Copyright & Fair Use Presentations

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CopyrightCompliance.net
http://www.copyrightcompliance.net

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COPYRIGHT COMPLIANCE MADE SIMPLE: 
SIX RULES FOR COURSE DESIGN

Linda K. Enghagen, J.D.
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Rule #1

If you own the copyright to the materials, you can use them in whatever manner you wish.

Rule #2

Copyright law does not protect some materials. You can use them in your courses (face-to-face and distance based) in whatever manner you wish. You may use:

- Blank forms;
- Works placed in the public domain by the creator;
- Works for which the copyright has expired;
- Works created by the federal government;
- Facts, formulas, theories, research methodologies and statistical techniques.

Rule #3

You are not allowed to use materials you acquired or accessed unlawfully.

Rule #4

You are not allowed to use materials you acquired or were given access to by someone else if you know or have reason to know that person obtained the materials or access to them in an unlawful manner.

Rule #5

If you own a copy of the materials, but not the copyright or you lawfully accessed (e.g. went to a web site) materials to which someone else owns the copyright, you may use them in your courses (face-to-face and distance based) if you use them:

- If the use is consistent with the rules governing fair use;
- In a manner that is consistent with their intended purpose (i.e. implied license);
- In a manner that is consistent with permission explicitly granted (i.e. express license);
- If you obtained permission and paid required royalties.

Rule #6

If the requirements of the TEACH Act are met, you may do the following in distance based courses:

- Transmit entire performances of nondramatic literary and musical works (e.g. everything but operas, musicals and music videos)
- Transmit any other performance as long as the portions transmitted are limited and reasonable
- Transmit the display of any work as long as it is comparable to that typically used in face-to-face instruction
THE TRUTH ABOUT COPYRIGHT & FAIR USE: MYTHS & MISCONCEPTIONS MEET REALITY

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DISCLAIMER

The information contained herein along with any questions and answers are for educational purposes only. Neither is a substitute for legal advice and neither is to be construed as the rendering of a legal opinion.

MYTH #1

If it doesn’t have a copyright notice, there is no copyright.
REALITY #1

Copyright © 2015 Terry Q. Jones

➢ Copyrights come into existence at the moment of creation by operation of law.
➢ A notice is not required.
➢ Default assumption: copyright protected

MYTH #2

If I copyright an idea, it’s mine; no one else can use it.

REALITY #2

➢ Copyright law protects the expression of an idea once it is placed in a fixed tangible medium.
➢ Secrecy or confidentiality agreements protect ideas.
➢ You can’t own an idea.
HOW TO COPYRIGHT AN IDEA

1. Express work in fixed tangible medium: print, electronic file, work of art etc.
2. Make sure it is a protected category: literary works/ musical works/ dramatic works/ choreography/ pictorial, graphic or sculptural works/ film and audiovisual works/ sound records/ architectural works.
3. Avoid confusion: include copyright notice!

MYTH #3

If it’s not registered,
it’s not valid.

REALITY #3

Registration is not required.

➢ Note: there are advantages to registration if you sue someone for copyright infringement.
MYTH #4

Using materials for educational purposes always qualifies as a fair use.

REALITY #4

For a use to qualify as a fair use it must ...
- Fall under one of the qualifying purposes – news reporting, critique, commentary, teaching, or research – and
- Satisfy the four fair use factors

BASIS STRUCTURE OF FAIR USE

Fair Use Purpose?

No? Get Permission!

Yes? Four Factors!
**FACTOR #1: PURPOSE OR CHARACTER OF USE**

- **Favors**
  - Nonprofit & educational
  - Teaching, research, scholarship, or critique
  - Transformative
  - Restricted access

- **Opposes**
  - For profit
  - Broad distribution
  - Omit author
  - Done to avoid fee
  - Entertainment

**FACTOR #2: NATURE OF WORK USED**

- **Favors**
  - Published
  - Non-fiction
  - Facts
  - Not sold in educational market

- **Opposes**
  - Not published
  - Fiction
  - Highly creative
  - Sold in educational market
  - Sold for 1-time use

**FACTOR #3: PORTION USED**

- **Favors**
  - Quantity = small
  - Qualitatively = insignificant
  - Portion used tailored to permitted purpose

- **Opposes**
  - Quantity = large
  - Qualitatively = significant/central
  - Portion used exceeds that reasonably necessary for permitted purpose
**FACTOR #4: IMPACT ON MARKET & VALUE**

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<tr>
<td>- Few copies made</td>
<td>- Unsecure setting</td>
</tr>
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</table>

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**MYTH #5**

*Materials posted to free web sites are in the public domain.*

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**REALITY #5**

Posting materials to a free web site is a method of distribution. It has nothing to do with who owns the copyright.

Public domain is a legal term of art that means no one owns the copyright.
MYTH #6

Open access materials are in the public domain.

REALITY #6

Making materials available via open access is a method of distribution. It has nothing to do with who owns the copyright.

Many open access materials are distributed with a Creative Commons license.

MYTH #7

As long as I cite it, it’s not copyright infringement.
REALITY #7

Properly citing your sources protects you from plagiarism – not copyright infringement.

- Plagiarism is not a violation of law
- Plagiarism is a violation of professional standards and protocols.

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MYTH #8

As long as I’m not selling it, it’s not copyright infringement.
**REALITY #8**

Copyright infringement does not require that the purported infringer made a profit – or for that matter – even tried to do so.

**MYTH #9**

*As a practical matter, colleges and universities don’t get sued for copyright infringement.*

**REALITY #9**

Within the last five years –

- Georgia State University
- UCLA
- University of Michigan
- Cornell University
- University of California System
- University of Wisconsin System
- Indiana University
MYTH #10

If I commit an infringement, the university will get sued – not me.

REALITY #10

Marketing Information Masters, Inc. vs. San Diego State University and Robert A. Rauch, an individual – 2006

- Case against San Diego State – dismissed
- Case against Robert A. Rauch – not dismissed
- Ultimately: settled for $15,000 – paid by SDS

Thanks for joining me!

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CopyrightCompliance.net
Copyright Compliance Made Simple: Six Rules for Course Design

Requisite Disclaimer
The information contained herein along with any questions and answers are for educational purposes only. Neither is a substitute for legal advice and neither is to be construed as the rendering of a legal opinion.

Background
U.S. Constitution

Congress shall have [the] power ... To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries...

Article I, Section 8, Clause 8
Generally Speaking ...

- Same rules apply to faculty & students
- Same rules apply on-ground & online – **Exception**: streaming under TEACH Act
- Same practice may be prohibited by one rule **but** permitted by another.

Six Rules for Course Design

1. If you own the copyright, you can do whatever you want.
2. If the materials are not protected by copyright law, you can do whatever you want.
3. If you acquired or accessed the materials unlawfully, you can’t use them.
4. If you acquired or were given access to materials by someone else and you know or have reason to know that person obtained or accessed them illegally, you can’t use them.

