

The Basics of Copyright in the University Setting - A Quick Guide

A common question amongst faculty, instructors, administrators, and staff is how copyrighted materials can be appropriately used in the classroom and the larger university environment in accordance with copyright law. To answer this question, we look to the Copyright Act, the Face-to-Face Classroom Teaching Exemption, the TEACH Act and the Fair Use Doctrine for guidance. The following is a quick guide on the basics of copyright law and its limited exceptions for the education environment. This guide is not intended to be a full explanation of the law in this area, nor is this specific legal advice on a particular use of a copyrighted work. For individualized assistance on copyright at Northern Illinois University (NIU or University), please contact the Division of Research and Innovation Partnerships and/or the Office of General Counsel. For more information on copyright law, please see the website for the U.S. Copyright Office at www.copyright.gov and/or the Copyright Clearance Center's *Campus Guide to Copyright Compliance*, which can be viewed here: <https://www.copyright.com/Services/copyrightoncampus/index.html>.

The Copyright Act was originally designed to encourage the creation of creative works by protecting and limiting the use of these works by anyone but the author. The language of this act states that the Copyright Act “protects original works of authorship fixed in any tangible medium of expression.” This Act covers different types of expression such as literary works, dramatic works, photographs, movies, sound recordings and more. Copyright attaches to an original work of authorship as soon as it is fixed in a tangible form. For example, as soon as an original character and plot of a story is written on paper, copyright attaches to that original character and plot. Once that happens, the law grants the copyright owner a bundle of exclusive rights for a limited period of time over that original character and plot, which include the right to copy the work, the right to distribute the work, the right to display the work, the right to perform the work, and the right to make derivative works or adaptations of the work. There is no requirement to register the copyrighted work with the U.S. Copyright Office before the rights attach, but registration does have its benefits – including putting the rest of the world on notice of your copyrighted work. Normally, the copyright owner of a work is the author of the work, but that is not always the case. Two common examples of this are: (1) when there is a “work-for-hire” situation where the author is hired to do the work on behalf of its employer or client; or (2) when the copyright rights have been expressly transferred to another by a contract/agreement.

In order to protect and support the copyright interests and rights of the University and its employees, Northern Illinois University (NIU or University) maintains an Intellectual Property Policy, which can be viewed in the University Policy Library at <https://www.niu.edu/policies/policy-documents/intellectual-property-policy.shtml>. Just as NIU and its employees would expect others to respect the rights that NIU and its employees hold in their respective copyrighted works, NIU and its employees should respect the rights of copyright owners in their respective works. As such, when the University and its employees wish to use the copyrighted work of another, it may need to get permission from the copyright owner for the use. That is usually accomplished by entering into a licensing agreement with the copyright owner. Please note that the mere attribution or citation to the source of thoughts, words or ideas of another might be sufficient to guard against accusations of plagiarism, but they are not for liability purposes.

With that said, there are some limited exceptions under copyright law that allow for some copyrighted materials to be used in an educational setting, without the need to get expression permission from the copyright owner for the use:

The Face-to-Face Classroom Teaching Exemption. 17 U.S.C. § 110(1)

In a face-to-face classroom setting, or similar place devoted to instruction (such as a gymnasium, a lab, an outdoor learning environment, etc.) faculty and instructors may utilize copyrighted materials such as:¹

- Showing movies or television shows
 - **Caution:** *Showing movies or television shows through streaming services such as Netflix or Amazon Video could violate your terms of service as a classroom setting may not be considered “Private Use”.*
- Performing plays
- Listening to music
- Displaying slides

¹ Nora E. Field and Lori Silver, *Copyright on Campus*, in *College and University Law Manual Chapter 3* (Massachusetts Continuing Legal Education, Inc., 2012) at 6.

- Reading from a book

The face-to-face classroom teaching exemption does not apply to online or distance education interactions, however the TEACH Act, allows for some similar exemptions.

