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Fair Use and Instruction

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Fair Use and Instruction

Rowan University Libraries

Spring 2021

Examples of Common Teaching Situations

- Do you want to give students access to course readings for free?
- Do you want to have students analyze copyrighted materials during class time?
- Do you want to use images in powerpoints?
- Do you want students to create original work that they may want to distribute in the future?
- Do you want to show videos in your courses?

Overview

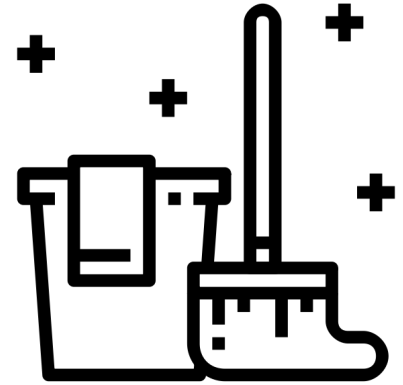
- Review of Copyright
- Classroom Exemptions
- Introduction to Fair Use
- The Four Factors
- Hands on Exercise
- Developing Strategies
- Copyright Series Library Workshops

Learning Outcomes

- Participants will understand the ways in which copyright and fair use are related to instruction
- Participants will apply a fair use analysis to classroom situations in face to face and online situations
- Participants will implement strategies for using classroom materials in an ethical manner

Presentation Housekeeping...

- Please enter questions into the chat and they will be answered as we go. You can also ask questions during Q&A at the end of the presentation.
- You can also email questions following this presentation to Bret and Shilpa (Email contacts on the final slide).
- The slides will be made available online following the presentation on the <https://libguides.rowan.edu/libraryworkshops> web page.



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Disclaimer:

Information presented here is purely that and is not to be considered as legal advice.

What is Copyright?

Copyright is a form of protection grounded in the U.S. Constitution and granted by law for **original works of authorship fixed in a tangible medium of expression.**

Copyright covers both published and unpublished works.

[Source: <https://www.copyright.gov/help/faq/faq-general.html#what>]

Definition of Terms

- **Original** = must have some degree of creativity, not common
 - Example: The phrase “I love you” cannot be copyrighted
- **Works**
 - **Literary works**
 - **Musical works**, including any accompanying words
 - **Dramatic works**, including any accompanying music
 - **Pantomimes and choreographic works**
 - **Pictorial, graphic, and sculptural works**
 - **Motion pictures and other audiovisual works**
 - **Sound recordings**, which are works that result from the fixation of a series of musical, spoken, or other sounds
 - **Architectural works**
- **Fixed in a tangible medium of expression** (example):
 - Work = choreographic work
 - Tangible medium of expression = video of the performance or some other fixed documentation

What is Copyright Protection?

Works are protected by copyright the moment they are created and fixed in a tangible form. Copyright owners retain the rights to:

1. Reproduce copyrighted work
2. Prepare derivative works
3. Distribute copies of the work
4. Perform the work publicly
5. Display the work publicly
6. Perform the work publicly by digital transmission



What Is Permissible To Share Under Copyright?

- The faculty member is the owner of the copyright in the material
- The material is made available by linking to a legal copy rather than copying
- The copyright owner of the material grants permission
- The material has been designated open access by the copyright owner
- The material is in the public domain
- The use intended of the **material falls within fair use under copyright law** or under another copyright exception.

Classroom Use Exemptions

The Classroom Use Exemption ([17 U.S.C. §110\(1\)](#)) allows students and instructors the right to perform or display legitimate copies of any works, including films, music, artwork, dance, as long as it occurs in person, in face-to-face teaching activities, at a nonprofit educational institution in a classroom (“or similar place devoted to instruction”)

This does not explicitly apply to making copies of those works for classroom use, though those are covered in Fair Use explicitly: "multiple copies for classroom use." ([17 USC § 107.](#))

Online Instruction Exemptions

The TEACH Act ([Section 110\(2\)](#)) allows educators to perform or display copyrighted works in distance education environments. You may want to consider whether that use is allowable under the TEACH Act, and not think about Fair Use.

Reasonable measures to assure that only enrolled students will have access to materials during the course of instruction must be in place before TEACH exemptions can be made:

- Use of lawfully acquired copies
- Use is limited to performances and displays, not making copies for student usage
- Use of materials must be analogous to the activities of a face-to-face class session.
- Use is not of materials primarily marketed for distance education
- Only those students enrolled in the class should have access to the material
- If a digital version of the work is already available, then an analog copy cannot be converted for educational use.
- Students must be informed that the materials they access are protected by copyright.

Other Considerations for Online Instruction

Our guidelines: <https://libguides.rowan.edu/c.php?g=248016&p=7405030>

- In an online environment, the recommendation for the transmission of non-educational media is to use a legally licensed copy from the institution

Introduction to Fair Use

[Section 107](#) of the Copyright Law allows some exemptions to copyright infringement, given certain uses, such as:

- Criticism
- Comment
- News reporting
- Teaching (including multiple copies for classroom use)
- Scholarship
- Research

Fair use is a guideline for courts to consider, and going to court is the only way to officially decide whether a use is “fair”

The Four 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.

