GUIDE TO THE UNIVERSITY
COMMUNITY ON:
Fair use and copyrights

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I. Introduction

At the Ana G. Méndez University System (“AGMUS”) we are committed in observing and promoting compliance with copyright laws. Copyrights have a direct impact on diverse and multiple areas of academic life.

The purpose of this guide is to provide the AGMUS community with a basic knowledge of fair use, particularly how it applies to the dissemination and reproduction of copyright protected materials, thereby ensuring compliance with copyright laws.

II. What is fair use?

Fair use, also known as the *fair use defense*, is a concept within federal copyright law.

III. What is copyright?

Pursuant to the Copyright Act of 1976, 17 U.S.C. §101-et seq., as amended, a copyright is the exclusive right granted by the federal government to creators of *original works of authorship* for a limited period of time.

An *original work of authorship* is defined as that which is fixed on a tangible medium of expression, now known or developed in the future, from which the work may be perceived, reproduced and/or otherwise communicated. The protection granted under federal law commences at the moment the work is fixed on a tangible medium of expression.

Copyright law vests unto the copyright owner, the right to commercially exploit a work. The author of an original work may transfer, sell, and/or assign his rights to another person.

IV. What are some examples of selling, assigning or transferring copyrights?

Federal copyright law grants authors and creators the right to sell, transfer and/or assign, all or some of their rights, to another person.

Some examples are:

- Sell and/or grant a license to use computer software program
- Transfer, in exchange for royalties, the rights to a literary work.
- Sell the rights the movie or book rights to a story.
- Grant a license to use books in digital format.
V. **What Works may be protected under copyright?**

Copyrightable works include works which fall under the following categories: (i) literary works, such as books, pamphlets, manuscripts; (ii) dramatic works, including any accompanying music; (iii) musical works, including any accompanying words; (iv) pantomimes and choreographies; (v) pictorial, graphic and sculptural works; (vi) motion pictures and other audiovisual works; (vii) sound recordings; and (viii) architectural works.

Those works whose protection under copyright law has expired and/or works which were never protected under copyright law are in the public domain. Works in the public domain may be reproduced and/or copied without the need of obtaining authorization.¹

VI. **What rights is the copyright owner entitled to?**

Federal copyright law grants the copyright owner the exclusive right to commercially exploit the work. In other words, author/artist and/or the copyright owner have the exclusive right to do or authorize others to do the following:

- Reproduce the work;
- Distribute the work;
- Prepare derivative works;
- Perform the work publicly; and
- Display the work publicly.

VII. **What is fair use?**

Under the fair use doctrine, the law allows for the limited use of copyrighted material without permission from the copyright owner under certain instances. This is known as fair use.

It may be considered as fair use when the work is used for purposes such as: (i) criticism; (ii) parody; (iii) news reporting; (iv) research and scholarship; and/or (v) teaching.

To be considered as fair use, use of copyrighted material must be spontaneous and not recurring. If the use is planned, recurring, or involves works which have been in circulation, and for which it could be reasonably expected to obtain a license from the copyright owner with sufficient time to use the work, then, the use would not be considered as fair use, and a license or authorization from the copyright owner would be required for the use of said work.

¹ See table 1 for the list of terms of protection under federal law protected by copyright.
VIII. **What should be considered when conducting a fair use analysis?**

If the proposed use of the copyrighted material falls under one of the four categories mentioned in the previous section, then, interested party must proceed and evaluate the proposed use and purpose for which the work is to be used. This analysis is conducted pursuant to the following:

- **What is the purpose and character of the use for which I intend to use the work?**
  - Here, we must consider if the use is of a commercial nature or nonprofit educational purpose.
  - As long as the purpose of the use is for nonprofit educational purpose, this factor will generally weigh in favor of fair use.
- **What is the nature of the copyrighted work?**
  - Here, we must consider the degree of creativity of the protected work.
  - The more creative a work is, the more restrictive a fair use analysis will be.
  - The less creative a work is, and more functional or informative it is, the fair use analysis will be more liberal and flexible.
- **What is the amount and substantiality of the portion of the work used in relation to the copyrighted work as a whole?**
  - Here, we must consider if the portion of the work to be used is reasonable in relation to the work as a whole.
  - It must also be considered if the portion of the work to be used and/or the medium in which it will be used is reasonable.
- **What will be the effect of the use upon the potential market for or value of the copyrighted work?**
  - Here, we must evaluate how the portion of the work to be used will in any way adversely affect or impact the potential market for the original work or the value of the original work.

