Four Fair Use Factors
Section 107 of the Copyright Act

The conditions of all four factors of fair use must be met prior to use of the copyrighted material in order to deem use of the material appropriate.

1. The purpose and character of the use (including commercial or nonprofit educational purposes).

In most cases, use of a copyrighted material by faculty or students is to support an educational activity in the traditional or virtual classroom; however, educational use of copyrighted works has been challenged in court. It is important to consider fair use when selecting materials to ensure that you are in compliance with copyright law.

2. The nature of the copyrighted work.

Classroom resources are most often selected by an instructor to support and strengthen educational activities, so this parameter is almost always met by instructors especially when it comes to reference tools including encyclopedias, maps, workbooks and manuals, and research articles. Use of factual works designed for an educational purpose falls under fair use.

3. The amount and substantiality of the portion used in relation to the copyright-protected work as a whole.

If an individual’s use of a copyrighted work exceeds 10 percent, the use may not fall under fair use; although this is simply a guideline, not a legal rule.

4. The effect of the use on the potential market for or value of the copyright-protected work.

To meet this parameter, an individual must review use of the copyrighted material to ensure that there is not a negative impact on the author’s ability to earn rewards for the original work.
# Fair Use Checklist

**Fair Use Factor #1: Purpose of the material**

<table>
<thead>
<tr>
<th>Favoring Fair Use</th>
<th>Opposing Fair Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>Teaching (including multiple copies for classroom use)</td>
<td>Commercial activity</td>
</tr>
<tr>
<td>Research</td>
<td>Profiting from the use</td>
</tr>
<tr>
<td>Scholarship</td>
<td>Entertainment</td>
</tr>
<tr>
<td>Nonprofit educational institution</td>
<td>Bad-faith behavior</td>
</tr>
<tr>
<td>Criticism</td>
<td>Denying credit to original author</td>
</tr>
<tr>
<td>Comment</td>
<td></td>
</tr>
<tr>
<td>News Reporting</td>
<td></td>
</tr>
<tr>
<td>Transformative of productive use (changes the work for new utility)</td>
<td></td>
</tr>
<tr>
<td>Restricted access (to students or other appropriate group)</td>
<td></td>
</tr>
<tr>
<td>Parody</td>
<td></td>
</tr>
</tbody>
</table>

**Fair Use Factor #2: Nature of the material**

<table>
<thead>
<tr>
<th>Favoring Fair Use</th>
<th>Opposing Fair Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>Published work</td>
<td>Unpublished work</td>
</tr>
<tr>
<td>Factual or nonfiction based</td>
<td>Highly creative work (art, music, novels, films, plays)</td>
</tr>
<tr>
<td>Important to favored educational objectives</td>
<td>Fiction</td>
</tr>
</tbody>
</table>

**Fair Use Factor #3: Amount of the material**

<table>
<thead>
<tr>
<th>Favoring Fair Use</th>
<th>Opposing Fair Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>Small quantity</td>
<td>Large portion or whole work is used</td>
</tr>
<tr>
<td>Portion used is not central or significant to entire work</td>
<td>Portion used is central to or is the “heart of the work.”</td>
</tr>
<tr>
<td>Amount is appropriate for favored educational purpose</td>
<td></td>
</tr>
</tbody>
</table>

**Fair Use Factor #4: Effect of the material on the original creator**

<table>
<thead>
<tr>
<th>Favoring Fair Use</th>
<th>Opposing Fair Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>User owns lawfully purchased or acquired copy of original work</td>
<td>Could replace sale of copyrighted work</td>
</tr>
<tr>
<td>One or few copies made</td>
<td>Significantly impairs market or potential market for copyrighted work or derivative</td>
</tr>
<tr>
<td>No significant effect on the market or potential market for copyrighted work</td>
<td></td>
</tr>
<tr>
<td>No similar product marketed by the copyright holder</td>
<td>Reasonably available licensing mechanism for use of the copyrighted work</td>
</tr>
<tr>
<td>---------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Lack of licensing mechanism</td>
<td>Affordable permission available for using work</td>
</tr>
<tr>
<td></td>
<td>Numerous copies made</td>
</tr>
<tr>
<td></td>
<td>User has made it accessible on the web or in other public forum</td>
</tr>
<tr>
<td></td>
<td>Repeated or long-term use</td>
</tr>
</tbody>
</table>

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Frequently Asked Questions for Faculty

QUESTIONS FOR THE FACE-TO-FACE CLASSROOM

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

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. A copyrighted work 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.