5. If you own a copy of the materials (not the copyright) or you lawfully accessed the materials to which someone else owns the copyright, you may use them:
   - If the use is a fair use.
   - Under an implied license.
   - Under an express license.
   - If you obtain permission and pay royalties.

6. If the requirements of the TEACH Act are met, you have expanded rights to use copyright protected works in distance education courses.
Rule #1

If you own the copyright, you can do whatever you want.

Policy or Contract?

- Yes: Terms control ownership
- No: Default rules

Default Rules

- GR = creator owns copyright
- Exception = unless it is a work-for-hire
  - Employee in course of employment
  - Ambiguous for faculty
If you own the copyright to the materials, you may use them in the development and delivery of any course you choose regardless of the delivery method: F2F, secured online, or open access (i.e. MOOC).

Rule #2

If the materials are not protected by copyright law, you can do whatever you want.

- Blank forms
- Facts, theories, scientific and mathematical principles, theorems, and formulas
- Research methodologies and statistical techniques
Rule #2

• Works created by (not for) federal government
  – Federal agencies
  – U.S. National Archives & Records Administration

• Works created by states may be protected
  – Reason -- Federalism

Rule #2

• Placed in public domain by owner
  – Uncommon
  – Requires explicit relinquishment
    • Creative Commons option
  – Don’t confuse with permission to use at no charge
  – Don’t confuse with open access

Rule #2

• Copyright Expired (works created in U.S.)
  • Pre-1923: in public domain
  • Pre-1978 w/o copyright notice: in public domain
  • 1923-1963 w/copyright notice but not renewed: in public domain
  • Most other works: remain protected
  • Orphan works ≠ public domain works
If the materials are not covered by copyright law, you may use them in the development and delivery of any course you choose regardless of the delivery method: F2F, secured online, or open access (i.e. MOOC).
Rule #3

If you acquired or accessed the materials unlawfully, you can’t use them.

— Illegal downloads
— Hacking — unauthorized access
— Authorized access but use in manner that exceeds authorization

F2F/Online/Open Access

If you acquired or accessed the materials unlawfully, you may not use them in the development or delivery of any course regardless of the delivery method: F2F, secured online, or open access (i.e. MOOC).

Rule #4
Rule #4

If you acquired or were given access to the materials by someone else and you know or have reason to know that person obtained or accessed them illegally, you can't use them.

• Out of sight, out of mind is not a defense.
• Analogous to possessing stolen property.

F2F/Online/Open Access

If you acquired or were given access to the materials by someone else and you know or have reason to know that person obtained or accessed them illegally, you may not use them in the development or delivery of any course regardless of the delivery method: F2F, secured online, or open access (i.e. MOOC).
Rule #5

If you own a copy of the materials (not the copyright) or you lawfully accessed the materials to which someone else owns the copyright, you may use them:
• If the use is a fair use.
• Under an implied license.
• Under an express license.
• If you obtain permission and pay royalties.

Rule #5—Fair Use Defense

• GR = no permission or payment required
• Fair Use Purposes
  • Criticism, comment, news reporting, teaching, scholarship & research
  • Myths & Misconceptions
    • If a use is educational it = fair use.
  • Reality
    • Fair use purpose + satisfy fair use factors.
Rule #5 — Fair Use Defense

Fair Use Factors

- Purpose or character of use
- Commercial/noncommercial
- Nature of work
- Fiction/nonfiction — Published/unpublished
- Portion used
- Large/small — Significant/insignificant
- Effect on market value

Factor #1: Purpose & Character of Use

Favors
- Nonprofit & educational
- Teaching, research, scholarship, or critique
- Transformative
- Restricted access

Opposes
- For profit
- Broad distribution
- Omit author
- Done to avoid fee
- Entertainment

Factor #2: Nature of Work Used

Favors
- Published
- Non-fiction
- Facts
- Not sold in educational market

Opposes
- Not published
- Fiction
- Highly creative
- Sold in educational market
- Sold for 1-time use
Factor #3: Quantity & Quality Portion Used

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Factor #4: Effect on Market for & Value of Work

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F2F/Online/Open Access

- F2F: use w/i limits of purposes & factors
- Online (secured/enrolled students): use w/i limits of purposes & factors
- Open access (e.g. MOOC): unlikely to apply in unsecured environment with massive enrollments
Rule #5—Implied License

- Permission implied from intended purpose
  - Unsecured Web sites
    - Link or direct students to site
  - Textbook supplements
    - If designed for student purchase, they must purchase them.

F2F/Online/Open Access

As long as done in a manner consistent with the terms of the implied license, materials acquired or accessed under an implied license may be used in the development and delivery of F2F, online and open access courses.

Rule #5—Express License

- Permission is explicit
  - Licensing agreement
  - Creative Commons licenses
  - Copyright Clearance Center
    - Permissions service
  - Obtained permission & paid royalties
    - E.g. via publisher or copyright owner
F2F/Online/Open Access

As long as done in a manner consistent with the terms of the express license, materials acquired or accessed under an express license may be used in the development and delivery of F2F, online and open access courses.

Rule #6

If the requirements of the TEACH Act are met, you have expanded rights to use copyright protected works in distance education courses.
Rule #6

- The Technology, Education and Copyright Harmonization Act (The TEACH Act) of 2002

- Purpose
  - Harmonize certain differences between face-to-face and distance education instructional practices
  - Applies only to distance education
  - Applies only if accredited & non-profit

Rule #6

- Affirmative obligations
  - Institutional policies
  - Provide copyright compliance information to faculty, students & relevant staff
  - Provide “notice to students that materials used in ... course may be subject to copyright protection”
  - Transmit to enrolled students only
  - Limit retention of copyrighted works
  - Do not interfere with security measures that control storage & distribution of protected works

Rule #6

- After affirmative obligations are met –
  - Transmit entire performances of literary & musical works (i.e. everything but operas, musicals & music videos)
  - Transmit any other performance as long as portions limited and reasonable
  - Transmit display of any work as long as comparable to that typically used in face-to-face instruction
- TEACH Act prohibits copying materials sold for distance education courses
F2F/Online/Open Access

• F2F: The TEACH Act explicitly does not apply
• Online: Explicitly applies as long as affirmative obligations met + used to replicate F2F classroom
  • Does not apply to outside of classroom assignments etc.
• Open access (e.g. MOOC): unlikely to apply in unsecured environment with massive enrollments

Consider This ...

• Faculty member posts 3 excerpts from same non-fiction book to secure LMS
  • None = heart of work
  • One = 15 pages
  • One = 11 pages
  • One = 2 pages
• Book = 425 pages total & average chapter = 20 pages
• Permissions system not available
## Factor 1
### Purpose or Character of Use

- If educational institution = non-profit
  - Favors fair use
- If educational institution = for-profit
  - Still likely favors fair use
  - Educational use more important than for-profit status of institution

## Factor 2
### Nature of Work Used

- Excerpts = published non-fiction
  - Non-fiction tends toward fair use

## Factor 3
### Portion Used

- Not “heart of the work”
  - Favors fair use
- Excerpts = 28 out of 425
  - Represents 6.5% of book
  - Likely favor fair use
Factor 4
Impact on Market

- Permissions not available
- Leans toward fair use
- Substantial harm
- Small portion (6.5%) leans toward fair use
- Overall Conclusion
- Strong case supporting fair use

Thanks for Joining Us!