A fair use analysis should always be conducted with these four factors in mind. Determining whether or not the proposed use of a work will be considered as fair use will greatly depend on this analysis. It should be noted that a fair use analysis is to be conducted within the context of

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2 The purpose of these tables that are included at the end of this document to serve as guides in assisting in their fair use analysis.

3 The analysis of fair use is focused and directed for nonprofit educational purposes. Under these explanations this is not considered for commercial nature and/or nonprofit educational purposes.
these four factors as a whole, in other words, a fair use analysis may not be conducted in a vacuum whereby isolating one factor from the other.

It is crucial that a fair use analysis be conducted each time one intends to use and/or reproduce a copyrighted work.

IX. **How much of a copyrighted work may I use and still be considered fair use?**

There does not exist a magic number of pages or percentage of usage which guarantees that the proposed use will be considered a fair use. Considering and evaluating how much and what type of use will be considered fair use or not is flexible and not an exact science.

In 1976, when the current federal copyright law was being drafted and revised, the Congress of the United States requested from the members of the private sector that they prepare an informational guide regarding what would be considered as within the industry as fair use by the academic sector. This guide is commonly referred to as the *Classroom Guidelines*.

The *Classroom Guidelines*, sets forth restrictive limits on percentages and word counts which may for the usage of copyrighted Works. The *Classroom Guidelines*, although never approved or adopted by Congress, continue to serve as a guiding light with regards to usage parameters for copyrighted works.

Recently, there have been three cases before the federal courts, all of which have dealt with fair use issues with regards to the use of copyrighted materials for non-profit educational purposes and by institutions of higher education. Pursuant to the opinions of the courts in these three cases, the best practice for purposes of using portions of copyrighted works for non-profit educational purposes is:⁴

- Of a book of 10 chapters or less, 10% of the book may be reproduced.
- Of a book of 11 chapters or more, 1 chapter may be reproduced.
- The portions and/or chapters reproduced must meet a legitimate purpose within the course and be narrowly related with the courses subject matter in order to meet this purpose.

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⁴ These quantities have to be considered and evaluated in conjunction as part of the analysis as fair use under copy rights laws. Estas cantidades han de ser consideradas y evaluadas en conjunto y como parte del análisis de uso justo conforme las cuatro interrogantes discutidas en esta guía.
X. May I use works found on the internet?

It should be presumed that all the information we obtain from internet has an author or creator. Consequently, all the information found on the internet is susceptible to copyright.

Just as material obtained from traditional and/or other sources, material obtained from the internet may be utilized as long as it is cited accordingly and reference is made to the source and author of the material.

On the internet, some works may be subject to specific and particular licenses such as a Creative Commons license. For more information about this type of licenses and their uses, visit www.creativecommons.org.

XI. May a professor make copies of a copyrighted work for use and/or distribution in the classroom?

As a general rule, yes. Notwithstanding, the copies distributed by a professor for classroom use must meet and comply with the fair use guidelines.

As a general rule, a professor: (i) may make one copy per student, to be handed out during the class; (ii) may not charge students for copying costs; (iii) the copy may not exceed fair use guidelines; (iv) may not copy, scan or digitize an entire book; (v) the use must be spontaneous in nature; (vi) may not use the material in an anticipated and planned manner, and may not repeat the use of the material from semester to semester under a fair use defense. The copy made must contain the copyright notice appearing on the original document.

The professor always has the alternative to place the selected materials in the library’s reserve area for the use and benefit of the students.

XII. May copies be made of a work and placed in the libraries reserve section?

No. The library may not make copies of a work and place the copies in its reserve section. The library may place on reserve the copies of a work it physically possess and/or owns.

In the event the library deems it necessary to have additional copies of a work in order to have multiple copies of the same work available on reserve, the library must first obtain a license or authorization from the copyright owner of the work.
XIII. May a professor request the library scan and/or digitize a work, or portions thereof, and make available the digitized version on the library’s electronic reserve?

There is currently a case in the federal court system discussing this issue. For each portion of a work that a professor wishes to be digitalized and placed in the library’s electronic reserve area, it is necessary to first enter into a fair use analysis.

Pursuant to current federal court opinions, the best practices are for use of digitized and/or scanned portions of a work for non-profit educational uses are:

- Of a book of 10 chapters or less, 10% of the book may be reproduced.
- Of a book of 11 chapters or more, 1 chapter may be reproduced.
- The portions and/or chapters reproduced must meet a legitimate purpose within the course and be narrowly related with the courses subject matter in order to meet this purpose.
- Access to the materials is limited to students enrolled in the course.

