

USING COPYRIGHTED WORKS IN YOUR TEACHING—FAQ:

Questions Faculty and Teaching Assistants *Need* to Ask Themselves Frequently¹

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Introduction

You don't need a lawyer to answer many of your common copyright questions. What is needed, however, is for your decision about using a copyrighted work to rest solidly on a reasonable, good faith analysis of relevant circumstances. Such an effort is important because it is the right thing to do and because the US Copyright Act provides relief from monetary statutory damages to employees of non-profit educational institutions, acting within the scope of their employment, who base their copyright decision on a reasonable, good-faith evaluation.

This FAQ is arranged around a sequence of 6 overarching questions that collectively represent a good-faith analysis for circumstances that are common in teaching at most universities.

Ask yourself:

1. Is the work copyrighted? If not, no further analysis is needed. If yes or if you don't know, read on.
2. What is the setting for the class where I want to display or hand out a copy of the work — is it in a face-to-face classroom or in an online course? The law allows different uses in different settings.
3. Is the work covered by a license, such as those governing my library's electronic journals and databases?
4. Is there a specific provision in the copyright law that supports my proposed use without seeking prior permission from the copyright holder?
5. Does the fair use provision of the copyright law justify my proposed use?
6. Do I need permission from the copyright holder for the use I propose?

The information below will help you explore these questions and reach an informed conclusion. When applied to a specific set of circumstances, the questions and responses will be interrelated so (if you are still reading after question #1) you are encouraged to review the entire part of this document relevant for your classroom setting.

¹ For a succinct starting point to questions on using copyrighted works in teaching, see Know Your Copy Rights —What You *Can* Do, [brochure] Washington, DC: ARL, 2007 at <http://www.knowyourcopyrights.org>.

Part I Uses in the Traditional Face-to-Face Classroom.

Part II Uses in the Online Classroom / Course Management System

PART I USES IN THE TRADITIONAL FACE-TO-FACE CLASSROOM

You wish to play a movie or music, show a picture or image, or distribute a handout to your students. How can you do it?

1. How do I know if the work I want to use is copyrighted?

Copyright protection arises automatically the moment an original work is fixed in a tangible medium of expression. It does not need to be registered, published, or have a copyright notice on it. Copyright has expired for works published in the US before 1923 and, therefore, they are in the public domain. For other works that may have entered the public domain, see *Copyright Term and the Public Domain in the United States* http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm.

Another exception is works produced by US government employees as part of their job; these are not copyrighted, neither is government information.

The safe bet or default assumption is that everything you are likely to use is copyrighted, unless it's really old or produced by the US government.

Of course, this does not automatically mean that you need permission to use it in some way for teaching. See the rest of this document for an explanation of teaching uses allowed by the law.

Also, providing a URL or linking to a work is always an option. The copyright law never precludes you from linking to a copyrighted work on a legitimate Web site.

- a. *What if I got the work from a Web site that*
- *didn't say anything about copyright?*
 - *didn't have a copyright notice?*
 - *said everything on it was public domain?*
 - *said I could use it for teaching?*

Web sites vary wildly in terms of quality, authenticity, validity, and accountability. Works residing on a site that is silent on copyright should be presumed to be copyrighted (with the exception of US Government Web sites). For works on sites claiming to be in the public domain, you will have to judge whether or not these claims are trustworthy, keeping in mind that such claims will not protect you should a copyright holder object to your use. Similar assessments will need to be made about sites purporting to give permission to use. Only the real copyright holder, or those

authorized by him or her, can give permission. Do you believe the entity giving you permission fits one of these categories?

Fair use is the only copyright provision that allows you to make a copy to display or distribute a copyrighted work that you find on Web sites. In order to lawfully make use of such works, without obtaining the permission of the copyright holder, you must decide whether your use is a fair use (see question #5, below) or direct students to a link to the work.

b. What if I created the work?

Unless you wrote the work under contract as a work for hire, you are the author and the initial copyright holder. If, however, you have transferred your copyright to another entity (in writing), without retaining any use rights for yourself, you are no longer the copyright holder and have no special privileges to use the work.

To keep your copyrights, the next time a publisher's agreement proposes transferring exclusive rights from you to them as a condition of accepting the item for publication, consider retaining the rights you need to place your own work in an open archive and sharing it with your students. The SPARC Author Addendum www.arl.org/sparc/author/ is one means of securing these rights.

c. What if a student created the work?

