Copyright or Copy Wrong

Copyright in the Classroom
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About Scholarly Communications

Image Courtesy of University of Ottawa Library
Additional Resources

- Guide to Copyright - copyright.mst.edu
- U.S. Copyright - https://www.copyright.gov/
Goals

- A brief review of copyright
- Discuss the fair use exemption to copyright
- Review the TEACH Act
- Learn some essentials for the classroom
- Opportunity for questions
True or false? The Primary purpose of copyright law is to protect the interests of authors/creator.
False

The primary purpose of copyright law is not so much to protect the interests of authors/creators, but rather to promote the progress of science and the useful arts. In other words, to *promote knowledge*.

(Association of Research Libraries, Scholarly Communications, http://www.arl.org/focus-areas/scholarly-communication#.VBh3x_IdV8E, 9/16/2014)
The US Constitution, Article 1, Section 8 states in part, "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."
The framers of our Constitution recognized that everyone would benefit by encouraging the creation and dissemination of creative and intellectual works into our culture and society.
The original intent of copyright law was to balance the “public interest” with “individual rights.”

The public’s right to access knowledge should not be limited by the individual author’s right to restrict access.
Copyright ownership is a temporary monopoly for a specific length of time.

- This incentive allows authors/creators to benefit from their work
- Encourages the creation of additional works
- Is an implied understanding that the public will ultimately benefit
This temporary monopoly is limited when it conflicts with an overriding public interest such as,

- Criticism
- Commentary
- News reporting
- Teaching (including multiple copies for classroom use)
- scholarship, or research
What are the exclusive rights granted by copyright?
Exclusive Rights

Copyright law gives the owner of a copyright the *exclusive right* (*the only one and no other*) to do and to authorize others to do the following:

- to reproduce the work
- to prepare derivative works based upon the work
- to distribute copies of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending
- to perform the work publicly
- to display the work publicly
How Long Does Copyright Last?

- The term of copyright for a particular work depends on several factors, including whether it has been published, and, if so, the date of first publication.

- As a general rule, copyright protection for works created after January 1, 1978, lasts for the life of the author plus an additional 70 years.
Fair Use
U.S. Copyright Law Section 107, Limitations on Exclusive Rights: Fair Use, states….

“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified in that section, *for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research*, is not an infringement of copyright…”
• The purpose of the fair use provision is to **allow limited use** of copyrighted material without obtaining prior permission from the copyright owner.

• Consideration of **all** of the fair use factors is required.
  ○ However, all factors do not have to be on the favorable side to reasonably conclude that a valid fair use claim can be made.
• A fair use analysis must be fact driven.

• Each unique set of facts regarding a proposed use leads to its own reasoned conclusion.
  ○ Reasonable individuals may come to different conclusions concerning the same set of facts, but the operative word is “reasonable.”

• The analysis applies to all formats and mediums, including the digital environment, and includes not only the right of reproduction but also the rights of performance, display, modification, and distribution.
In determining whether the use made of a work in any particular case is a fair use, the factors to be considered are:

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.

4. the **effect** of the use upon the potential market for, or value of the copyrighted work.
The Purpose and Character of Use

- Nonprofit educational purposes are generally favored over commercial uses

- The statute explicitly lists several purposes especially appropriate for fair use, such as criticism, comment, news reporting, teaching, scholarship, or research

- Courts favor uses that are “transformative,” or that are not merely reproductions
  - Fair use is more likely to be found when the copyrighted work is “transformed” into something new or of new utility or meaning, such as quotations incorporated into a paper, or perhaps pieces of a work mixed into a multimedia product for your own teaching needs or included in commentary or criticism of the original
The Nature of the Copyrighted Work

- The focus is on the nature of the work being used.
- The law allows for a wider or narrower scope of fair use, depending on the characteristics or attributes of the work.
- Use of unpublished works, such as private correspondence or a manuscript, weigh against a finding of fair use.
- Use of commercially available works specifically created for the educational market is generally disfavored and is unlikely to be considered a fair use.
- Courts give greater protection to creative works.
- Fair use applies more broadly to nonfiction (factual), rather than fiction.
The Amount of Substantiality of the Portion Used

- The law does not set exact quantity limits, generally the more you use, the less likely you are within fair use.

- The “amount” used is usually evaluated relative to the length of the entire original and in light of the amount needed to serve a proper objective.