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FACTS

In the spring of 2008, Georgia State University officials were sued by three academic publishers claiming extensive copyright infringement over the posting of book excerpts to GSU’s e-reserves and learning management systems. Though the case went to trial in the summer of 2011, the judge took nearly a year to craft an almost 350 page opinion painstakingly analyzing 75 alleged violations of fair use. The opinion was released on May 11, 2012. The judge concluded GSU faculty violated the limits of fair use in 5 of the alleged violations that went to trial. In a subsequent ruling issued on August 10, 2012, the judge ruled against the publishers refusing to enter an injunction against GSU. Further, in large part because the court concluded that GSU acted in good faith throughout, she held that GSU is the “prevailing party” and ordered the publishers to pay GSU’s costs and fees associated with the lawsuit. The publishers appealed and on October 17, 2014, the 11th Circuit Court of Appeals issued its ruling agreeing in part, and disagreeing in part with the lower court’s ruling.

KEY RULINGS AT A GLANCE

Proof of Copyright Ownership

Publishers must be able to prove ownership of a valid copyright to any allegedly infringed works. If they can’t prove such ownership, they lose on that claim.

Repeated (Semester-to-Semester) Use of Same Work

Repeated use of the same work is permitted by copyright law and does not violate fair use.

1976 Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions With Respect to Books and Periodicals

These guidelines are not legally binding and are not an appropriate standard for determining what does and does not qualify as a fair use.


**Hits**

Posting a work to e-reserves or a learning management system is not a violation of fair use if, in fact, the work is not accessed and/or used by students. Such copying is de minimis. Examples: work posted but course is cancelled, work posted but the number of recorded hits indicates it wasn’t used by students. (Not all systems track hit counts.) The district court discussed hits in this way and the appeals court did not express any disagreement with that view.

**“Heart of the Work”**

Excerpts that qualify as the “heart of the work” require permission. An excerpt is not automatically “the heart of the work” simply because it was selected by a faculty member to be used in teaching or scholarship. An excerpt is “the heart of the work” if: it is a “critical part of the book;” it bears “an unusually striking relationship to the book as a whole;” or it “essentially sum[s] up the ideas in the book.” Of primary concern here is that “heart of the work” excerpts serve as “market substitutes” which weighs against fair use.

**Page Count**

When determining whether a posted excerpt or excerpts qualifies as a fair use, all the pages in the book are included in the page count. That is, the total page count includes not only the main body of the book, but also includes the title page, forward, table of contents, index, appendices, etc. However, when a posted excerpt contains public domain materials, the length of the posted excerpt is computed by subtracting the length of the public domain materials.

Example: A 25 page excerpt of a book contains 3 ½ pages of material that are in the public domain (e.g. copyright has expired or federal government documents). For the purposes of any required page count, that excerpt is 21 ½ pages long.

**Fair Use Factors**

- **Factor #1** – Purpose or Character of the Use: Because GSU is a non-profit educational institution, the appeals court agreed with the district court in concluding that in each instance of alleged copyright infringement, this factor weighed in favor of fair use. Interestingly, the appeals court indicated that the use (educational) was of greater significance than the fact that GSU is a non-profit.

- **Factor #2** – Nature of the Work Used: Here, the appeals court concluded that this factor was of no particular significance because the materials used were non-fiction and published. However, the court did note that factual material can contain additional “expressive” content and as a result just because the work used is non-fiction does not automatically weigh in favor of fair use.

- **Factor #3** – Portion Used (Quantitatively & Qualitatively): This is the point at which the appeals court most significantly differed with the district court. The district court judge
established 10% or 1 chapter rules for analyzing fair use in non-fiction books. The appeals court overruled that finding and called for a traditional case-by-case evaluation of the portion used.

- **Factor #4** – Impact on the Market: Agreeing with the district court, the appeals court ruled that if there is no permissions market for a work that weighs in favor of fair use. Beyond that, the court established a standard to be used when evaluating the market impact that asks the question: If “everybody did it,” would that result in “substantial” harm to the market for the work? If yes, that weighs against fair use. If no, it weighs in favor of fair use.

**Fair Use Protection Requires the Following**

The lower court ruled that all of the following are required for fair use to apply. The appeals court expressed no disagreement with that view.

- Access to materials must be limited to enrolled students, in a secure environment, only “for the term of the course.”
- Institutional policies must be in place that prohibits students from further distributing the materials.
- Each time a student accesses such materials, he or she must be “reminded of the limitations of the copyright laws.”
- All materials used “must fill a demonstrated, legitimate purpose in the course curriculum and must be narrowly tailored to accomplish that purpose.”

**Sound Bites Worth Noting**

“…it is consistent with the principles of copyright to apply the fair use doctrine in a way that promotes the dissemination of knowledge, and not simply its creation …”

“Even verbatim copying ‘may be transformative so long as the copy serves a different function than the original work’”

“The legislative history of [the Copyright Act] further demonstrates that Congress singled out educational purposes for special consideration.”

“…it is not determinative that programs exist through which universities may license excerpts … the ability to license does not demand a finding against fair use.”
Frequently Asked Questions

As a faculty member, I receive many complimentary textbooks from publishing companies. Can I use the teaching supplements from textbooks I don’t require for my courses?

Maybe. This sorts out as follows. When you require a textbook for a class and receive supplementary materials from the publisher, you’re allowed to use them. If any of the supplements are designed for student purchase, you must have your students purchase them; copying is not allowed. Supplementary materials from a textbook you don’t require are another story. Presumably, the supplementary materials are not in the public domain. Consequently, your avenues for lawfully using them are: an express or implied license, fair use, or obtaining permission. To the extent any of these apply, you’re protected. If you have the time to do so, there is one other option. Copyright law protects the expression of ideas, not the underlying ideas. As long as you give appropriate credit to avoid any allegations of plagiarism, you can always create your own materials. They then become your expression of that idea which you are free to use as you wish.

In educational institutions, who is responsible for ensuring that courses are copyright compliant?

This sounds like a perfectly sensible question that should have a direct answer. But, it doesn’t. Copyright law does not impose this kind of affirmative obligation on educational institutions. The Digital Millennium Copyright Act creates certain affirmative obligations, but that is in relation to the institution’s role as an Internet Service Provider. So, those rules don’t apply to copyright compliance for courses. As a practical matter, it goes something like this. If an institution has copyright use policies, the policies might address who is responsible for what. However, regardless of whether such policies exist, the plaintiff in a copyright infringement lawsuit is entitled to sue the faculty member, the institution or both. Some institutions, as a matter of policy, practice, or union contract, defend faculty members who are sued in relation to the performance of their professional duties. Others don’t. So, the short answer is that faculty members, instructional designers and others involved in the development of courses are susceptible to copyright infringement lawsuits as are the institutions as their employers.