The Technology, Education, and Copyright Harmonization (TEACH) Act for Online and Distance Education²

The TEACH Act is a federal law that allows for the performance and display of copyrighted works in online and distance education course but only if certain requirements are met, which are:

- The institution must be an accredited, non-profit educational institution.
- The use must be part of mediated instructional activities.
- The use must be limited to a specific number of students enrolled in a specific class.
- The use must either be for “live” (where students and instructor are online at the same time), or asynchronous class sessions (where students and instructor are not online at the same time).
- The use must not include the transmission of textbook materials, materials “typically purchased or acquired by students,” or works developed specifically for online uses.
- Only “reasonable and limited portions,” such as might be performed or displayed during a typical live classroom session, may be used.
- The institution must have developed and publicized its copyright policies, specifically informing students that course content may be covered by copyright, and include a notice a copyright on the online materials.³
- The institution must implement some technological measures to ensure compliance with these policies, beyond merely assigning a password. Ensuring compliance through technological means may include user and location authentication through Internet Protocol (IP) checking, content timeouts, print-disabling, cut & Paste disabling, etc.

The TEACH Act exemption does not cover:

- Electronic reserves, coursepacks (electronic or paper) or interlibrary loan (ILL).
- Commercial document delivery.
- Textbooks or other digital content provided under license from the author, publisher, aggregator or other entity.
- Conversion of materials from analog to digital formats, except when the controverted material is used solely for authorized transmissions and when a digital version of a work is unavailable or protected by technological measures.

Fair Use Doctrine

In a non-profit educational environment (such as a state university), some copyrighted materials are able to be used in the course of instruction, or for other limited uses. This is known as the Fair Use Doctrine, which guides us in how various materials can be used in the educational setting. The Fair Use Doctrine states that copyrighted work can be used “for purposes such as criticism, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” 17 U.S.C. § 107. In summary, a copyrighted work can be used for these purposes, but the use of the work must be limited to only that portion of the copyright work that is necessary to accomplish the “criticism, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” For example, the use of a small clip from a movie in order to demonstrate a point would be acceptable, but showing the entirety of the movie when the remainder has no teachable purpose would not be acceptable.

The Fair Use Doctrine uses four factors to determine whether fair use would apply.⁴ When courts analyze these factors, they are not weighed equally. The courts appear to give more weight to Factor Four below, but that can change depending on the circumstances of the copyrighted work and its use in any particular situation.

Fair Use Doctrine: Four Factors

² Adapted from the Campus Guide to Copyright Compliance by the Copyright Clearance Center:

<https://www.copyright.com/Services/copyrightoncampus/basics/teach.html>

³ See NIU Intellectual Property Policy: <https://www.niu.edu/academicaffairs/appm/16.shtml>

⁴ Adapted from Copyright.gov: www.copyright.gov/fair-use/more-info.html

Factor One: Purpose and Character of the Use

Factor Two: The Nature of the Copyrighted Work

Factor Three: The Amount and Sustainability

Factor Four: The Impact on the Potential Market

Factor One: Purpose and Character of the Use

This factor evaluates whether the use is of a commercial nature, such as the advertisement or promotion of a business, or for a nonprofit educational purpose. Although educational purposes have been preferred over commercial purposes when it comes to fair use, not all nonprofit purposes are considered fair use. For example, it would likely not be considered fair use if a copyrighted image was used on a poster to promote a campus activity or event. Using the same image on a lecture slide to further an educational objective, however, may be considered fair use. Courts have also favored “transformative” uses, such as those that add something new or transform the purpose of the material.

According to Factor One, in a classroom or on a class website, faculty and instructors should ensure that any material is accompanied by commentary or criticism or in some other way to “transform” the purpose of the material. Additionally, materials should only be used only for specific educational purposes, such as to further a learning objective, not to add “entertainment value” to the educational activity.

Examples:

- ✓ Listening to music of a specific time period in class to illustrate how the music was influenced by the political climate would likely be considered Fair Use.
- ✓ Distributing song lyrics to students as a part of an assignment that would require students to transform the lyrics into an application of the class material. This would likely fall under Fair Use because it could be considered a “transformative” use, that would add something new or transform the purpose of the material.
- ✓ Adding an unrelated piece of music to a presentation or lecture just to add “entertainment value” would likely not fall within Fair Use, since the music wouldn’t be furthering the educational objectives. This example is different from the “song lyric” example above, because the “song lyrics” in that example were used to further an educational objective and not just used to enhance the entertainment value of the lesson.

Factor Two: The Nature of the Copyrighted Work

Courts consider certain characteristics of copyrighted work for determining Fair Use. Courts have tended to offer more copyright protections for unpublished work as well as highly creative or artistic work because a purpose of copyright is to encourage creative expression.

