

COPYRIGHT BASICS FOR EDUCATORS

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I. Introduction

Copyright law imposes significant restrictions on our ability to use the copyrighted works of others in our teaching, but it also offers a number of opportunities and “safe harbors”. This outline provides a general summary of both the restrictions and our rights. Additional background on these and other copyright issues is available in the list of resources at the end of this outline.

In reading these materials, please keep in mind that they do not constitute, and should not be considered a substitute for, specific legal advice. The resolution of legal issues frequently hinges on slight changes in the facts and circumstances, and your particular situation may well be different from those described in these materials. If you have questions about your situation, consult your institution’s copyright expert or counsel.

II. Basic Copyright Principles

A. What Does A Copyright Protect?

Copyright protection, like patent protection, is based on Article I, Section 8, of the U.S. Constitution: “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” Under this provision, as implemented by the Copyright Act of 1976 and subsequent amendments, 17 U.S.C. § 101 et seq., copyright protection has been extended to eight categories of “works of authorship”:

- (1) literary works (including not only books, articles, and other such works, but also software programs and their accompanying documentation);
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;

- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works (including not only plans and drawings, which also can be considered pictorial, graphic, and sculptural works, but also buildings themselves).

17 U.S.C. § 102(a).

While these categories are quite broad, they are not all-encompassing. Among other things, copyright protection does *not* extend to titles, names, slogans, or short phrases; “useful articles”, such as clothing, furniture, jewelry, or wallpaper (though, to the extent such items incorporate pictorial, graphic, or sculptural aspects that can be identified separately from their utilitarian functions, those aspects may qualify for protection); works consisting entirely of “common property”, such as standard calendars, height and weight charts, tape measures, and the like; and works created by federal officers and employees as part of their official duties, such as presidential speeches, congressional reports, and federal judicial opinions. Moreover, copyright protection extends only to the *expression* and *not* to any underlying ideas, facts, concepts, principles, processes and procedures, systems, discoveries, and so forth that the expression may incorporate. 17 U.S.C. § 102(b).

B. What Are The Requirements For Copyright Protection?

To be eligible for copyright protection, a given work of authorship must also be “original” and “fixed in a tangible medium of expression”. 17 U.S.C. § 102(a). To be “original”, the work need only reflect a minimal degree of creativity and not have been copied. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991) (“To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”). “A work is ‘fixed’ . . . when its embodiment . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration” – in other words, when the work is no longer just an idea in the creator’s head, but the words have been set forth on paper (or, more likely nowadays, typed into a computer), the brushstrokes have been applied to the canvas, the clay has been molded into an object, and so forth. 17 U.S.C. § 101.

As soon as an original work of authorship has been fixed, copyright protection attaches *automatically*. At various times in the past, it also was necessary to affix a copyright notice (e.g., © 2005 Steven J. McDonald) to the work, register it with the Copyright Office of the Library of Congress, and publish it, but none of those

requirements applies today. Registration *is* a prerequisite to filing a lawsuit for copyright infringement, but it need not predate the infringement – though there are significant advantages for the copyright owner if it does. Most important, a copyright owner who registers prior to infringement is eligible for statutory damages of as much as \$150,000 per infringement and attorney fees, regardless of actual loss, while a copyright owner who registers after infringement may recover only provable actual damages. 17 U.S.C. § 411-12 and 504-05.

C. What Rights Does Copyright Protection Provide?

Once copyright protection exists for a work, its owner has five principal exclusive rights, which, in general, no one may exercise without the owner's permission:

- (1) the right to reproduce the work, in whole or in part;
- (2) the right to make derivative works, such as translations, dramatizations, musical arrangements, sound recordings, and other such adaptations, based on the work;
- (3) the right to distribute copies of the work to the public by means of sale, lease, loan, gift, or any other form of transfer;
- (4) with respect to works capable of being performed (such as plays, movies, music, or books (which can be read aloud)), the right to perform the work in a public place or any other place where a substantial number of persons other than family members and friends are gathered; and
- (5) with respect to works capable of being displayed (such as paintings, sculptures, photographs, and the individual frames of a movie), the right to display the work in a public place or any other place where a substantial number of persons other than family members and friends are gathered.