Does fair use apply to non-credit courses?

Yes with a “but…” The fair use doctrine does not disappear because a course is offered on a not-for-credit basis. However, noncredit courses are more in the direction of a commercial activity and less in the direction of an academic activity. Consequently, you have to re-evaluate the application of fair use. So, you may need permission for materials used in a non-credit course even though you didn’t need permission when using the same materials in a course offered on a for-credit basis.
Can a college or university take advantage of the TEACH Act while it is in the process of becoming compliant with all its requirements?

No. The increased rights available under the TEACH Act are conditioned on satisfying all the Act’s requirements.

Who certifies TEACH Act compliance?

There are no provisions in the TEACH Act for governmental certification, oversight, registration, or documentation of compliance. So, once an institution is satisfied that it meets all the requirements, it can begin to take advantage of the transmission rights.

What is the “online” equivalent of showing a video in a classroom setting? How do we make videos that have been legally purchased available to students in an online course?

While copyright law permits the display of such DVD’s and videos in a fact-to-face setting, the rules are different under the copyright statute for transmitting streaming video even when it is limited to enrolled students accessing a secure system. It may sound logically inconsistent, but it is the ways the rules are written. Nevertheless, it is possible to stream such materials. Without going into detail, to digitize and stream such materials, the university must own them (not the individual faculty member personally). If a college or university is TEACH Act compliant, the materials may be streamed in accordance with its rules. If a college or university is not TEACH Act compliant, some institutions establish policies for streaming under the parameters of fair use. For those interested in knowing more about the TEACH Act, there are many online resources that detail its requirements.

Can a consultant who is giving an educational workshop for which they are paid by an outside organization rely on fair use?

When consultants provide workshops it is typically not academic credit bearing work – the word “training” is often used to differentiate between academic course work and other types of classroom experiences that are not for academic credit. Fair use does not disappear in training contexts; however, a more conservative approach is wise. In addition to the use not qualifying as academic course work, in most cases, the consultant is engaged in the activity on a for-profit basis.

How can you tell whether government materials are in the public domain?

First, remember that materials created by (not for) the federal government are in the public domain. State governments are not bound by this rule. When evaluating whether such materials are protected by a copyright, look for a copyright notice in the place that is most customary for it to be located in that type of work. For example, when looking at a web site, scroll to the bottom of the page. In a book, a copyright notice is typically located in the front materials.
Protecting Ideas, Plagiarism and Open Access: Clearing Up Some Copyright Confusion

Linda K. Enghagen, J.D., Professor
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University of Massachusetts at Amherst

Congress shall have [the] power …To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries…

Article I, Section 8, Clause 8
U.S. Constitution

Combine the complexity of copyright law with its application to technology and it is not a surprise that confusion abounds. In some cases, the confusion is not about anything new. How can copyright law be used to protect an idea? In other cases, the confusion stems from something that has been around for a long time—plagiarism—but is now infinitely easier to accomplish due to the copy and paste functions of any basic word processing software. Yet others arise from the new vocabulary associated with new applications of emerging technologies. What is open access? Is it related to public domain?

How can copyright law be used to protect an idea? The short answer is that it can’t. Copyright experts are quite familiar with what is referred to in the field as the “idea/expression dichotomy.” That dichotomy is grounded in the words found in a portion of the U.S. Constitution quoted above. Congress is directed to create a system of limited monopolies that secures to authors and inventors the exclusive right to their respective writings and discoveries… Consistent with this directive, the rules of copyright law protect the expression of an idea by giving creators a copyright. Copyright law does not protect the idea itself, however. If it did, the progress envisioned in the words of the Founding Fathers would instead suffer.

Plagiarism is nothing new. But advances in technology now permit the copying and pasting of vast amounts of text and images with nothing more than a few clicks of the mouse. The ease and frequency with which this occurs even led to a new line of businesses—plagiarism detection services such as Turnitin®. Yet, many people are unclear about the relationship between plagiarism and copyright infringement. By definition, copyright infringement is against the law; but plagiarism is not. Plagiarism refers to the failure to properly credit someone else’s work. It is a violation of professional protocols that may carry sanctions from professional associations, but usually not from a court of law. The only time plagiarism becomes copyright infringement is when the copying is so extensive that is also violates the rights of a copyright owner.

New and emerging technologies often come with new vocabulary and terminology. This is the case with the Open Access movement. In academia, Open Access tends to focus on making research and scholarly works widely available. In practice, it typically refers to making such works freely available such as via an unsecured web site. This does not mean, however, that
Open Access works are in the public domain. Most works posted in Open Access sites are covered by copyright law. Open Access is about the method of distributing works, not about copyright ownership.

Sloan-C View blog: posted July 7, 2010
Reviving the Primary Purpose of Copyright Law: "Don't Stifle Creativity!"

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The Congress shall have 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, Article 1, Section 8, Clause 8

Last spring, the 9th Circuit Court of Appeals handed down a decision in the case of Perfect 10, Inc. v. Amazon.com, Inc., A9.com Inc. & Google Inc. breathing new air into the gasping lungs of copyright law's fair use defense. In a well-reasoned decision, the court rejected formulaic applications of the fair use factors reminding everyone that they are not to be "treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright."

Perfect 10 is in the business of selling copyright protected photos of nude models. It offers access to these photos in a number of ways including a members only subscription-based website and thumbnail (reduced size) images intended for downloading to cell phones. The 9th Circuit opinion focused on Perfect 10's claims against Google, Inc. Google's search engine is designed in such a way that when it generates responses to search requests, the responses include not only relevant text but thumbnail versions of images associated with such text. Like the thumbnail images Perfect 10 markets to cell phone users, the thumbnail images generated in a Google Image Search can be downloaded by cell phone users. In its lawsuit, Perfect 10 contended that Google's incorporation into search results of the copied images constituted direct copyright infringement. Google countered that the copying and distribution of such images via search engine responses is protected by the fair use defense. In the end, Google prevailed.

The court's reasoning was fairly straightforward. The 9th Circuit agreed with Perfect 10 that Google engaged in copyright infringement. Google's search engine functioned in a way that it both reproduced and distributed copyright protected works. These are violations of the rights of the copyright owner. Indeed, Google didn't argue that point. Instead, Google asserted the defense of fair use.

While a bit of an oversimplification, the fair use defense serves as an exception to the general rules of copyright law. Generally, copyright law reserves to copyright owners the right to reproduce and distribute their works. In contrast, fair use preserves the rights of users of copyright protected works. If fair use applies, a user does not need permission from the copyright owner and the copyright owner cannot require payment of a royalty or licensing fee. In this sense, fair use is free use.