XIV. May the library make copies for its patrons?

Yes. The library may make copies of a work for its patrons (students, faculty member, employees) pursuant to the following limitations:

- One copy of a newspaper, magazine or journal article, or a small portion of a book or other work.
- The copy must pass on to the patron, and become property of the patron.
- The library reasonably believes that the copy will be used for legitimate educational and/or research purposes.
- The library does not charge for the copy.
- The library publicly and visibly displays a copyright notice with regards to the use and reproduction of copyrighted works in the area where patrons make their copy requests.

XV. May students make photocopies?

5 These amounts are to be taken into consideration and evaluated as part of a fair use analysis.
Copies made by students are subject to a fair use analysis.

The copy of a small portion of a work or the copy of an article may be considered fair use.

The copy of all assigned chapters of an assigned and/or recommended book for a course, multiple copies of an article or chapters for distribution to classmates, or copies of workbooks, among other things, are not fair use and will require permission from the copyright owner.

XVI. Do other countries have laws regarding copyrights?

Yes. Many countries have their own laws which in one form or another protect and oversee the rights of their native authors, artists, designers, and creators, among others.

Each country has its own laws and regulations by which it oversees copyrights. Under the Berne Convention of 1886, it is required that all member countries recognize the copyrights of foreign authors in the same manner they do those of their own nationals.

For additional information contact the Director of Copyrights, Patricia Ramírez Gelpí, Esq. patramirez@suagm.edu, propiedadinintelectual@suagm.edu
Table 1

Guide for determining the years of protection of a copyrighted work.  

<table>
<thead>
<tr>
<th>Date of the work</th>
<th>Protected from</th>
<th>Term</th>
</tr>
</thead>
<tbody>
<tr>
<td>Created on January 1, 1978 or after</td>
<td>Since work is fixed in a tangible medium of expression.</td>
<td>Life of the author + 70 years. For works made for hire, the term is 95 years from date of publication or 120 years from date of creation.</td>
</tr>
<tr>
<td>Published before 1923.</td>
<td>In the public domain.</td>
<td>N/A</td>
</tr>
<tr>
<td>Published between 1923-1963.</td>
<td>Since date of publication with copyright notice.⁹</td>
<td>28 years + renewable for 47 years, now extended by 20 additional years for a total renewal of 67 years. If not renewed, now in the public domain.</td>
</tr>
<tr>
<td>Published between 1964-1977</td>
<td>Since date of publication with copyright notice.</td>
<td>28 years first term; automatic extension of 67 years for a second term.</td>
</tr>
<tr>
<td>Created before January 1, 1978 but published between then and December 31, 2002.</td>
<td>Since January 1, 1978.</td>
<td>Life of the author + 70 years, or December 31, 2047, whichever is greater.</td>
</tr>
</tbody>
</table>

⁶ Source: [www.unc.edu/~unclng/public-d.htm](http://www.unc.edu/~unclng/public-d.htm), When Works Pass Into the Public Domain written by Lolly Gasaway.

⁷ For joint works, term is measured by life of the longest lived author.

⁸ Also applies to anonymous works, and works created under pseudonyms.

⁹ Under the Copyright Act of 1909, works created without a copyright notice went into the public domain upon publication. Works published without notice between January 1, 1978 and March 1, 1989, retained copyright only if efforts to correct the accidental omission of notice was made within five years, such as by placing a notice on unsold copies. 17 U.S.C. §405.
Included below are two tables which may serve as an aid when conducting a fair use analysis.  

**Table 2, Use of material according to medium.**

<table>
<thead>
<tr>
<th>Medium</th>
<th>Reasonable use under fair use analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Movie, video</td>
<td>Up to 10% or 3 minutes, whichever is less.</td>
</tr>
<tr>
<td>Music, lyrics, and music videos</td>
<td>Up to 10%, but in no event more than 30 seconds.</td>
</tr>
<tr>
<td>Illustrations, photographs</td>
<td>Up to 5 images from one artist, or no more than 10% or 15 images from a published collective work.</td>
</tr>
<tr>
<td>Numerical data sets</td>
<td>Up to 10%.</td>
</tr>
</tbody>
</table>