17 U.S.C. § 106. These rights are quite broad and include, for example, photocopying an article; handing out copies of that article to the students in a class; adapting a book or play into a movie; showing a video, playing a CD, or singing a song to an audience; uploading an image, text, or sound recording to the web; or even just forwarding an e-mail message to a friend or listserv.

D. How Long Does Copyright Protection Last?

Under current law, these rights generally exist from the moment of the work's creation until 70 years after the creator's death. 17 U.S.C. § 302. If the work is either a "work for hire" (meaning it was created by an employee in the scope of employment or by an independent contractor who expressly assigns ownership to another party) or an anonymous or pseudonymous work, the copyright protection is valid for a set term of 95 years from publication or 120 years from creation, whichever expires first. *Id.*

Once the applicable term has expired, a work is considered to be in the “public domain”, meaning that it may be used freely by anyone, in any way, and for any purpose (at least insofar as copyright law is concerned). Because copyright terms and requirements have varied over the years, because current copyright terms depend in part on the vagaries of human life, and because there is no central registry keeping track, however, it can be quite difficult to tell whether any given work has “passed into the public domain”, with one exception: under any set of circumstances, a work that was first published before 1923 is definitely now in the public domain under U.S. law. In addition, as noted above, all works created by employees of the federal government acting within the scope of their employment automatically go into the public domain; the federal government does not claim copyright to its works. Note also that the fact that works are publicly and readily available does not necessarily mean that they are in the public domain. The availability of a work on the Internet is no more indicative of an absence of copyright protection than its availability in a library or music store.

For details on how to determine the status of other works, see “When Works Pass into the Public Domain” in the resources listed at the end of this outline.

E. How Can Copyright Rights Be Transferred Or Shared?

The exclusive rights are freely transferable. The owner of a copyright may sell, give, or otherwise transfer ownership of, and/or grant permissions or licenses to use, the rights as a whole, one or more of the rights separately, or even a portion of one of the separate rights. 17 U.S.C. § 201(d). Thus, for example, a book author might sell the copyright to a publishing company, or (at least theoretically) might instead license the publishing company the right to reproduce and distribute the book, a motion picture studio the right to make a derivative work based on the book, a given theater the exclusive right to perform the movie in a specified geographical area for a specified time, and other theaters the nonexclusive right to perform the movie in that same geographical area after that specified time. Transfers of ownership and *exclusive* licenses must be in writing to be enforceable, 17 U.S.C. § 204(a), but the owner’s ability to carve up and exploit the rights is otherwise limited largely only by the imagination.

Note also that copyright rights in a given work exist independently of the work itself and that they therefore can be – and normally are – transferred separately. The acquisition of a copyrighted work does *not* include the acquisition of the copyright to that work *unless* the copyright owner expressly transfers the copyright in a signed writing. 17 U.S.C. § 202. Thus, for example, libraries generally do not acquire copyright to the books that they purchase or the papers that they are given, and art museums rarely own the copyrights to the paintings that hang on their walls. Similarly, under the “first sale doctrine”, the copyright owner’s right to control the distribution of any given copy of a work ends with the initial distribution of that copy. 17 U.S.C. § 109(a). Thus, the purchaser of a book, painting, sculpture, video, or other work normally does not acquire any of the copyright rights to that work, and therefore cannot reproduce, publicly perform, or make derivative works based on that work, but nevertheless is perfectly free

to sell, lend, rent (except in the case of computer software and sound recordings), give away, or otherwise distribute the copy that he or she acquired. (It is for this reason that libraries are able to lend books without engaging in copyright infringement.) Moreover, notwithstanding the copyright owner's general right to control public displays, the owner of a lawful copy of a work is free to display that copy "to viewers present at the place where the copy is located". 17 U.S.C. § 109(c). (It is this principle that allows art museums to operate.)