- Courts have ruled that even uses of small amounts may be excessive if they take the “heart of the work.”
  - For example, a short clip from a motion picture may usually be acceptable, but not if it encompasses the most extraordinary or creative elements of the film.
  - Similarly, it might be acceptable to quote a relatively small portion of a magazine article, but not if what you are quoting is the journalistic “scoop.”
The Amount of Substantiality of the Portion Used

- On the other hand, in some contexts, such as critical comment or parody, copying an entire work may be acceptable

- Photographs and artwork often generate controversies, because a user usually needs the full image, or the full “amount,” and this may not be a fair use

- Courts have ruled that a “thumbnail” or low-resolution version of an image is a lesser “amount.” Such a version of an image might adequately serve educational or research purposes
The Effect of Use on the Potential Market for the Value of the Work

- Effect on the market is more complicated than the other three factors

- Fundamentally, this factor means that if you could have realistically purchased or licensed the copyrighted work, that fact weighs against a finding of fair use

- “Effect” is also closely linked to “purpose.” If your purpose is research or scholarship, market effect may be difficult to prove. If your purpose is commercial, then adverse market effect may be easier to prove

- Occasional quotations or photocopies may have no adverse market effects, but reproductions of entire software works and videos can make direct inroads on the potential markets for those works
Weighing and Balancing the Factors

- A central tenet of the fair use analysis is a flexible doctrine that Congress wanted us to test and adapt for changing needs and circumstances.

- The law provides no clear and direct answers about the scope of fair use or its meaning in specific situations.

- Instead, we are compelled to return to the four factors and to reach reasoned and responsible conclusions about the lawfulness of our activities.
Fair use is at its core risk analysis

- if most factors lean in favor of fair use, the proposed use is probably allowed

- if most lean the opposite direction, the action will not fit the fair use exemption and may require permission from the copyright owner

- Reliance on a “reasoned” analysis is essential to claiming a good-faith effort

- Document your decisions
The TEACH Act
Technology, Education, and Copyright Harmonization Act (TEACH Act)

- The TEACH Act is a copyright exemption that covers teaching conducted through digital transmission and addresses the performance and display of copyrighted materials used in teaching.

- Even if your class has on ground, face to face sessions, anything you transmit through course delivery systems, such as CANVAS, would fall under the TEACH Act, unless you choose to use Fair Use as an alternative exemption.
Technology, Education, and Copyright Harmonization Act (TEACH Act)

- The TEACH Act is not a wild card exemption to do anything you want; it comes with significant limitations.
• Teachers have more privileges in face-to-face teaching situations for the use of copyrighted materials than teachers in online instruction

• The TEACH Act attempts to bring the two environments closer together, but the playing fields are not level

• The TEACH Act does not cover the use of textual materials such as readings
The Act allows teachers to show the full performance of a **nondramatic** literary or musical work or display the following types of materials:

- a sound recording of a poem
- a sound recording of a piece of literature
- a recorded symphony still images, photographs (these are considered "displays")
- still images from subscription databases if allowed by license
- text if it is something that would normally be "displayed" in a face to face class; not if it is something only to be read by students
Teachers may only display "reasonable and limited portions" of **dramatic works**. Use only the portions that are necessary to make a point. (Teachers in face to face classrooms may use the following works in their entirety):

- dramatic works
- audio/visual works
- musicals
- operas
- commercial films
- music videos
Teachers may not transmit or display instructional materials, without permission or licensing, which students are commonly expected to purchase such as:

- textbooks
- coursepacks
- workbooks
- digital educational work (made for the purpose of performance or display for use in mediated instruction)
Works "produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks" should not be copied, but purchased and used as intended by the publisher.
Obligations of the Teacher

- The performance or display is made by or under the supervision of an instructor.

- The performance or display is directly related and integral to the class content, not ancillary.

- The work is part of systematic mediated instructional activities (Canvas).

- The "transmission is made solely for and limited to students officially enrolled in the course." (Canvas)
Obligations of the Teacher … Continued

- Materials that are used for performance or display must be lawfully made and acquired.

- Instructor must use reasonable controls to prevent copying and retention of the work, those that would "discourage most users." (streaming is suggested for video; thumbnails, watermarks and disabling right click copy function can be used to protect images.)
Obligations of the Teacher … Continued

- A digital copy may be made from an analog copy when no digital version is available or when the digital version is technologically protected.

- Work must carry a warning notice to students.
Essentials for the Classroom
You may display or perform a work in a your class without permission or licensing when your use is:

- For instructional purposes
- In a face-face-to-face classroom (no internet connectivity and no distance component)
- And at a nonprofit educational institution
In a distance education classroom you may display or perform a nondramatic literary or musical work without permission or licensing

- a sound recording of a poem
- a sound recording of a piece of literature
- a recorded symphony
- still images, photographs (these are considered “displays”)
- still images from a subscription database (if allowed by license)
In a distance education classroom you may display or perform text of a nondramatic literary or musical work without permission or licensing:

- Only if it is something that would be normally displayed in a face-to-face classroom
- This does not apply if it is something only to be read by students
In a distance education classroom you may only display “reasonable and limited portions” of dramatic works without permission or licensing. Use only the portions that are necessary to make a point. Examples include:

- dramatic works
- audio/visual works
- musicals
- operas
- commercial films
- music videos
In a distance education classroom you may never transmit or display any portion of instructional materials, without permission or licensing, which students are commonly expected to purchase, such as:

- textbooks
- coursepacks
- workbooks
- digital education work made for the purpose of display or performance in mediated instruction
Works produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks should not be copied, but purchased and used as intended by the publisher.
For Additional Assistance

Visit: copyright.mst.edu

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