In its argument against Google, Perfect 10 focused on the fact that it offered thumbnail images of its photos for sale to cell phone users. Because of the nature of the format used by Google's thumbnail images of the same photos, Google's images could be downloaded too, and at no cost. Perfect 10 contended this reality defeated Google's fair use claim because one of the fair use factors is the impact of the use on the market for the copyright protected work. The 9th Circuit
disagreed. In its rejection of Perfect 10's argument, the court primarily relied on two points. First, it concluded that any financial loss experienced by Perfect 10 as a result of Google's use of the thumbnail images in its search engine responses was purely speculative. Second and more importantly, the court reminded everyone that the rules of copyright law are not to be applied with a rigid adherence to the statute when to do so "would stifle the very creativity which that law is designed to foster." In what is likely to become often repeated language from the decision, the 9th Circuit explicitly revives the viability of fair use when it says:

We must be flexible in applying a fair use analysis; it 'is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis...Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright law.'...The purpose of copyright law is '[t]o promote the Progress of Science and useful Arts,' and to serve ‘the welfare of the public.'

While it is impossible to predict with precision where this line of analysis might lead, it clearly represents a welcome adjustment in the thinking about fair use. For those of us in educational environments who rely on fair use when using copyright protected works for teaching and research, it is a hopeful sign. Consider what it might mean relative to the market for permissions when developing teaching materials like course packets. Some have feared that the existence of a market for permissions means that permission must be sought and requested royalties paid, that the existence of the market was the end of the discussion. If the 9th Circuit has its way, it becomes clear that the market for permissions is neither irrelevant nor controlling. It is simply one of the facts to be considered, weighed and balanced within the larger contest of the overriding purpose of copyright law.

Sloan-C View Volume 6 Issue 12: posted: December 2007
Sovereign Immunity, Public Employees & Personal Liability for Copyright Infringement

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Lawyers are trained problem spotters. In fact, in law school, students routinely refer to exams as issue spotting contests. From a practitioner's standpoint, the job is to protect the client. To do so, potential problems must be identified, risks assessed and the client informed and advised accordingly. As a result, lawyers are sometimes seen as beholders of nothing but bad news who employ scare tactics by telling people what can go wrong. Telling people what can go wrong is not only central to the job; failing to do so may be professional malpractice. Regrettably, some people confuse being told what might happen with what will happen. In reality, with the exception of getting divorced, most people go through their entire personal and professional lives without being a party to a lawsuit.

All of the foregoing is an attempt to put a recent federal court decision in context. At the moment, there is no indication of large numbers of these cases in the system or some new trend. So, this is not a sounding of the alarm bells. Nevertheless, low risk is not no risk. Consequently, it is important to be aware of the possible limits to protection from federal lawsuits many public employees take for granted under the 11th amendment sovereign immunity provisions of the U.S. Constitution.

In many respects, Marketing Information Masters, Inc. v. The Board of Trustees of the California State University System, a public entity; and Robert A Rauch, an individual is a garden variety copyright infringement case. Marketing Information Masters, Inc. alleges that Mr. Rauch infringed on one of its copyrights by directly copying large portions of one of its economic impact studies. At the time of the alleged infringement, Mr. Rauch was the Director of the Center for Hospitality and Tourism Research at San Diego State University, a public university in the California State University System. The claim was met with a predictable response. The university filed a motion to dismiss the case on the grounds of sovereign immunity which protects both public entities and their employees from being sued in federal courts. In an unusual application of sovereign immunity, the court agreed that sovereign immunity protected both the university system and Mr. Rauch as the Director of the Center. However, it concluded the lawsuit could proceed against him in his individual capacity. That is, the court allowed the lawsuit to proceed against him personally.

At this point, the case against Mr. Rauch has neither gone to trial nor settled, so its final outcome on the question of whether he committed copyright infringement is unknown. Nevertheless, the facts as alleged in the case suggest a possible explanation for the court's unexpected ruling. According to the court documents, Marketing Information Masters, Inc. (MIM) conducted economic impact studies for the Holiday Bowl Committee in relation to post-season college football games held in the San Diego area. MIM performed the studies at below market rates. After delivering the 2003 study, MIM informed the committee it could no longer perform the studies at reduced rates. Subsequently, the committee contracted with the Center for Hospitality and Tourism Research for the 2004 study. According to the complaint filed by MIM, Mr. Rauch contacted MIM after the Center got the contract for the study asking MIM to work on a consulting
basis with the Center because Mr. Rauch didn’t know how to conduct economic impact studies. This concerned MIM which then contacted the executive director of the Holiday Bowl committee warning him to not give Mr. Rauch or the Center access to its proprietary information from previous years’ work. Nevertheless, Mr. Rauch and the Center did obtain such information. After the 2004 study was presented to the Holiday Bowl committee, MIM contacted SDSU claiming Mr. Rauch plagiarized large portions of the 2003 study. Ultimately, SDSU undertook an internal investigation of Mr. Rauch in relation to the preparation of the study and found he had committed plagiarism. The university issued "two formal letters of reprimand to Mr. Rauch."

Generally speaking, sovereign immunity protects public employees who are acting within the scope of their employment as long as they are acting in good faith (even if it turns out they acted illegally). While the court doesn’t comment on good faith in its decision, the facts alleged against Mr. Rauch paint a picture that is hard to characterize as "acting in good faith." Understood in this light (while remembering the facts are alleged and not yet proven), the decision makes sense. Public employees who act in good faith (even though they may be wrong) can continue to enjoy 11th amendment sovereign immunity while those who act with impunity may find themselves paying the price—literally and personally.

Sloan-C View Volume 7 Issue 10: posted November 2008
Fair Use: Derivative Works and Transformative Works

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Anyone with a basic working knowledge of copyright and fair use law is familiar with the balancing act represented by, on the one hand, the rights of copyright owners and, on the other, the rights of users of copyright protected works. Copyright owners possess exclusive though not absolute rights. Those exclusive rights are: the right to reproduce the work, distribute the work, create derivative works, display the work, and perform the work. Consistent with the Constitutional mandate to “promote the progress of science and the useful arts,” users have rights too and these rights include the right to use works in a manner that is consistent with the rules of fair use. Generally, copyright owners retain control over the creation of derivative works while users possess the right to create transformative works under the rules of fair use.

Derivative works are defined under the Copyright Act of 1976 as follows:

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work” (17 U.S.C. § 101).

In other words, a derivative work doesn’t add anything new- it doesn’t build on the original but merely recasts it. The owner of the underlying original copyright protected work controls the creation of such works. A copyright owner may personally undertake the creation of a derivative work or authorize someone else to do so. Similarly, a copyright owner may just say no. There is no legal obligation to allow others, even for a fee, to create derivatives of the original. Of course, this changes once the copyright expires on the underlying work. When a copyright expires, the work goes into the public domain and the right of the original owner to prevent the creation of the derivative works expires as well.