III. Use Of Copyrighted Materials In Teaching Activities

While the rights of copyright owners are quite broad, there are, fortunately, a number of exceptions. For purposes of higher education, the most important of those exceptions are as follows:

A. Performance And Display Of Copyrighted Works In The Classroom

Under 17 U.S.C. § 110(1), faculty and students may perform or display *any* copyrighted work in the course of face-to-face teaching activities in a classroom, without seeking permission. For purposes of this exception, to "perform" a work means to show a film or video, play music, recite a poem, act out a play, and so forth, while to "display" a work means to show a copy of it either directly or by means of a projection or similar system. Note that, under the "MPAA exception" to this exception, the person performing a film or other audiovisual work must not know or have reason to know that the copy to be performed was made unlawfully; no such limitation applies in the case of other types of works. Note also that this exception does *not* include the right to make or distribute copies of, or to make derivative works based on, the works that are performed or displayed.

B. Performance And Display Of Copyrighted Works In Distance Education

The Technology, Education, and Copyright Harmonization Act of 2002 (the "TEACH Act"), codified at 17 U.S.C. § 110(2), provides similar rights in the context of distance education, including both traditional satellite-based distance education and newer web-based programs. However, because of the greater risks for the copyright owner in the digital classroom (think Napster), the TEACH Act imposes a number of additional restrictions and requirements, including, among others:

- A work may be *displayed* only in "an amount comparable to that which is typically displayed in the course of a live classroom session", which, depending on the nature of the work, may not include the entire thing. (Thus, the TEACH Act would *not* permit the posting of lengthy readings that typically would be studied outside of class and is not a justification for the creation of "electronic coursepacks".)

- Nondramatic literary and musical works may be *performed* in their entirety, but other works may be performed only in “reasonable and limited portions”. (Thus, for example, the TEACH Act would *not* permit a film to be shown in its entirety in distance education, although it may still constitute “fair use” to do so.)
- “To the extent technologically feasible”, the institution must limit access to the works used to students officially enrolled in the relevant course. (Most current “courseware” packages, such as Blackboard and WebCT, do this automatically.)
- The institution must implement “technological measures that reasonably prevent” those students from retaining copies of the materials on their own computers or distributing them to others. (Examples include using streaming video rather than downloadable MPEG files and “locking” PDF files so that the “save” function is disabled.)
- The “MPAA exception” applies to *all* works used in distance education and extends to the *institution’s* knowledge rather than just the individual’s.
- The institution must adopt a copyright policy and educate its faculty, students, and relevant staff about copyright law.

A more detailed explication of the TEACH Act’s many restrictions and requirements is set forth in the chart at the end of this outline

C. Fair Use

For institutions of higher education, the most important exception to copyright is, undoubtedly, the “fair use” doctrine. Under § 107 of the Copyright Act, “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is”, by definition, “not an infringement of copyright”. Determining just what *is* a fair use, however, can be a complicated question, requiring a detailed, case-by-case evaluation and balancing of four subjective factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107.

Note that, under this standard, not every “educational” use is automatically, for that reason alone, a fair one. While the fact that a particular use is educational in nature certainly is favorable, all four factors must be considered and balanced in every case. Moreover, the final factor, the effect of the use on the potential market, has become increasingly important in recent cases.

In very general terms, then, a use is “fair” if it is for educational or other noncommercial purposes, draws more on the facts and ideas expressed in the underlying work than on its creative elements, involves only a relatively small portion of that work, *and* is unlikely to interfere significantly with the copyright owner’s ability to market that work. The classic example of fair use is quoting a few sentences or paragraphs of a book in an article or paper, though it certainly extends well beyond that. On the other hand, uses as extensive as coursepacks are much more difficult to justify, particularly when the same materials are reproduced for more than one term. See, e.g., Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381 (6th Cir. 1996), cert. denied, 520 U.S. 1156 (1997).