This does not necessarily mean that you need permission to use it for teaching.

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 website.

2. What if I got the work from a website that 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. You will have to judge whether or not a site trustworthy.

Fair use is the only copyright provision that allows you to make a copy or distribute a copyrighted work that you find on a websites. 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. If you’re not sure, direct students to a link to the work.

3. What if a student created the work?

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

4. 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 our campus’ subscriptions to electronic journals and databases. Also, libraries vigorously negotiate licenses for electronic 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 the library.
You may also encounter works governed by licenses that specifically grant rights to use them, such as 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).

You can learn more about Creative Commons at [http://www.creativecommons.org](http://www.creativecommons.org).

5. **The work I want to use in class is copyrighted and I don’t have a license to use it. 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.

6. **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, not a bootlegged or pirated copy.

7. **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 to digitize your VHS you would have to rely on fair use, which may justify digitizing portions of the work, but probably not the entire movie. Instead, consider buying it (or ask your department to buy it) and you can show that.

8. **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. For works found on the Internet, consider accessing the work using a projection of the site during class.

9. **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. Also, remember that copyright law never restricts you from directing your students to a link for a copyrighted work.

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

Fair use is a very important provision of the law for educators that allows limited use of copyrighted material without requiring permission from the copyright holder. Consideration of all four factors of fair use is required, although all factors do not have to be in favor of a use to make it a fair one.

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

11. **What if a work is out of print? Is that the same as not copyrighted?**

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

**QUESTIONS FOR THE ONLINE CLASSROOM**

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

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. A copyrighted work 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.

This does not necessarily mean that you need permission to use it for teaching.

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 website.

2. **What if I got the work from a website that**
   — **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. You will have to judge whether or not a site trustworthy.

Fair use is the only copyright provision that allows you to make a copy or distribute a copyrighted work that you find on a websites. 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. If you’re not sure, direct students to a link to the work.

3. **What if a student created the work?**

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

4. **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 our campus’ subscriptions to electronic journals and databases. Also, libraries vigorously negotiate licenses for electronic 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 the library.

In an online class, your students will be “authorized users” under a campus license as long as access to your course is restricted to only those students who are enrolled. This way, your class does not become a portal for the rest of the world to access your library’s licensed resources.

You may also encounter works governed by licenses that specifically grant rights to use them, such as 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).

You can learn more about Creative Commons at [http://www.creativecommons.org](http://www.creativecommons.org).

5. **The work I want to use in my online class is copyrighted and I don’t have a license to use it. Are there any specific provisions of the copyright law that apply to online classroom use?**

Yes, the TEACH Act specifically applies to displaying images, playing motion pictures or sound recordings, or performing works in your online class.
Generally, to perform or display a work in your online class the work must be
— used under your supervision
— as part of systematic mediated instructional activities directly and materially related to the teaching content
— 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 in your site or on your syllabus

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

In order to fit within the TEACH Act 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.

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

Yes, as long you comply with the general requirements listed above.

8. Can I post journal articles or book chapters?

The TEACH Act does not authorize posting scanned journal articles, book chapters, and other large chunks of a text if a digital version is available. For this type and amount of material, you should consider linking to the digital version, asking for permission, or evaluating your use using the four factors of fair use.

9. 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. If this is the case, the TEACH Act becomes inapplicable and you must fall back on linking, asking permission, or fair use.

10. What are “mediated instructional activities” (as defined in the TEACH Act)?

Mediated instructional activities are activities that use works
— as an integral part of the class experience
— under the control of the instructor
— in a manner analogous to live classroom settings.

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

Fair use is a very important provision of the law for educators that allows limited use of copyrighted material without requiring permission from the copyright holder. Consideration
of all four factors of fair use is required, although all factors do not have to be in favor of a use to make it a fair one.

In online classroom setting, you will usually need to consider fair use when you do not qualify under the TEACH Act and when linking is not an option.