Transformative works are different. They are not defined by the Copyright Act of 1976; instead, they are discussed as part of fair use analysis. The fair use rules allow the use of copyright protected works owned by others as long as the use is for one of the fair use purposes (e.g. news reporting, criticism, comment, research, teaching and scholarship) and satisfies the fair use factors. The factors are: 1. The purpose of the character of use; 2. The nature of the work used; 3. The portion used; and 4. The impact of the use on the market for and value of the work. Whether a new work qualifies as transformative is considered when analyzing the first factor— the purpose or character of the use. In educational environments, analyzing the purpose and character of the use is typically approached by evaluating whether the use is commercial or noncommercial. Because educational uses are usually noncommercial and therefore weigh in favor or fair use, transformative uses are rarely discussed. Nevertheless, it bears noting that the U.S.
Supreme Court is on record in declaring the significance of concluding a use is transformative.

Although [a finding of] transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use. *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569 (1994).

Transformative uses that result in the creation of a transformative work are similar to derivative works in that they are based on the original. However, they are different in that they satisfy the underlying purpose of copyright law by building on the original and thereby “promoting the progress of science and the useful arts.” Simply put, transformative works create something new. Again, as noted in *Campbell v. Acuff-Rose Music, Inc.*, “The central purpose of this investigation is to see...whether the new work merely [supersedes] the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message; it asks, in other words, whether and to what extent the new work is transformative.” Consequently, copyright owners do not control transformative uses that result in the creation of transformative works. Anyone can lawfully undertake a transformative use of another's copyright protected work even before the copyright expires. No permission is required from the copyright owner.

Being aware of the rules governing transformative uses provides fertile ground for those with the creativity and time to transform existing works in to something new.

Sloan-C View: posted February 1, 2011
Orphan Works & Copyright Law: A Primer

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In January of 2006, the U.S. Copyright Office released its official "Report on Orphan Works" detailing both the current state of affairs and recommending changes to existing copyright law limiting the exposure of the users of orphan works. H.R. 5439, known as the Orphan Works Act of 2006, is at present under consideration by the House Judiciary Committee. Its progress can be tracked via the Library of Congress.

What is an orphan work?

Orphan work is the term used to refer to a copyright protected work for which the owner cannot be identified and located. Not being able to identify or locate a copyright owner becomes a problem when someone wants to use the work in a manner that requires the owner's permission. While identifying a work as an orphan work may sound elementary, the "Report on Orphan Works" indicates that many people are confused on this point. In preparing its report, the Copyright Office solicited comments from the public. In response, it received over 850 written replies, most of which were from individuals. Approximately 40% of those comments described situations involving copyright protected works that did not meet the legal definition of an orphan work. For example, a copyright protected work does not qualify as an orphan work simply because the copyright owner declined to respond to a request for permission to use it. Going to the trouble of tracking down an owner only to be confronted with silence may be frustrating, but it doesn't change the legal landscape. In this instance, silence is properly construed to be the copyright owner's way of saying "no". Similarly, a copyright owner's direct refusal to grant permission or request for what seems to be an excessive permissions fee do not change the legal status of the situation either. These situations do not describe orphan works. They describe situations in which the potential user simply failed to obtain the required permission.

Orphan works and fair use

The inability to identify and locate the owner of an orphan work is not always a problem for users. If the work in question is used in a manner that qualifies as a fair use, permission isn't necessary and the copyright owner cannot require the payment of licensing fees. While it is true that determining whether a particular use qualifies as a fair use is easier said than done, it is nevertheless worth considering. (Many web sites contain information and checklists to assist in this evaluation.) Furthermore, for certain educational users, copyright law permits judges to reduce damage awards for copyright infringements that result from a good faith belief that the use satisfied the requirements of fair use even though that belief turns out to be mistaken. These provisions of copyright law make educators and educational institutions less attractive targets for lawsuits.
Using orphan works - recommendations

While awaiting possible changes in copyright law that might clarify the do's and don'ts of using orphan works, the following recommendations will assist those confronting their use in the meantime. First, determine whether you need permission. Is the work in the public domain? Is your use a *fair use*? If you determine that you need permission (or it's unclear and you don't want to take any chances), exercise reasonable diligence in identifying and locating the copyright owner. Keep documentation of your search (e.g. copies of correspondence, e-mail messages etc.). Complete your search *before* using the work. In using the work, include as much information as you are able by way of attribution. This clarifies that you are not claiming credit for someone else's work. If contacted by the owner after the fact, respond professionally and quickly. Finally, if the situation warrants it, contact an attorney.

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Copyright Protection and Worthless Works

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In January of 2007, in the case of Kahle v. Gonzales, the 9th Circuit Court of Appeals rejected the arguments of two plaintiffs who challenged the constitutionality of copyright extension laws claiming the term extensions violate the First Amendment. Both plaintiffs maintained online archives of copyright protected works they claimed to be of little or no commercial value. The archives were available for free online.

Copyright Term Extension Laws: The Move from Opt-in to Opt-out

Taken together, the Copyright Renewal Act of 1992 and the Sonny Bono Copyright Term Extension Act of 1998 alter the nature and length of copyright protection in certain respects. Under prior law, copyright protection lasted for a period of years but was subject to renewal. That is, if a copyright owner failed to file for a renewal (i.e. continue to opt-in to copyright protection), the copyright expired and the work passed into the public domain. Under this system, copyright owners tended to not renew the copyright of works possessing little or no commercial value. Consequently, for example, orphaned works tended to be in the public domain.

The Copyright Renewal Act of 1992 in conjunction with the Sonny Bono Copyright Term Extension Act of 1998 changed the old copyright protection system significantly. First, the system was no longer opt-in with required renewals for extended copyright protection. Instead, under the new rules, copyright protection is automatic. The owner doesn't need to do anything. Not only is there no need for registration, copyright owners don't need to place a copyright notice on the work. Instead, the system became an opt-out system. That is, copyright ownership becomes the default presumption and an owner must do something to opt-out. While the law does not prescribe specific &magic words& to accomplish this, the owner must explicitly place the work in the public domain to opt-out of copyright protection. Second, these two laws reached back in time to the period between 1964 and 1977 eliminating the renewal requirement for works created during those years. Consequently, there are works from that period that would have passed into the public domain if the copyright had not been renewed, but instead, under the new opt-out rules, they continue to be protected.

Opt-out and the First Amendment

Among other things, the First Amendment protects the free exchange of ideas. Essentially, the plaintiffs in Kahle v. Gonzales argued that the copyright term extensions along with the change to an opt-out system must be reviewed to determine whether they unconstitutionally interfere with the freedom of speech. Their rationale focused on a variety of considerations. From a legal perspective, they argued that extending the duration of copyright protection limits the ways in which users may utilize such works thereby potentially interfering with their right to use them in the exercise of their First Amendment rights. They argued that any balancing of First Amendment rights against copyright protection should weigh in favor of the First Amendment when dealing with worthless works. The Ninth Circuit disagreed. The court concluded that any constitutional concerns were
settled under the U.S. Supreme Court's decision in *Eldred v. Ashcroft*.