D. Single Copies For Use In Teaching And Research

Because of the uncertainties inherent in the general fair use analysis, there have been a number of efforts over the years to develop more concrete guidelines for specific common situations. Under one such set of guidelines negotiated by representatives from higher education and the publishing industry, it is generally accepted that faculty may make single copies of the following for use in their scholarly research, teaching, or preparation for teaching:

- A chapter from a book
- An article from a periodical or newspaper
- A short story, short essay, or short poem
- A chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper

Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with respect to Books and Periodicals, reprinted in *Reproduction of Copyrighted Works by Educators and Librarians* (available at www.copyright.gov/circs/circ21.pdf). Keep in mind that these guidelines are intended to create a “safe harbor” and therefore represent the *minimum* of what is permissible, not the outer limits of fair use. Copying in excess of these guidelines *may* be a fair use *if* it meets the fair use test described above, but it will fall into a “gray area”. Also keep in mind that, while these guidelines do not specifically discuss copying by students, it generally has been assumed that they have comparable rights under fair use.

E. Multiple Copies For Classroom Distribution And Use

Under a similar set of negotiated guidelines, and with the same “safe harbor” caveat, it also is generally considered to be fair use for faculty to make copies of copyrighted material and distribute them to their students for classroom use and discussion under the following conditions:

- The number of copies made of any given work may not exceed the number of students in the course
- The copies must be made “at the instance and inspiration of the individual teacher”
- The inspiration to use the work and “the moment of maximum teaching effectiveness” with respect to that work must be “so close in time that it would be unreasonable to expect a timely reply to a request for permission”
- Each copy must include a notice of copyright
- Any charge to the students may not exceed the actual cost of the copying
- The amount copied from any given work may not exceed the following:
 - Poetry: (a) a complete poem if less than 250 words and if printed on not more than two pages or (b) an excerpt of not more than 250 words from a longer poem (though either limit may be expanded to permit the completion of an unfinished line)
 - Prose: (a) a complete article, story, or essay consisting of less than 2,500 words or (b) an excerpt of not more than 1,000 words or 10% of any other prose work, whichever is less, but in any event a minimum of 500 words (though either limit may be expanded to permit the completion of an unfinished paragraph)
 - Illustration: a single chart, graph, diagram, drawing, cartoon, or picture per book or per periodical issue
 - "Special" works combining words and illustrations and consisting of fewer than 2,500 words in their entirety: an excerpt of up to two pages, but no more than 10% of the words
- The copying of any given item must be for only a single course and may not be repeated by the same teacher from term to term
- The copying must be limited to one short poem, article, story, or essay or two excerpts from the same author and three from the same collective work or periodical volume (other than current news periodicals and newspapers) during one class term

- No more than nine items in total may be copied for one course during one class term
- “Consumables” such as workbooks, exercises, and tests may not be copied
- Copying may not be used to create or substitute for anthologies, compilations, or other such collective works

USEFUL COPYRIGHT LAW RESOURCES ON THE INTERNET

A Crash Course in Copyright

<http://www.utsystem.edu/OGC/IntellectualProperty/cprtindx.htm>

An extensive collection of practical advice, a “crash tutorial”, and other useful, plain English materials on copyright issues, focusing primarily on the academic setting

Copyright Management Center

<http://www.copyright.iupui.edu/index.htm>

Another extensive collection of materials on copyright in academe, including a “copyright quickguide”

Center for Intellectual Property and Copyright in the Digital Environment

<http://www.umuc.edu/distance/odell/cip>

Materials, online workshops, and other resources on digital copyright issues, including an interactive “©Primer” and “Digital©Primer”

TEACH Act Toolkit

<http://www.lib.ncsu.edu/scc/legislative/teachkit>

“An online resource for understanding copyright and distance education”

©opyown and ©opyfair

<http://www.nethics.umd.edu/copyown>

<http://www.nethics.umd.edu/copyfair>

A wealth of sample policies and other resources on the issues of copyright ownership and fair use in higher education

Copyright Law & Graduate Research

<http://www.umi.com/umi/dissertations/copyright>

An overview of the copyright rights and responsibilities of dissertation authors

10 Big Myths About Copyright Explained

<http://www.templetons.com/brad/copymyths.html>

A primer on copyright law and the Internet

The United States Copyright Office
<http://www.copyright.gov>

Information, copyright registration forms, and more from the people in charge; in particular, see “Reproduction of Works by Educators and Librarians”, an information circular available at <<http://www.copyright.gov/circs/circ21.pdf>>; and “Copyright Search”, a tool for identifying the copyright owner of a given work, at <<http://www.copyright.gov/records>>