Students hold the copyright to the works they create, such as their papers, projects, theses, and dissertations. If you wish to use their work, absent any relevant university policy, you will have to treat it like any other copyrighted work.

2. What is the setting for the class where I want to display or hand out a copy of the work — in person or online?

The law allows different uses in different settings.

- If the use is in a face-to-face classroom, continue reading in Part I.
- If the setting is to be an online course or course management software, jump to Part II of this document.
- If your class uses a combination of both settings, review both Parts I and II of this document and consider which setting offers the best opportunities for the use you have in mind.

3. Many copyrighted works are accessed through a campus license that can override copyright. How do I know if the work I want to use is covered by such a license?

You are most likely to encounter licensed works via your campus library's electronic journals and databases. Libraries vigorously negotiate licenses for such materials and are usually successful in getting the rights you need to use the works in your teaching. However, if you have a specific concern, contact your library.

You may also encounter works governed by licenses that specifically grant or affirm rights to use them such as those employing the Creative Commons model. Using a Creative Commons notice, creators specify the rights conveyed to users such as to copy, distribute, display, and perform the work, provided attribution is given. Watch for this logo:



You can learn more about Creative Commons at <http://www.creativecommons.org>.

4. The work I want to use in class is both copyrighted and free of any license. Does the copyright law grant me any specific rights to use it in a traditional classroom setting?

Yes. Section 110(1) of the copyright law makes special provision for displaying images, playing motion pictures or sound recordings, or performing works in classes.

You may display or perform a work in your class without obtaining permission when your use is

- for instructional purposes;
- in face-to-face teaching; and
- at a nonprofit educational institution.

If you don't meet all three of these criteria, consider whether what you have in mind is a fair use. Fair use is addressed in question #5. The rest of question #4, below, discusses movies, images, playing music, and creating handouts.

- a. *Can I show part or all of a copyrighted movie in my classroom? And does it matter if I'm*
- *using my own copy?*
 - *using the library's copy?*
 - *using a copy I rented from a store?*
 - *using a copy I taped from TV?*

In order to fit within the 110(1) exemption, the copy, whoever it belongs to, must have been "lawfully" made. Note that a fair use copy is lawfully made. (See fair use described below in question #5.) What this is intended to prohibit is the use of bootlegged or pirated copies.

Under section 110(1), you are allowed to show all or part of any of these copies in your face-to-face classroom as long as it is for the educational purposes of your class (not just entertainment). In particular, you can show a rented movie as long as you have not entered into a license or agreement with the rental store that would prohibit such use.

b. The copy I have is VHS and is getting worn out. Can I

- *digitize it and show that?*
- *ask the library to digitize either my copy or theirs for showing in class?*

There is nothing in section 110(1) that addresses “reproduction” which is what migrating your VHS copy to digital format would be. In order for you, the professor, to digitize your VHS, you would have to rely on fair use (see question #5, below), which may justify digitizing portions of the work, but probably not the entire movie. If the work is available in digital format, buy it (or ask your library to buy it) and you can show that.

If the work is not available in digital format for you or your library to purchase, your library can digitize its VHS copy as long as it can be reasonably described as deteriorating. The library is allowed to do this pursuant to a different section of the Copyright Act.

c. Can I display a copyrighted picture, image, graph, chart, text, etc. to my class?

Yes, you may display these kinds of copyrighted works in your class. However, what you need to consider is how you obtained the copy of the image etc. that you want to display. Are you using slides (35 mm or digital) you made from

- printed books or journals?
- the library’s electronic databases and journals?
- works you found on a Web site?

Reproducing a picture, image, graph, etc. from printed works or works found on the Web, in whatever format, is not covered in section 110(1). Your reproduction must be considered a fair use (see question #5, below) or you need to seek permission. There is often a strong fair use argument in favor of this practice.

Reproducing works obtained from the library’s electronic databases and journals, on the other hand, is governed by the terms of the campus license. Consult your library to be confident this kind of use is permitted by the license.

For works found on the Web, consider accessing the work from a “live” projection of the site during class.

d. Can I play music to my class?

Yes.

e. *Can I copy a chapter or article as a handout for my lecture?*

You may be able to make such handouts but you must turn to fair use for your answer. (See question #5, below.) Also, remember that copyright law never restricts you directing your students to a link for a copyrighted work.

