

Understanding Copyright and Fair Use in an Open-Access Academic Setting

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What is Copyright?

- “Congress shall have the power...to promote 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” *U.S. Constitution, Art. I, Sec. 8, Cl. 8*
- Copyright protects **original works of authorship** fixed in a **tangible medium of expression**.



Copyrightable Works

“Works of Authorship” include the following:

- Literary Works
- Musical Works (including words)
- Dramatic Works (including music)
- Pantomimes & Choreographic works
- Pictorial, Graphic and Sculptural Works
- Motion Picture and Audiovisual Works
- Sound Recordings
- Architectural Works (after 12/1/90)

**17 U.S.C. § 102*

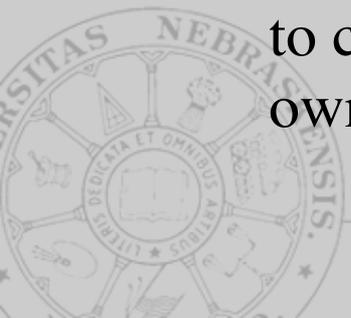


Copyright Owners

Generally, copyright is owned exclusively by the work's creator or author.

Exceptions:

- Work-for-hire: works created by an employee in the course of employment, the employer owns the copyright
- If the copyright owner sells the entire copyright, the purchasing business or person becomes the copyright owner
- Joint owners: two or more authors prepare a work with intent to combine contributions, they are considered joint copyright owners



Rights of Copyright Owners

The owner of a copyright has the exclusive right to:

- *Reproduce* the copyrighted work
- Prepare *derivative works* based on the copyrighted work
- *Distribute* copies of the copyrighted work by sale, license, lending, etc...
- *Publicly perform* the copyrighted work, and
- *Display* the copyrighted work.

Owner can also prohibit others from doing any of these.



Copyright – Acceptable Uses

It's not an infringement if...

- The work you want to use is in the public domain.
- Your use is a “fair use.”
- You are the copyright owner.
- There is a specific statutory exemption.
- You have permission.



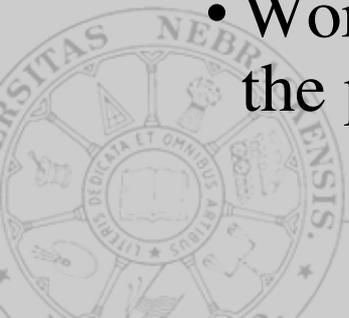
Overview

- Public Domain
- TEACH Act
- Fair Use Guidelines
- Classroom Uses
- Open Access Issues
- Creative Commons/Obtaining Permission



Public Domain

- Works no longer protected by copyright.
- Free for anyone to use without consent of author/owner.
- Dates of publication and/or registration are important.
 - Almost all works published before 1923 are in the public domain.
- No notice requirement for most works created after 1978.
- Works created by Federal Government are, by law, in the public domain.



Term of Copyright Protection

- Term of copyright protection for works published after 1/1/78 is now life of author plus 70 years or until 12/31/2047, whichever is greater. For works for hire, the term is 95 years from the date of publication or 120 years from date of date of creation, whichever expires first.
- For extremely detailed information on copyright term and the public domain, see:
http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm



The TEACH Act

Technology, Education and Copyright Harmonization Act of 2002 (17 U.S.C. § 110 (2))

- Applies to on-line education.
- Allows educators at accredited, non-profit educational institutions to use portions of copyrighted works for distance learning without the permission of the owner or payment of fees or royalties.
- Instructional tools like Blackboard can help with compliance.



TEACH Act - Requirements

- 1) Material used must be legally acquired;
- 2) Material must be used under the direction of an instructor as an integral part of a class session;
- 3) Material may only be disseminated to students officially enrolled in the course;
- 4) Material can only be made available as long as reasonably necessary to complete the transmission of information to students;



TEACH Act Requirements (cont'd)

- 5) The institution must implement measures to reasonably prevent unauthorized access to and dissemination of the work; and
- 6) The institution must institute policies regarding copyright and must educate its faculty and staff members about copyright law.