Stanford University Libraries’ Fair Use Site
<http://fairuse.stanford.edu>

A virtual law library of copyright-related materials

When Works Pass into the Public Domain
<http://www.unc.edu/~uncing/public-d.htm>
http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm
<http://www.librarylaw.com/DigitizationTable.htm>

Three handy reference charts on this surprisingly thorny issue

Copyright Clearance Center
<http://www.copyright.com>

Online access to the rights organization of the same name

CNI-COPYRIGHT

A copyright-related listserv from the Coalition for Networked Information -- to subscribe, send the following message to listproc@cni.org:
subscribe cni-copyright Firstname Lastname

**A COMPARISON OF PRIOR AND CURRENT LAW GOVERNING
THE USE OF COPYRIGHTED MATERIALS IN INSTRUCTIONAL ACTIVITIES**

FACE-TO-FACE INSTRUCTION (17 U.S.C. § 110(1))	DISTANCE EDUCATION (FORMER 17 U.S.C. § 110(2))	TEACH ACT (REVISED 17 U.S.C. § 110(2))
Applies to nonprofit educational institutions	Applied to nonprofit educational institutions	Applies to accredited nonprofit educational institutions
Permits the display of any work	Permitted the display of any work	Permits the display of any work in an amount comparable to that which is typically displayed in the course of a live classroom session
Permits the performance of any work	Permitted the performance of non-dramatic literary and musical works	Permits the performance of non-dramatic literary and musical works and reasonable and limited portions of any other works
(No similar provision)	(No similar provision)	Excludes the performance and display of works produced or marketed primarily for performance or display as part of mediated instructional activities* transmitted via digital networks
The performance or display of a motion picture or other audiovisual work cannot be made by means of a copy that was made unlawfully if the person responsible for the performance or display knows or has reason to believe that the copy was made unlawfully	(No similar provision)	The performance or display cannot be made by means of a copy that was made or acquired unlawfully if the institution knows or has reason to believe that the copy was made or acquired unlawfully

<p>The performance or display must be made in the course of face-to-face teaching activities in a classroom or similar place normally devoted to instruction</p>	<p>The performance or display had to be by or in the course of a transmission made primarily for reception in classrooms or similar places normally devoted to instruction</p>	<p>The performance or display must be by or in the course of a transmission made solely for, and to the extent technologically feasible reception of which is limited to, students officially enrolled in the course for which the transmission is made</p>
<p>The performance or display must be made by an instructor or pupil</p>	<p>(No similar provision)</p>	<p>The performance or display must be made by, at the direction of, or under the actual supervision of an instructor</p>
<p>(No similar provision)</p>	<p>The performance or display had to be:</p> <ul style="list-style-type: none"> • directly related and of material assistance to the teaching content of the transmission • a regular part of the systematic instructional activities of the institution 	<p>The performance or display must be:</p> <ul style="list-style-type: none"> • directly related and of material assistance to the teaching content of the transmission • an integral part of a class session offered as a regular part of the systematic mediated instructional activities* of the institution
<p>(No similar provision)</p>	<p>(No similar provision)</p>	<p>The transmitting institution must:</p> <ul style="list-style-type: none"> • institute policies regarding copyright • provide faculty, students, and relevant staff with informational materials that accurately describe and promote compliance with copyright law • provide notice to students that materials used in connection with the course may be subject to copyright protection

(No similar provision)	(No similar provision)	<p>In the case of digital transmissions, the transmitting institution:</p> <ul style="list-style-type: none"> • must employ technological measures that reasonably prevent recipients from retaining the work in accessible form for longer than the class session and further disseminating the work to others without authorization • must not interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination
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* The term “mediated instructional activities” means activities that are an integral part of the class experience, that are controlled by or under the actual supervision of the instructor, and that are analogous to the type of activities that would take place in a live classroom setting, other than activities that use works such as textbooks, course packs, and similar materials in any media that typically are purchased by students for their independent use and retention.