5. What is fair use and when would I need to rely on it for my traditional classroom uses?

The fair use provision of the copyright act (section 107) is always potentially available as an option, even if another specific and more restrictive provision of the law also applies. Fair use is a very important provision of the law for educators. What is it?

Fair use allows limited use of copyrighted material without requiring prior permission from the copyright holder. The statute lists four factors to be weighed when analyzing the proposed use in order to determine whether it is a fair one. Consideration of all factors is required although all factors do not have to be in favor of a use to make it a fair one.

A fair use analysis is necessarily a fact-driven one. Each unique set of facts regarding a proposed use leads to its own reasoned conclusion. Reasonable individuals may come to different decisions concerning the same set of facts, but the operative word is "reasonable."

The four fair use factors are as follows:

1. The purpose and character of the use, including whether the 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.

For assistance in analyzing these factors relative to your proposed use, see the Fair Use Considerations Worksheet <http://www.lib.ncsu.edu/scc/copyright/worksheet.pdf>.

In the face-to-face classroom setting, you will usually need to consider fair use when you are reproducing material, either to show to the class or to hand out copies.

6. Suppose I decided to ask for permission anyway?

If you wish to pursue permission for your use, you will need to identify and locate the copyright holder, a task often easier said than done. Sample letters and suggestions can be found at this Permissions Guide

<http://www.lib.ncsu.edu/scc/copyright/worksheet.pdf>. Allow yourself plenty of time and patience. See below if you can't reach a copyright holder.

a. *What if they say no but now I believe fair use or a specific provision of the copyright law applies? Am I disadvantaged because I asked?*

Previous payment of a fee or even outright denial of permission does not preclude you from exercising your rights under the Copyright Act. You can still employ an appropriate specific provision or the fair use provision and there is no presumption against you for having asked permission.

b. *What if they don't respond?*

Lack of response does not translate into a passive grant of permission to use. If your proposed use exceeds all provisions of the law, including fair use, you probably need to direct your students to a link to the work, find another work to use, or modify your proposed use to fit within fair use.

c. *What if the work is out of print? Is that the same as out of copyright?*

"Out of print" is not the same as "out of copyright." An out of print work may still be protected by copyright and should be approached the same as a work still in print.

d. *What if I can't find current contact information for the copyright holder? For example the publisher is out of business or the author is deceased.*

These situations present the problem of a work whose copyright holder cannot be located, despite reasonable efforts. The US Copyright Office has recognized this problem, calling such works "orphan works." Much work is currently being done to create an exemption in the law that would encourage uses of such works by mitigating the liability risk.

At the present time, however, educators and libraries must make individual decisions concerning their use of such works, including evaluating the risk of liability. Those who proceed with their use should document and preserve their efforts to locate the copyright holder.

PART II. USES IN THE ONLINE CLASSROOM / COURSE MANAGEMENT SYSTEM

I wish to play all or part of a movie or piece of music, show a picture or image, or post articles for downloading from my online course Web site. How can I do this?

1. How do I know if the work I want to use is copyrighted?

Copyright protection arises automatically the moment an original work is fixed in a tangible medium of expression. It does not need to be registered, published, or have a copyright notice on it. Copyright has expired for works published in the US before 1923 and, therefore, they are in the public domain. For other works that may have entered the public domain, see *Copyright Term and the Public Domain in the United States* http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm.

Another exception is works produced by US government employees as part of their job; these are not copyrighted, neither is government information.

The safe bet or default assumption is that everything you are likely to use is copyrighted, unless it's really old or produced by the US government.

Of course, this does not automatically mean that you need permission to use it in some way for teaching. See the rest of this document for an explanation of teaching uses allowed by the law.

Also, providing a URL or linking to a work is always an option. The copyright law never precludes you from linking to a copyrighted work on a legitimate Web site.

- a. *What if I got the work from a Web site that*
- *didn't say anything about copyright?*
 - *didn't have a copyright notice?*
 - *said everything on it was public domain?*
 - *said I could use it for teaching?*

Web sites vary wildly in terms of quality, authenticity, validity, and accountability. Works residing on a site that is silent on copyright should be presumed to be copyrighted (with the exception of US Government Web sites). For works on sites claiming to be in the public domain, you will have to judge whether or not these claims are trustworthy, keeping in mind that such claims will not protect you should a copyright holder object to your use. Similar assessments will need to be made about sites purporting to give permission to use. Only the real copyright holder, or those authorized by him or her, can give permission. Do you believe the entity giving you permission fits one of these categories?

