribes to the principles that fair use of copyrighted materials is applicable to teaching, research, and scholarship in higher education; that access to information, regardless of its format, is essential for the creative and learning processes; and, that licenses and/or transaction fees inhibit the free exchange of information. San Jose State University accepts the obligation to educate constituents about intellectual properties and the lawful (fair) uses of the copyrighted works of others.

The factors in law that guide decisions regarding fair use are:

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 the potential market for or value of the copyrighted work.

These are the decision criteria that shall guide San Jose State University in the determination of fair use.

Extended discussion of the meaning and interpretation of these factors and illustrative court cases can be found in Fair Use of Copyrighted Works, a guide published jointly by CSU-SUNY-CUNY (1995) and incorporated by reference into this policy.* The application of these factors must be made separately, since they are compelling both alone and together in decisions regarding fairness of any use made of copyrighted materials. The CSU-SUNY-CUNY guide states: "If most factors lean in favor of fair use, the activity is allowed; if most lean in the opposite direction, the action will not fit the fair use exception and may require permission from the copyright owner" (p.15). Serious evaluation of each factor is essential for sound decision-making regarding fair use of each element of copyrighted material.

Application of Fair Use to Multimedia Production

The use of copyrighted materials in the development of multimedia products has provoked serious review of Section 107 of the Copyright Law. At San Jose State University, faculty, staff and students involved in multimedia production incorporating copyrighted materials shall accept the following obligations in order to assure compliance with the four factors that address fair use:

Copyrighted materials to be incorporated within multimedia products must be lawfully acquired.

Proper attribution and credit with citations to sources must be noted for all copyrighted works included in all multimedia programs prepared by faculty, staff, and students, including those prepared under fair use.

Notice that certain materials within the multimedia program have been included under the fair use exemption of the Copyright Law must be presented on the opening screen of the production, noting that they are restricted from further use.

Faculty, staff, and students shall seek permission before using copyrighted works in multimedia productions for commercial reproduction and/or distribution.

* Copies of the guide are available from Clark Library, the Alquist Center for Innovative Learning, and the Office of Graduate Studies & Research. Electronic versions are available on the home page of the Consortium for Educational Technology for University Systems:

<http://www.cetus.org>

Balancing Privilege and Respect

Administrators, faculty, staff, and students are encouraged to assert the fair use privileges permitted by Copyright Law in the pursuit of teaching and scholarship, the preservation and dissemination of information to the university community, and the involvement of students in creative works for classroom and/or personal use. At the same time, all members of the university community shall exercise due diligence in respecting the rights of copyright holders and are asked to observe the following precautions in the use of copyrighted materials:

Caution must be exercised in using digital material downloaded from the Internet since there is a mix of works protected by copyright and works in the public domain on the network. Access to works on the Internet does not automatically mean that these can be reproduced and reused without permission or royalty payment and some copyrighted works may have been posted to the Internet without the proper authorization of the copyright holder.

Caution must be exercised when copyrighted materials are to be disseminated over an instructional (digital and/or audio-visual) network. Access to these materials must be protected by password, dedicated server, limited IP addresses or other appropriate means and must be limited to students enrolled in the course for which they were developed.

Caution must be exercised in the retention and use of student projects intended to be kept by the student as part of his/her portfolio when the project includes copyrighted materials. The student project should note the inclusion of copyrighted materials and prohibition against duplication in any non-educational or for-profit setting.

Caution must be exercised in the development of multimedia prototype lessons by the faculty when they include copyrighted materials. Clear notice should be given that the lesson has been developed for research purposes, contains copyrighted materials, and may not be duplicated or used, except for research and testing.

In order to respect the integrity of the original creation, caution must be exercised when making any alterations in a copyrighted work. Any alterations must be clearly described. Permission to use may often need to be sought.

By promoting the informed application of the four factors in the Copyright Law and the observance of cautions in this policy, San Jose State University will advance the protection of higher education's right to make a fair and balanced use of copyrighted materials in our mission to advance and disseminate knowledge.