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“Fair Use” of Copyrighted Works

Federal copyright law protects original works of authorship, including articles, photographs, artwork, music and other types of works. Generally, the creator owns the copyright. (“Work for hire” is a common exception.) Copyright exists as soon as the creative work is fixed in a tangible medium of expression, meaning as soon as it is written, recorded, drawn, or otherwise brought into existence in a tangible form. Registration is not required for copyright to attach.

The owner of a copyrighted work has the right to: (1) reproduce the work; (2) display the work; (3) prepare derivative works; and (4) distribute copies of the work and license others to use it. These rights are exclusive to the owner, meaning no one else can do these things with the copyrighted work unless the owner grants permission, the work is in the public domain, or the use constitutes a “fair use” of the work.

“Fair use” is raised frequently in the education context, but it is often misunderstood and misapplied.

Under federal copyright law, the doctrine of “fair use” allows the limited use of a copyrighted work without the copyright owner’s permission for purposes such as criticism, comment, news reporting, teaching, scholarship or research. Four basic factors are considered in determining whether a use constitutes fair use. Not all educational use is necessarily “fair use,” and each particular set of facts should be analyzed on a case-by-case basis in determining whether a certain use would be considered a “fair use” if a copyrighted work is to be used without permission.

- 1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.**

Nonprofit educational purposes are more likely to be considered fair use, and commercial

purposes are disfavored. Transformative uses are favored; *i.e.*, uses where something new is added, with a further purpose or different character from the original, altering the first with a new expression, meaning or message.

- 2. The nature of the copyrighted work.**

Highly creative works, such as fiction, have more protection than factual works, such as scientific data. Unpublished works have greater protection than published works.

- 3. The amount and substantiality of the portion used in relation to the work as a whole.**

Courts look at what percentage of the total copyrighted work is used and how central the portion used is to the whole work.

- 4. The effect of the use upon the potential market for or value of the copyrighted work.**

Courts evaluate whether the challenged use, if it were to become widespread, would adversely affect the potential market for the copyrighted work.

No one factor alone determines a person’s right to use a copyrighted work without permission, but courts tend to give the fourth one the most weight.

The Technology, Education and Copyright Harmonization Act (TEACH Act) revised the Copyright Act to allow the reproduction and display of copyrighted works for digital distance education purposes, under numerous conditions and safeguards.

When in doubt, seek written permission from the copyright owner or don’t use the work in question. For additional information, see: Copyright Q&A for Campus or <http://www.nacs.org/toolsresources/cmip/copyright/questions/copying.aspx>



Featured FAQ

Q: May I accept a speaking fee (or “honorarium”) from a source outside K-State?

A: Yes. Faculty and other employees may accept speaking fees, but only if:

1. the talk is given as an outside activity (*i.e.*, not as part of duties that he or she is obligated to perform as part of his or her official duties as a state employee, and appropriately approved and reported as necessary under the K-State conflict of interest and commitment of time policy); AND

2. the primary reason the employee is invited to give the speech is not because of the employee’s position in state government.

This question is governed by State of Kansas law, including the rules concerning gifts, meals, entertainment and travel (K.S.A. 46-237a), the rule governing honoraria (K.S.A. 46-237(f)), and the rule restricting compensation (K.S.A. 46-235), and by K-State’s conflict of interest and time commitment policy. For further information, please see our informational memorandum on Speaking Fees and Related Travel Expenses.

Visit our website:

k-state.edu/generalcounsel

Our website gives an introduction to the services we provide and addresses frequently asked questions. It also houses a list of resources for easy access to laws and policies applicable to University operations.

Resource Reminder



The Office of Employee Relations and Engagement is available to serve all unclassified and USS employees, including supervisors and administrators, as a resource for assistance with employment policies, workplace conflict management, referral to mediation and other dispute resolution services, and consultation on a wide range of issues related to workplace environment and effectiveness. The Office administers the disciplinary and grievance processes for USS employees and provides assistance to University administrators with such processes for unclassified employees. The Director of Employee Relations and Engagement, Charlotte Self, also serves as the campus ADA Coordinator.

For more information, see: <http://www.k-state.edu/hr/current-employees/employee-relations/index.html>

OGC to Launch New Seminar Series Beginning this Fall

The Office of General Counsel is adding to its repertoire of legal issues education programs with its new Legal Issues Seminar Series for administrators. The program will include half-day interactive workshops using a combination of presentations, Q&A and roundtable exercises. Deans, department heads and directors will have the opportunity

to participate in small groups using case studies to gain insights into legally significant issues faced by higher education administrators. A variety of topics will be offered at four times throughout the academic year. Each of the four seminar/workshops will be offered on two alternative dates to accommodate teaching and other schedules. Watch for your invitation!

Dear Atty

“Atty” receives and answers legal questions you have about conducting business on behalf of the University. Please send your questions for publication to attys@k-state.edu, including Dear Atty in the subject line. We may reword questions for conciseness or clarity, and we will always publish questions anonymously.

Dear Atty,

If a student asks me to write a letter of recommendation, what are the student privacy issues of which I need to be aware?

– *Uneasy Writer*

Dear Uneasy,

The Family Educational Right to Privacy Act (FERPA) requires the University (and anyone acting as a University employee or agent) to protect the privacy of student information and records, subject to certain exceptions. One of those exceptions is when a student signs a written consent to release the records.

Generally, your observations about a student are not FERPA-protected and can be included in the recommendation letter without a written consent. But any personally-identifying information maintained by the University about a student is protected and requires a written consent before it

is released, even if the student has verbally requested that you include that information. This would include information such as GPA, classes, class rank, specific grades, and so on.

Also, once drafted, if a recommendation letter is kept on file by a University employee, it is part of the student’s education record. Under FERPA, the student has a right to review it. So before you write the recommendation letter, you might want to have the student sign a statement as to whether the student is waiving his or her right to access the recommendation letter now and in the future.

Our office can provide template documents to University personnel for FERPA consents, which require certain items set out in the FERPA statute. We can also provide waivers of the right to access recommendation letters. The person writing the letter of recommendation would maintain such a document in his or her file along with any copies of the recommendation letter.

About this Publication:

This newsletter is designed to serve as a practical informational tool, bringing you topics of interest and practical tips. It should not be relied on as a substitute for legal advice. Laws, regulations and policies change frequently, and legal advice requires careful consideration and application of all relevant facts. If you have legal questions or need legal advice concerning any University matter, please contact the Office of General Counsel directly at 785-532-5730 or attys@k-state.edu