Fair use is the only copyright provision that allows you to make a copy to display or distribute a copyrighted work that you find on Web sites. In order to lawfully make use of such works, without obtaining the permission of the copyright holder, you must

decide whether your use is a fair use (see question #5, below) or direct students to a link to the work.

b. What if I created the work?

Unless you wrote the work under contract as a work for hire, you are the author and the initial copyright holder. If, however, you have transferred your copyright to another entity (in writing), without retaining any use rights for yourself, you are no longer the copyright holder and have no special privileges to use the work.

To keep your copyrights, the next time a publisher's agreement proposes transferring exclusive rights from you to them as a condition of accepting the item for publication, consider retaining the rights you need to place your own work in an open archive and sharing it with your students. The SPARC Author Addendum www.arl.org/sparc/author/ is one means of securing these rights.

c. What if a student created the work?

Students hold the copyright to the works they create, such as their papers, projects, theses, and dissertations. If you wish to use their work, absent any relevant university policy, you will have to treat it like any other copyrighted work.

2. What is the setting for the class where I want to display or hand out a copy of the work — in person or online?

The law allows different uses in different settings.

- If the setting is to be an online course or course management system, continue reading this Part II of the document.
- If the use is in a face-to-face classroom, refer back to Part I.
- If your class uses a combination of both settings, review both Parts I and II of this document and consider which setting offers the best opportunities for the use you have in mind.

3. Many copyrighted works are accessed through a campus license that can override copyright. How do I know if the work I want to use is covered by such a license?

Asking and answering this question is just as important in the online world as it was in the traditional classroom setting, particularly since licenses may prohibit reposting of materials.

You are most likely to encounter licensed works via your campus library's electronic journals and databases. Libraries vigorously negotiate licenses for such materials and

are usually successful in getting the rights you need to use the works in your teaching. However, if you have a specific concern, contact your library.

You may also encounter works governed by licenses that specifically grant or affirm rights to use them such as those employing the Creative Commons model. Using a Creative Commons notice, creators specify the rights conveyed to users such as to copy, distribute, display, and perform the work, provided attribution is given. Watch for this logo:



You can learn more about Creative Commons at <http://www.creativecommons.org>.

You can link to the material from your online class unless specifically prohibited by the license. Commonly a publisher's or aggregator's license with a research library will allow faculty and students to share it with other authorized users covered by the license. In an online class, your students will be "authorized users" however your class Web site should not become a portal for the rest of the world to access your library's licensed resources. You can avoid this by restricting access to your class Web site to the students enrolled.

4. The work I want to use in my online class is both copyrighted and free of any license. Are there any specific provisions of the copyright law that apply to online classroom use?

Yes, Section 110(2) of the copyright law (otherwise known as the "TEACH Act") specifically applies to displaying images, playing motion pictures or sound recordings, or performing works in your online class. Since this section applies to any "transmissions" of performances or displays, cable television classes would also be included here.

There are a number of institutional and faculty member obligations that must be fulfilled in order to use the TEACH Act. Consult your library or university counsel on whether and how the TEACH Act is implemented locally. If your university cannot or does not wish to comply with TEACH Act obligations, consider whether what you have in mind for your online course is a fair use. (See question #5, below.)

If you wish to explore the TEACH Act option, read on for a description of a faculty member's obligations.

Generally, to perform or display a work in your online class the work must be

- used under your supervision
- as part of the class session
- as part of systematic mediated instructional activities (see 4j, below)

- directly and materially related to the teaching content

The work must be lawfully made and not excerpted from a product that was specifically designed and marketed for use in an online course.

Furthermore, there are three additional requirements:

- You must password protect or otherwise restrict access to your online class Web site to enrolled students, and
- You must reasonably prevent your students from being able to save or print the work, i.e., control the “downstream” uses, and
- You must include a general copyright warning on your class Web site.

If the above circumstances and requirements are met:

a. *Can I show part or all of a copyrighted movie?*

- *Using my own copy?*
- *Using the library’s copy?*
- *Using a copy I rented from a store?*
- *Using a copy I taped from TV?*

Can I digitize a VHS movie?

Can I make a DVD of all the clips I use and distribute it to the class?