**Significance of Decision**

In many respects, this decision is unremarkable. The Ninth Circuit undertook a straightforward application of the relevant court decisions in concluding that a copyright is a copyright is a copyright. And, that is why this case is worth noting. It clearly stands for the proposition that copyright protection is not dependent on the commercial value of the infringed work. It stands for the proposition that copyright protection applies even if that work is literally worthless. It stands for the proposition that copyright law is not completely and inextricably intertwined with the wheels of commerce because something can be worthless yet remain worth protecting—just not in the manner the plaintiffs had in mind.

Sloan-C View Volume 6 Issue 2: posted February 2007
Additional Resources

(Disclaimer: As we all know, links change. If the link doesn’t work, use the identifying information to determine whether the materials remain available in another location.)

Books


Codes of Best Practices in Fair Use

Center for Media & Social Impact
http://cmsimpact.org/fair-use

• The Code of Best Practices for Academic & Research Libraries
• Code of Best Practices in Fair Use for Poetry
• Society for Cinema and Media Studies’ Statement of Fair Use Best Practices for Media Studies Publishing
• Code of Best Practices in Fair Use for OpenCourseWare
• The Code of Best Practices in Fair Use for Media Literacy Education
• Code of Best Practices in Fair Use for Online Video
• Documentary Filmmakers’ Statement of Best Practices in Fair Use
• Society for Cinema and Media Studies’ Statement of Best Practices in Fair Use in Teaching for Film & Media Teachers
• Code of Best Practices in Fair Use for Scholarly Research in Communication
• Best Practices in Fair Use of Dance-related Materials

Fair Use Resources

Columbia University Libraries/Information Services: Copyright Advisory Office
http://www.columbia.edu/cu/lweb/copyright/

Fair Use & TEACH Act Checklist
http://www.kcc.edu/FacultyStaff/copyright/Documents/copyrightchecklist.pdf

Know Your Copy Rights from the Association of Research Libraries
http://www.knowyourcopyrights.org/

Marcopia Community College: Fair Use Principles
http://www.maricopa.edu/legal/ip/guidelines/fairuse.htm
Stanford Copyright & Fair Use – Summaries of Fair Use Cases
http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-c.html

The Fair Use Network
http://www.fairusenetwork.com

UCCopyright: A Resource for the University of California Community
http://www.universityofcalifornia.edu/copyright/usingcopyrightedworks.html

Visual Resources Association – Intellectual Property Rights Resources
http://www.vraweb.org/resources.html

Will Fair Use Survive? Free Expression in the Age of Copyright Control from the Brennan Center for Justice at NYU School of Law

Public Domain Resources

Clip Art – Public Domain Images
http://www.princetonol.com/groups/iad/links/clipart.html

Images of American Political History
http://www.h-net.org/announce/show.cgi?ID=124983
http://www.digitalhistory.uh.edu/

New Rules for Using Public Domain Materials
http://www.copylaw.com/new_articles/PublicDomain.html

Public Domain Images
http://www.electricteacher.com/diversity/publicdomain.htm

Public Domain Images (Mostly!) for Use in Multimedia Projects and Web Pages
http://www.cuyamaca.edu/InstSupport/stu_multimedia.asp

Public Domain Information Project
http://www pdinfo.com/

Public Domain Movies and Film
http://openflix.com/
http://www.archive.org/details/movies
http://pdmdb.org/

Public Domain Music
http://www.pdmusic.org

Stanford Copyright & Fair Use – The Public Domain
http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter8/index.html
The TEACH Act Resources

American Library Association
Site includes comprehensive information on copyright law applicable to libraries.
http://www.ala.org/ala/issuesadvocacy/copyright/index.cfm

Boston College
Site includes: 12 item list of compliance requirements
http://www.bc.edu/content/dam/files/offices/ides/expanded_checklist.pdf

Florida State University
Site includes: The TEACH Act of 2002: How the law affects online education

Texas A&M University
Site includes: TEACH Act, Checklist, Expanded Checklist, Senate Report
http://imedia.tamu.edu/copyright_info/teach_act

The TEACH Toolkit—NC State University
http://www.provost.ncsu.edu/copyright/toolkit/

The TEACH Act —University of Texas System Copyright Crash Course
http://copyright.lib.utexas.edu/teachact.html
Copyright & Fair Use

Nonprofit/For Profit Educational Institution Statutory Comparison for the Use of Traditional Copyright Protected Works

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<th>Exclusive Rights of Copyright Owners</th>
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<tr>
<td>17 U.S.C. §106</td>
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1. Reproduce copyright protected work.
2. Create derivative works.
3. Distribute the work.
4. Publicly perform the work.
5. Publicly display the work.

Copyright owners possess exclusive not absolute rights. Users’ rights are highlighted below. Users’ rights vary depending on a variety of factors including their nonprofit or for profit status.

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<tr>
<th>Rights of Nonprofit Educational Institutions in Face-to-Face Classrooms</th>
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<td>17 U.S.C. §110(1)</td>
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As long as the copies used were lawfully obtained, and are being used for educational (not entertainment) purposes, faculty members may:

1. Show videos and films.
2. Perform and listen to musical or other recordings.
3. Perform or show a play.
4. Show slides, photographs, charts, tables, graphs or other images.

For profit institution solution: Because these rules apply only to nonprofit educational institutions, faculty members at for profit educational institutions must get permission to use such materials and pay any required royalties or licensing fees. If the materials are in the library at a for profit educational institution, the library may already hold a license permitting this type of use.
Rights of Accredited Nonprofit Educational Institutions in Distance Education  
TEACH Act – 17 U.S.C. §110(2) & §112

As long as the copies used were lawfully obtained, are being used for educational purposes and are comparable to that used in-class in an on-campus course (i.e. the TEACH Act does not apply to homework or other out of class assignments), faculty members may:

1. Transmit up to entire performances of non-dramatic literary and musical works (e.g. everything but operas, musicals and music videos).
2. Transmit any other performance as long as the portions transmitted are limited and reasonably tailored to the educational purpose.
3. Transmit the display of any other work as long as it is comparable to that typically used in face-to-face instruction.

Unaccredited institution solution: Because these rules apply only to accredited nonprofit educational institutions, faculty members at unaccredited educational institutions must get permission to use such materials and pay any required royalties or licensing fees. If the materials are in the library at an unaccredited educational institution, the library may already hold a license permitting this type of use.

Fair Use Rights of Both Nonprofit & For Profit Educational Institutions  
17 U.S.C. §107

The fair use rules apply to both nonprofit and for profit educational institutions. When a use qualifies as a fair use, a faculty member does not need to obtain permission or pay any royalties or licensing fees to use the copyright protected work (as long as the copy being used was lawfully acquired or accessed).