All four factors are weighed against each other in determining whether a use is fair

Factor 1: Purpose

Favors:

- Nonprofit educational uses, **directly related to classroom instruction**
- Research and Scholarship
- Criticism and Commentary
- News reporting
- Transformative or Productive use (changes the work for new utility)
- Parody

Disfavors:

- Commercial activity
- Profiting from the use
- Entertainment
- Bad-faith behavior
- Denying credit to original author

Factor 2: Nature of the Copyrighted Work

Favors:

- Factual and nonfiction works
- News
- Published work

Disfavors:

- Creative (art, music, fiction), or consumable (workbooks, tests) work
- Unpublished work

Factor 3: Amount Copied

Favors:

- Small quantity (e.g. a single chapter or journal article or other excerpt consisting of less than 10% of the work)
- Portion used is not central to entire work as a whole
- Amount is appropriate to educational purpose

Disfavors:

- Large portion or entire work
- Portion used is central or the "heart" of the work
- Includes more than necessary for educational purpose

Factor 4: Effect on the Market

Favors:

- No significant effect on the market or potential for the copyrighted work
- One or few copies made and/or distributed
- No longer in print; absence of licensing mechanism
- Restricted access (limited to students in a class or other appropriate group)
One-time use, spontaneous use (no time to obtain permission)
- No similar product marketed by the copyright holder

Disfavors:

- Cumulative effect of copying would be to market substitute for purchase of the copyrighted work
- Numerous copies made and/or distributed
- License to use copyrighted work available
- Publicly available on the Web
- Repeated or long-term use

The Transformative Factor

One of the most important aspects of fair use that judges consider is an extension of the first factor, the purpose or character of the work and your use of it, asking whether you have created something new or whether you have used something verbatim for its original purpose.

Guiding questions include:

- Has the material you have taken from the original work been transformed by adding new expression or meaning?
- Was value added to the original by creating new information, new aesthetics, new insights, and understandings?

Real-Life Examples

Fair use (mostly). In a case alleging 75 instances of infringement in an educational setting, a district court, proposing a fair use standard based on less than 10% of a book, determined that 70 instances were not infringing. On appeal, the Eleventh Circuit rejected the 10% standard and emphasized the importance of a flexible case-by-case fair use analysis. The case was remanded to the district court which, in 2016, found the majority of instances to be fair use. Important factors: On remand, the second factor (the scholarly nature of the work) and the fourth factor (impact of the use on the market value) weighed in favor of fair use. *Cambridge University Press v. Patton*, 769 F.3d 1232 (11th Cir. Ga. 2014).

Not a fair use. A biographer paraphrased large portions of unpublished letters written by the famed author J.D. Salinger. Although people could read these letters at a university library, Salinger had never authorized their reproduction. In other words, the first time that the general public would see these letters was in their paraphrased form in the biography. Salinger successfully sued to prevent publication. Important factors: The letters were unpublished and were the “backbone” of the biography—so much so that without the letters the resulting biography was unsuccessful. In other words, the letters may have been taken more as a means of capitalizing on the interest in Salinger than in providing a critical study of the author. (*Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987).)

Hands on exercise (Apply the Four Factors)

<https://docs.google.com/document/d/1vJOAxXhOrvy552-MRRY3Wk2MLg5JhFoSvcRVOcOx1VM/edit?usp=sharing>

Developing Strategies for Ethical Use of Copyrighted Materials

- Provide links to licensed and legal online materials instead of distributing copies
- Give attribution to resources used
- Have strategies for using Fair Use checklists when making exceptions
- Model ethical behavior for students and discuss copyright issues
- Look at alternative resources, like Open Educational Resources, Creative Commons-licensed materials, works in the Public Domain
- Provide Statements about Fair Use or using copyrighted materials in your syllabi.

From [Rowan Online's Copyright Guide](#):

- "Copying, displaying and distributing copyrighted works, may infringe the owner's copyright. The University's policy statement on fair use can help you determine whether your use of a copyrighted work may be an infringement. Any use of computer or duplicating facilities by students, faculty or staff for infringing use of copyrighted works is subject to appropriate disciplinary action as well as those civil remedies and criminal penalties provided by federal law."

Fair Use and Rowan Online's Copyright Policies

“Instructors are responsible for obtaining permission for use of all third-party work in his/her online course. . . . In some cases, copyright permission may be very explicit regarding who can use the work and for what reason. **If the work is being used under ‘fair use,’ there is a time limit after which explicit permission is required.**”

“Third-party content hosted on the Streaming Multimedia Content Distribution System must be accompanied by expressed, written consent from the authorized owner of the work or a written justification of copyright compliant use. . . . Works to be hosted on the system that are being used under creative commons, **fair use** (See Section 4), or other licensure must be accompanied by a **statement of justification that clearly addresses how use is copyright compliant.**”

“If your copyright search reveals that the copyright owner does not make his/her work available on the open market. Ask yourself the question, “To the best of my knowledge, is there an efficient and effective way to get a license that lets me do what I want to do with the work?” If not, **you may employ fair use based on the fact that the market does not provide a license for the work that meets your needs.** For example, if the video is out of print or only available in analog format, digitizing the video and hosting it for your students (only) on a secured system may be acceptable. However, when there is doubt, it is best to seek permission.”

- “Hyperlinks that connect to known illegal works (works hosted on an outside web site, but are not copyright compliant) will not be posted in the LMS or may be removed from the LMS with notice to the developer and/or current instructor (notice may be sent after removal).”

Codes for Individual Disciplines

Fair use is also supported when it conforms to documented practice within individual communities.

The Center for Media and Social Impact supported codes for Fair Use in:

- Documentary Filmmaking
- Visual Arts
- Journalism
- Scholarly Research in Communication
- Sound Recordings
- Software Preservation
- Online Video
- Media Studies Publishing
- Teaching for Film and Media Educators
- Images for Teaching, Research, and Study
- Poetry
- Dance-related Materials
- Open Courseware
- Academic and Research Libraries
- Open Educational Resources

Thank you / Questions?

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