According to Factor Two, university employees should be cautious with the use of creative works and if creative works are utilized should ensure that the works cannot be downloaded or shared beyond the specific educational activity.

Examples:

- ✓ Using copyrighted photographs in an in-class presentation or lecture would likely fall under fair use, as long as the photographs are being used to further the educational objectives of the class. This presentation would also likely fall under Fair Use within the TEACH Act in a remote classroom setting or on Blackboard, as long as the access was restricted to the students currently enrolled in the course.

Factor Three: The Amount and Sustainability

The amount and sustainability of the portion used in relation to the copyrighted work is also considered when determining Fair Use. When considering the amount and substantiality of the portion used from copyrighted works, courts look at not just the amount of work used, but what proportion of the entire work was used. When evaluating substantiality, courts look to see if the “heart” of the work was used, or if the work used was a less significant part of the original work.

According to Factor Three, instructors should be sure to use only the amount of copyrighted material needed for the course. Using copyrighted materials should never replace or substitute for the purchase of books, publisher's reprints or periodicals.

Examples:

- ✓ Putting a digital copy of an entire book on Blackboard to lessen the course cost for students would not fall under Fair Use.
- ✓ Copying one article to distribute to the class for an educational purpose, would likely fall under Fair Use, however if the same article is being used year after year, it may not be considered Fair Use.
- ✓ Scanning an out-of-print book onto Blackboard for students to read would not fall under Fair Use. Out-of-print books still fall under copyright. A better practice would be to put the out-of-print book on reserve at the library for students to access.

Factor Four: Effect on Potential Market

Courts consider the effect of the use upon the potential market for or value of the copyrighted work when determining fair use. The essence of this factor is the extent to which the use of copyrighted material would have a negative impact on the existing or future market for the copyright owner's work.

According to Factor Four, instructors should ensure that if copyrighted materials are used in the course, the materials should only be available to the students enrolled in the course, and only for the duration of the course. This includes information used in person as well as materials shared on Blackboard or another course website. Also, instructors should be careful not to post or distribute copies of "consumable" materials, such as worksheets, that are meant to be purchased.

Examples:

- ✓ Putting an article on Blackboard for students to read for class could be considered Fair Use, as long as the access is limited to the students enrolled in the course, and the material is taken down after the semester ends.
- ✓ Finding a free copy of the Myers-Briggs personality test online (it usually costs money) and distributing it to your class would violate Fair Use.

Application of Fair Use:

Although specific guidelines for Fair Use are difficult to find, there are things you can do to increase the likelihood that the materials you are using would fall within Fair Use.⁵

If posting on Blackboard or another course website:

- Post only the amount needed for the course, and only the amount you would use in person.
- Ensure that the material is accompanied, either on the Web site or in class, by commentary or criticism.
- Restrict access to students enrolled in the course.
- Post copyrighted materials in a format that cannot be downloaded, copied, or redistributed, through streaming media or otherwise.
- Post images of artwork or photographs in thumbnail, low-resolution formats.
- Take the material down at the end of the course.
- Do not digitize and post "consumable" educational materials (such as worksheets) or material marketed for classroom or distance education use.
- You can link YouTube videos as long as they are available for download. Make sure that any videos you link are not infringing on copyright. Just because something is found on YouTube, doesn't mean it's safe to share.

Guidelines for Books and Periodicals:

⁵ Nora E. Field and Lori Silver, *Copyright on Campus*, in *College and University Law Manual Chapter 3* (Massachusetts Continuing Legal Education, Inc., 2012) at 11.

The U.S. Copyright office published a circular which included the following guidelines for books and periodicals⁶.

- A single copy may be made of the following for use in classroom teaching:
 - A chapter from a book
 - An article from a periodical or newspaper
 - A short story, short essay or short poem, whether or not from a collective work
 - A chart, diagram, drawing, cartoon or picture from a book, periodical, or newspaper
- Multiple copies (one per student) can be made for classroom use provided that they are brief and spontaneous.
- The copying of the material is for only one course in the school in which the copies are made.
- Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
- There should not be more than nine instances of multiple copying for one course during one class term.
- Copying should not replace or substitute for the purchase of books, publishers' reprints or periodicals.
- There should be no copying of or from works intended to be "consumable" in the course of studying or teaching. These include workbooks, exercises, standardized tests, and test booklets and answer sheets, etc. Again, just because something is found "online" doesn't mean that it is okay to use according to Fair Use standards.
- No charge should be made to the student beyond the actual cost of the photocopying.