TEACH Act (cont'd)

- Allows for works only available in analog form to be digitized without owner consent, so long as only *relevant portions* are copied.
- Does NOT apply to works created primarily for educational purposes.
- It is still OK to provide links to external content.
- Helpful link – Teach Act Toolkit @ NC State:

<http://www.provost.ncsu.edu/copyright/toolkit>



TEACH Act (cont'd)

- It is recommended, but not required, to insert the following notice when using third party works pursuant to the TEACH Act:

The materials on this course website are only for the use of students enrolled in this course for purposes associated with this course and may not be retained or further disseminated. The materials on this course website may be protected by copyright, and any further use of this material may be in violation of federal copyright law.



Fair Use

- Legal theory that balances the interests of copyright owners against the interests of society in accessing and using their work for socially valuable purposes.
- Fair use helps protect public uses such as criticism, commentary, news reporting, **teaching, scholarship & research** (17 U.S.C. § 107).
- “This exception permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is intended to foster.” – *Kelly v. Arriba Soft Corp.* (9th Cir. 2003)



Fair Use – Four Factor Test

- 1) Purpose and character of the use.
 - Non-profit/educational vs. commercial
 - Is the use *transformative*?
- 2) Nature of the copyrighted work.
 - Is it factual or creative? Is it unpublished?
- 3) Amount and substantiality of the portion used in relation to the copyrighted work as a whole.
 - Small portion of the work vs. entire work
- 4) Effect on potential market for copyrighted work.
 - Supersede the use of the original? Heart of work?

**Courts balance all 4 factors*



Fair Use (cont'd)

- Unwritten fifth factor – GOOD FAITH.
- Imprecise, but flexible and adaptable.
- Risk/reward analysis – includes not only bad things that can happen if you proceed, but good things that won't happen if you don't proceed.
- It's just as gray from the other side.



Fair Use (cont'd)

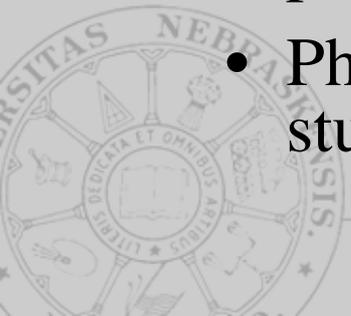
- Transformative uses are favored.
- Use only portion necessary to convey the concept, and only share with enrolled students.
 “Pigs get fed, but hogs get slaughtered”
- Have a good story to tell.
- Remember that fair use is central to the goals of copyright law.



Fair Use – Educational Use Considerations

Fair use is more likely to exist where:

- A modest portion of the work is used – use of entire works should trigger higher scrutiny.
- Use of the work is directly related to an instructional goal (or for scholarship or research).
- Distribution is limited to students in the class.
- Material should be made available for limited periods.
- Physical copies are not given to or retained by students.



Classroom Exemption

17 U.S.C. § 110(1) allows for classroom use of copyrighted materials so long as:

- 1) The use occurs at a non-profit educational institution;
- 2) The teachers and students are present in the same place at the same time;
- 3) The use occurs in a classroom or area devoted to instruction; and
- 4) If the work is an audiovisual work, the copy used must be a lawfully made or obtained copy.



Open-Access Issues

Regular campus copyright exceptions do not apply:

- Section 110(1) of the Copyright Act protects generous displays of educational materials in **face-to-face teaching**.
- Section 110(2) (the TEACH Act) allows delivery of considerable content in support of **distance learning initiatives**, although the rights defined there are more limited than those applicable to in-classroom face-to-face teaching.
- Both of these sections are specifically limited to teaching activities or class sessions offered by nonprofit educational institutions to their enrolled students.



Open-Access Issues (cont'd)

Section 107 – Fair Use

- *Is* applicable, but is probably more limited in scope than in academy-internal teaching and learning.
- Requires case-by-case, fact-specific evaluation.