For a use to qualify as a permitted fair use, the use must be both for a fair use purpose and satisfy the fair use factors. As specified in the language of the statute, fair use purposes include: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” The teaching, scholarly and research activities of faculty members at both nonprofit and for profit educational institutions meet this requirement. Evaluating the fair use factors is less straightforward. The four factors are:

1. The purpose and character of the use.
2. The nature of the work used.
3. The amount and substantiality of the portion used.
4. The impact of the use on the market for and value of the work used.
Without going into a detailed analysis of the four factors, for the purposes of comparing nonprofit and for profit educational institutions, factor one is where the difference lies. Both nonprofit and for profit institutions provide students with an education, so from that perspective, the purpose or character of the use is educational which weighs in favor of fair use. For nonprofit institutions, their status as non-commercial entities further weighs in favor of fair use. Obviously, the same is not true of for profit educational institutions. For profit educational institutions are both educational and commercial entities. Consequently, the purpose and character of the use is mixed which means it does not as clearly and neatly weigh in favor of fair use. As a result, while fair use is available to for profit educational institutions, most experts agree that greater care is in order when utilizing it in such environments.

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**Remitting Damages for “Innocent” Infringements in Nonprofit Settings**  
17 U.S.C. §504©(2)

Judges can remit certain damage awards (i.e. reduce them) when a copyright infringement occurs if the infringement was based on the reasonable though mistaken belief that the use qualified as a fair use. Judges have this authority only when the infringer is an employee of a “nonprofit educational institution, library, or archives.”

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**Practical & Pragmatic Alternatives**

This comparison of the application of the rules of copyright and fair use law in nonprofit and for profit educational institutions applies to the use of copyright protected materials that are available for purchase or licensing. However, there are other options.

1. Make your own. Copyright law protects the expression of an idea, not the idea itself. So create your own version of the materials and you can use that as you wish. Just make sure you properly cite your sources to avoid plagiarism problems.
2. Use public domain resources. By definition, public domain resources are not protected by copyright law and can be used by anyone.
3. Use open access materials. Open access materials are available at no cost to anyone. Do remember that open access materials are copyright protected but the owner choose to distribute them via an open access network. So, make sure you properly cite your sources.
4. Use the library. Your librarians can help you figure out what is and is not permitted. This will be in part due to the licenses under which your library acquired its collection and in part a function of institutional policies and procedures.
The Code of Best Practices in Fair Use for Academic & Research Libraries

**The Old Guidelines Have Failed**

**BEST PRACTICES RULE!**

1. **Purpose to describe 'minimum safe harbors' but are inevitably treated as 'outer limits' by practitioners and rightsholders.**
   - *Because they* describe centrist, moderate practices that are neither the bare minimum nor the absolute maximum of fair use, but a comfortable middle
   - *Because they* are developed by practice communities themselves, without intimidation from hostile outside groups
   - *Because they* are grounded in library mission and practice
   - *Because they* are based on solid research into how courts decide fair use cases
   - *Because they* are informed by the latest scholarly and judicial opinions about fair use
   - *Because they* do not impose arbitrary and absurd limitations
   - *Because they* are endorsed by leading library and educational groups: ALA, ACRL, ARLIS/NA, CAA, CCUMC, MLA, VRA

2. **Were negotiated with rightsholders from a position of fear and intimidation.**
   - *Because they* undermine the teaching objective favored by [fair use] and are "not compatible with the language and intent" of fair use.
   - *Because they* were characterized by a federal court as "impractical and unnecessary" limits that "undermine the teaching objective favored by [fair use]" and are "not compatible with the language and intent" of fair use.
   - *Because they* are arbitrary and absurd limitations
   - *Because they* are developed by practice communities themselves, without intimidation from hostile outside groups

3. **Take no account of legitimate library practice or mission.**
   - *Because they* have no legal force, despite appearances and pretense to the contrary
   - *Because they* do not reflect current legal or scholarly understandings of fair use
   - *Because they* include arbitrary numeric limitations
   - *Because they* are promoted and distributed by groups hostile to libraries and our rights
   - *Because they* purport to describe 'minimum safe harbors' but are inevitably treated as 'outer limits' by practitioners and rightsholders

4. **Without fair use, much of this material would be off-limits for next-generation library uses.**

5. **Current duration of copyright: 70-80%.**
   - *50%* of in-copyright materials in library collections will be "orphan works" (i.e. author/owner is unknown or unlocatable).

6. **Average number of volumes in ARL library collection: 4.8 million.**
   - *85%* of a typical research library collection is likely under copyright.

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**How it was Made (Three Phases)**

1. **Team interviewed 65 academic and research librarians in confidential phone conversations to learn how copyright was affecting their work.**
   - **Share** it with your boss, your general counsel, your colleagues, and patrons so they know the good news
   - **Replace** old guidelines as a go-to resource for basic information

2. **Team spoke with 90 librarians, from 64 libraries, in nine sessions, 4 hours each, to deliberate about best practices.**
   - **Use** it to guide project planning

3. **Consensus of groups was distilled to 8 principles w/ limitations and enhancements.**
   - **Access the full code and other resources at www.arl.org/fairuse**

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**The Good News About Library Fair Use**

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**Libraries Need Fair Use**

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**An academic and research library’s mission is to enable teaching, learning, and research. Increasingly this requires copying (especially digitizing), distributing, and displaying library materials. Library materials are mostly under copyright.**

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**Life+70**

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**Fair use is the broad, flexible doctrine that will allow libraries to meet mission in the digital age.**
Professor Enghagen is an attorney and Professor in the Isenberg School of Management. She also serves as a Copyright Law Research Specialist for the Online Learning Consortium (formerly Sloan-C) and regularly offers live and online workshops in relation to copyright compliance in educational settings. Her scholarly contributions related to intellectual property are directed to the needs of faculty members. They include numerous articles (e.g. Round One? Judge Issues Ruling in Long-Awaited Copyright Infringement Lawsuit Against Georgia State University and Fair Use in an Electronic World and Copyright Law and Fair Use—Why Ignorance Isn’t Bliss) as well as pamphlets and brochures such as Copyright Compliance Made Simple: Six Rules for Course Design, Educators, Technology and the Law: Common Questions/Direct Answers and Legal Literacy in the Information Age: Ten (easy to understand) Rules of Thumb. In addition, she has been a guest commentator on NPR where she discussed copyright piracy.

Professor Enghagen is available to deliver workshops, keynote addresses, and presentations. Titles include:

- Applying Fair Use Court Decisions to Distance Education
- Copyright & Fair Use: Myths and Misconceptions Meet Reality
- Copyright Compliance Made Simple: Six Rules for Course Design
- Fair Use: A Closer Look
- Fair Use in the Crosshairs: Whose Been Sued? What’s at Stake?
- The Case Against Georgia State University: Copyright Infringement or Fair Use?
- Personal Liability for Copyright Infringement: They Can Sue You and Your Employer
- Open Access, Creative Commons Licensing & Plagiarism: Clearing Up Some Copyright Confusion
- Legal Literacy in the Information Age: Ten (easy to understand) Rules of Thumb
- Copyright Law & Higher Education: Creating a Culture of Compliance
- Copyright Law and Research Presentations: What You Don’t Know Can Hurt You

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