In the classroom:

- Ensure that any copyrighted material, especially creative works, relates directly to your educational objectives and are not being used to add "entertainment value".

Open Licenses/Open Source

Some copyright owners retain their rights in their copyrighted works, but allow those works to be accessed, used, modify and re-distributed freely based upon an expressed open license or permission. The Creative Commons License is the most common form of this. To learn more about Creative Commons Licenses, please see <https://creativecommons.org/licenses/>. If you believe that a copyrighted work is under an open license or permission, it is best to make sure that you print out or save and keep a copy of the open license or permission in your files. Do not assume that a copyrighted work is under an open license or permission unless you can clearly show documentation of such an open license or permission regarding the copyrighted work.

Another resource for open licenses is the Copyright Clearance Center, found at www.copyright.com.

Works in the Public Domain. Works that are in the public domain are no longer protected by copyright law and are free to use without restrictions. A work enters the public domain when either (1) the bundle of rights that a copyright owner receives under the law when the work is created expires, or (2) the copyright owner willingly places the work in the public domain and gives up their rights in the work. Like open licenses or permissions above, it can sometimes be difficult to discover what works are in the public domain and which are not. It is best not to assume that a work is in the public domain unless you can clearly demonstrate that it is in the public domain.

As a general rule, those works that were created before 1923 are usually in the public domain. However, still be cautious of collections or assemblies of works that are in the public domain. New copyright rights may attach in the layout or supplemental materials in such collections or assemblies, including but not limited to introductions, epilogues, photos or pictures, footnotes or endnotes, appendices, etc.

Fair Use Checklist⁷

⁶ The United States Copyright Office, Reproduction of Copyrighted Works by Educators and Librarians, <https://www.copyright.gov/circs/circ21.pdf>.

⁷ This checklist is licensed by a Creative Commons Attribution License with attribution to the original creators of the checklist Kenneth D. Crews (formerly of Columbia University) and Dwayne K Butler (University of Louisville). Adaptions were made to the checklist. <https://creativecommons.org/licenses/by/4.0/>

You can use this checklist to evaluate if your use of copyrighted materials is likely to fall within or outside of fair use standards. Again, this is not a definitive legal assessment of whether your use is fair use under the law. But the checklist can be very helpful in guiding you towards making good, reasonable determinations on whether a use is fair use. For individualized legal advice or counsel on your proposed work, please contact the University's Office of General Counsel.

Factor One: Purpose and Character of the Use

Purposes that Favor Fair Use

- Teaching including multiple copies for classroom use)
- Research
- Scholarship
- Nonprofit Educational Instruction
- Criticism
- Comment
- News Reporting
- Transformative or Productive Use (changes the work)
- Restricted Access
- Parody

Purposes that Oppose Fair Use

- Commercial activity
- Profiting from the use of the material
- Entertainment
- Bad-faith behavior (knowledge of wrongdoing)
- Denying credit to original author

Factor Two: The Nature of the Copyrighted Work

Natures that Favor Fair Use

- Published Work
- Factual or nonfiction based
- Important to favored educational objectives

Natures that Oppose Fair Use

- Unpublished Work
- Highly creative work (art, music, novels, films, plays)
- Works of fiction

Factor Three: The Amount and Substantiality

Amounts that Favor Fair Use

- Small Quantity
- Portion used is not central or significant

Amounts that Oppose Fair Use

- Large portion or whole work used
- Portion used is central to, or the "heart" of, the work

Factor Four: Effect on Potential Market

Effect that Favors Fair Use

- User owns lawfully purchased copy of original work
- One or few copies made
- No significant effect on the market or potential market
- No similar product marketed by copyright holder
- Lack of licensing mechanism
- Making the materials accessible on the Web

Effect that Opposes Fair Use

- Use of item could replace sale of copyrighted work
- Significantly impairs market for copyrighted work
- Reasonably available licensing mechanism for use
- Affordable permission available for using work
- Numerous copies made