**Table 3, Use of material according to format.**

<table>
<thead>
<tr>
<th>Material</th>
<th>Permitted Use</th>
<th>Prohibited Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>Website containing copyrighted materials.</td>
<td>Create a link to the page via Blackboard.</td>
<td>Copying and pasting the content on Blackboard.</td>
</tr>
<tr>
<td>Web image</td>
<td>Must be educational use in nature; posted for one term (semester, trimester, etc.).</td>
<td>Repeated use over multiple terms.</td>
</tr>
<tr>
<td>Article from e-reserves or other library database.</td>
<td>Create a direct link to the article.</td>
<td>Copying and pasting the content of the website onto Blackboard or other.</td>
</tr>
<tr>
<td>Scanned image subject to copyright protection</td>
<td>Must be educational use; used on Blackboard for one term (semester, trimester, etc.)</td>
<td>Repeated use over multiple terms.</td>
</tr>
<tr>
<td>Scanned portion of a prose work</td>
<td>Must be educational use; and no more than 10% of the entire work for books of 10 chapters or less; no more than 1 chapter for books of 11 chapters or more.</td>
<td>Repeated use over multiple terms or use of more than the allotted percentages.</td>
</tr>
<tr>
<td>Scanned article from a journal, trade publication or magazine</td>
<td>A single article for one term.</td>
<td>Multiple articles from the same publication or repeated use over multiple terms.</td>
</tr>
</tbody>
</table>

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10 The purpose of these tables is to serve as guides in assisting faculty in their fair use analysis.

11 Source: Blackboard, Inc., Copyright, Fair Use & Educational Multimedia FAQ; http://www.ccsj.edu/blackboard/BB%20copyright_fair_use.pdf

Exhibit 1.

Guide for the fair use analysis.

**Instructions:** Check all boxes that apply. For each section below, determine whether the proposed use favors or disfavors fair use under the fair use doctrine. When the majority of the checked boxes fall under the fair use column, then the use may be acceptable under the fair use doctrine. When less than half of the checked boxes disfavor fair use, then permission should be obtained from the copyright owner prior to using the material. It is important to check with the library and verify if they have a license for the use of the proposed material. If the library holds a license, it is possible that the proposed use may fall under the parameters of the license.

Name: __________________________ Date: __________________________

Classes or Project: __________________________________________________

Semester or Trimester: __________________________________________________

Title of the work: ______________________________________________________

Author: __________________________________________________________________

Portion to be used (pages etc.): __________________________________________

1. **Purpose of the use**

<table>
<thead>
<tr>
<th>Fair Use</th>
<th>Disfavoring Fair Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>Educational</td>
<td>Commercial, entertainment or other use</td>
</tr>
<tr>
<td>Teaching (including multiple copies for classroom use)</td>
<td>Non-transformative, verbatim, exact copy</td>
</tr>
<tr>
<td>Research</td>
<td>profit generating use</td>
</tr>
<tr>
<td>Scholarship</td>
<td></td>
</tr>
<tr>
<td>Criticism</td>
<td></td>
</tr>
<tr>
<td>Comment</td>
<td></td>
</tr>
<tr>
<td>Transformative or productive use (the work modified/changed to serve a new purpose)</td>
<td></td>
</tr>
<tr>
<td>Non profit use</td>
<td></td>
</tr>
</tbody>
</table>

2. **Nature of the copyrighted work**

<table>
<thead>
<tr>
<th>Fair Use</th>
<th>Disfavoring Fair Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>Published work</td>
<td>Unpublished work</td>
</tr>
<tr>
<td>Factual, nonfiction, news</td>
<td>Creative (art, music, fiction) or consumable work (workbook, test)</td>
</tr>
</tbody>
</table>
3. **Amount of the work to be copied**

<table>
<thead>
<tr>
<th>Fair Use</th>
<th>Disfavoring Fair Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>□ Small portion (one chapter or article consisting of 10% or less of the work)</td>
<td>□ Large portion or entire work</td>
</tr>
<tr>
<td>□ Portion used is not central or the heart of the work</td>
<td>□ Portion used is central or the heart of the work</td>
</tr>
<tr>
<td>□ Amount is appropriate for educational purposes</td>
<td>□ Includes more than is necessary for educational purposes</td>
</tr>
</tbody>
</table>

4. **Effect on the market for the original**

<table>
<thead>
<tr>
<th>Fair Use</th>
<th>Disfavoring Fair Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>□ No significant effect on the market or potential market of the copyrighted work</td>
<td>□ Cumulative effect of copying would be to substitute purchase of the copyrighted work</td>
</tr>
<tr>
<td>□ One or few copies made and/or distributed</td>
<td>□ Numerous copies made and/or distributed</td>
</tr>
<tr>
<td>□ Work no longer in print, absence of licensing mechanism</td>
<td>□ Reasonably available licensing mechanism for obtaining permission to use the work</td>
</tr>
<tr>
<td>□ Restricted and/or limited access to students registered in the course, or other appropriate group</td>
<td>□ Access not restricted and/or limited, copy will be publicly available</td>
</tr>
<tr>
<td>□ One-time use, spontaneous use (no time to obtain permission)</td>
<td>□ Repeated or long term use</td>
</tr>
</tbody>
</table>