In order to fit within the 110(2) provision, you can use a “reasonable” portion of a movie or a piece of music. (Note: this differs from the face-to-face classroom where you may play the entire work.) The currently acceptable “downstream” control is to use streaming technology. The copy you excerpt from must be lawfully made and not specifically designed and marketed for online courses. For a discussion of whose copy you may use, see Part I, question 4b, above.

Under 110(2), you may digitize the reasonable portions you intend to use from a VHS or other non-digital format, as long as there is no digital version available to the institution or the available digital version is encrypted.

Section 110(2) would not permit you to make a DVD of your online clips to provide your students with their personal copy because you cannot control the uses made after the class session. You should consider whether this would be permitted as a fair use.

b. *Can I display a copyrighted picture, image, graph, or chart in my online class?*

Yes, as long as it is a work you would have shown in a face-to-face classroom setting and you comply with the other general 110(2) requirements listed above. This provision is very helpful to classes that use large numbers of images, such as art history. The challenge lies in controlling the downstream uses of the material, e.g., preventing your students from saving or printing the works. North Carolina State University has

devised one solution that is available to other educational institutions at <http://www.lib.ncsu.edu/scc/legislative/teachkit/overview.html>.

c. Can I post journal articles or book chapters?

Because you can only post online the amount you would display in a traditional class, Section 110(2) does not authorize posting journal articles, book chapters, and other large chunks of text that you wouldn't have shown in class. For this type and amount of material, you should consider linking, fair use, or permissions.

If the text is something you would have displayed in a face-to-face traditional class setting, such as a poem or newspaper clipping, you may digitize and post it on your class Web site. Again, you can digitize a printed or other non-digital work as long as a digital version is unavailable or encrypted. Keep in mind that you are not required to use Section 110(2)—linking, fair use, and permissions are always an option.

d. Can I use the works more than one semester?

Yes.

e. Can I display newspaper articles?

Yes, if you would have displayed the article in a traditional class, perhaps for class discussion. If you only want the students to read the article outside of class and be prepared to discuss it in class, Section 110(2) would not apply. You might consider linking, fair use, or permissions.

f. Can the materials stay up throughout the entire course?

Yes.

g. Is there a limit to how many times materials can be viewed or played during the course?

No.

h. Can students or teaching assistants post materials on the class site or only the professor?

Yes, students and teaching assistants may also post.

i. What if I want my students to be able to print everything on the course Web site?

Many professors are unhappy with the downstream control requirements because they want their student to be able to print materials from the course Web site. If this is the case, Section 110(2) becomes inapplicable and you must fall back on linking, fair use, or permissions.

j. *What are mediated instructional activities (as defined in section 110(2), the TEACH Act)?*

Mediated instructional activities are activities that use such [permitted] works

- as an integral part of the class experience
- under the control or actual supervision of the instructor
- in a manner analogous to performances and displays in live classroom settings.

According to the Senate Report accompanying the TEACH Act, such activities must use the works as part of the course rather than ancillary to it. Thus the TEACH provision would not cover “student use of supplemental or research materials in digital form, such as electronic coursepacks, e-reserves, and digital library resources.”

For additional help with applying Section 110(2), the TEACH Act, see The TEACH Act Toolkit at <http://www.lib.ncsu.edu/scc/legislative/teachkit/index.html>.

5. What is fair use and when would I need to rely on it for my online classroom uses?

The fair use provision of the copyright act (section 107) is always potentially available as an option, even if another specific provision applies. What is it?

Fair use allows limited use of copyrighted material without requiring prior permission from the copyright holder. The statute lists four factors to be weighed when analyzing the proposed use in order to determine whether it is a fair one. Consideration of all factors is required although all factors do not have to be in favor of a use to make it a fair one.

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

For assistance in analyzing these factors relative to your proposed use, see the Fair Use Considerations Worksheet. <http://www.lib.ncsu.edu/scc/copyright/worksheet.pdf>.

In online classroom setting, you will usually need to consider fair use when you do not qualify for Section 110(2) and when linking is not an option.

6. Suppose I decided to ask for permission anyway?

If you wish to pursue permission for your use, you will need to identify and locate the copyright holder, a task often easier said than done. Sample letters and suggestions can be found at this Permissions Guide <http://www.lib.ncsu.edu/scc/copyright/worksheet.pdf>. Allow yourself plenty of time and patience. See below if you can't reach a copyright holder.

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