Options

Options when using videos and images in open-access academic setting:

- Make the content yourself;
- Get content from a colleague or friend and obtain permission to use it;
- Get content from a website that offers public domain content or Creative Commons or similarly licensed material;



Options (cont'd)

- Link to it;
- Conduct a fair use analysis;
- Seek clearance from the publisher for use;
- Pay for a license; or
- Blank it out.



Ways to Manage Potential Issues

3 options for using material that is not your own in an open-access academic setting:

- 1) In the public domain;
- 2) In copyright and used with permission (direct permission or a license); and
- 3) In copyright and used under fair use doctrine.



Fair Use Analysis

Can safely rely on fair use in two circumstances:

- Material being used is being directly criticized; and
- Material is being used in a transformative way.



Fair Use Quiz

At Big State University, you teach a course on filmmaking in which your students watch classic films and then create their own short films, incorporating clips from the classics and using the same styles and techniques, which you also show and critique in class. You would now like to create an online version of the course, using the school's course management system. To facilitate the widest possible exploration, you will post your personal collection of classics to that system, and, to facilitate the widest possible critique, you will require your students to post their assignments to YouTube.

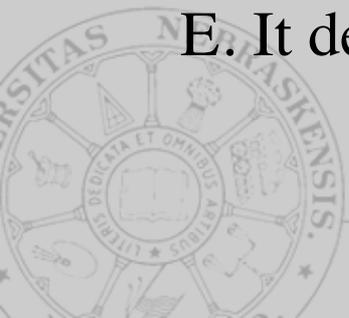


Fair Use Quiz (cont'd)

Question 1:

Under the fair use doctrine, may your students “remix” classic films to create their own short films as a class project?

- A. Definitely yes
- B. Arguably yes
- C. Arguably no
- D. Definitely no
- E. It depends



Fair Use Quiz (cont'd)

Question 2:

Assuming that the class projects do constitute fair use, may your students post them to YouTube?

- A. Yes, if it was fair use in the classroom, it's fair use on YouTube
- B. No, even if it was fair use in the classroom, posting to YouTube is not
- C. It depends

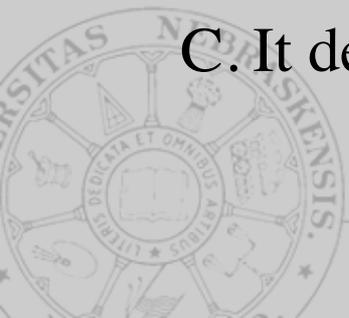


Fair Use Quiz (cont'd)

Question 3:

May you post your personal collection of classic films to the course management system so that your students can view them outside of class and incorporate clips of them into their own films?

- A. Absolutely yes – I own them and can do what I want with them
- B. Definitely no – it would violate the TEACH Act
- C. It depends



Fair Use Quiz (cont'd)

Question 4:

May you include short excerpts of dialogue and stills from your collection of classic films as examples in a textbook you are writing on filmmaking techniques?

- A. Almost certainly yes
- B. Not unless you first obtain permission and pay a licensing fee
- C. It depends



Fair Use Quiz (cont'd)

Question 5:

Assuming that it is fair use to do so, will you be allowed to include short excerpts of dialogue and “stills” from your collection of classic films as examples in a textbook you are writing on filmmaking techniques?

- A. Of course – the question answers itself
- B. It depends



Safest Practices

- Use material in the public domain
- Link to materials on authorized sites
- Attempt “trades” with content owners
- Implement fair use thoughtfully
- Obtain permission



Obtaining Permission

- Creative Commons license:
 - Standard licensing system that allows owners to easily communicate which uses of their works are permitted and which are reserved
- If obtaining from source other than CC or open use source:
 - Negotiate a comprehensive license(s)
 - Obtain item by item permission



U of N Resources

University of Nebraska Memorandum on Copyright Law and Compliance can be found at:

<http://www.nebraska.edu/docs/policies/>

[MemorandumonCopyrightLawandCompliance.pdf](http://www.nebraska.edu/docs/policies/MemorandumonCopyrightLawandCompliance.pdf)



THANK YOU

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