

THE UNIVERSITY of TEXAS SYSTEM

Office of General Counsel

—WEBINAR SERIES—

Copyright in the Time of COVID-19: Moving Classes Online

GENERAL GUIDANCE FOR FACULTY

UT System Office of General Counsel
Intellectual Property

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Privileged and Confidential

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Do Not Distribute Outside UT System

One-page Advice for Faculty: Teach your students online the best you can, as you would in any normal class.

Copyright law is designed to facilitate education and protect bona fide teaching.

17 USC § 110(1) and (2) have specific protections for face-to-face and online learning. Section 107 Fair Use can help fill in gaps.

Using and sharing your normal course materials will be fine. Just:

- Limit access to students in class.

- Don't steal material from others.

It's generally OK to supplement with reasonable excerpts from copyrighted works if you give attribution; if possible, ask for permission.

Remember we are CCC members. Ask your librarian.

Advice to Faculty—Protect Your Copyright

If you are creating new material to meet newly created online needs, or even simply posting your own material online, consider adding copyright notice.

Nothing fancy, just include a header or footer that says:

© Dr. Jane Doe 2020

This would help if others take advantage of your materials being on line or if you later want to get them off Course Hero or similar platforms.

If you would like to encourage inquiries for permission to license the copyrighted work, including contact information could help. But that is optional, not necessary.

© Dr. Jane Doe 2020, 1234 University Hall, City, TX 77777 [*could further encourage inquiries by including: jane_doe@utuniv.edu*]

If you'd like to share your materials with others in this time of crisis, consider www.creativecommons.org/licenses .

Copyright in the Classroom

Face to Face Teaching Exception (*strong argument this applies to live video or phone classes in pandemic*)

- An educator may show or perform any work related to the curriculum, regardless of the medium, **face-to-face in the classroom** - still images, music of every kind, even movies. There are no limits and no permission required. 17 USC §110(1).

Distance Learning

- The TEACH Act authorizes an educator to digitize works for use in digital distance education, but only to the extent one is authorized to use those works in 17 USC §110(2)
 - Use under, by, at direction of, or under actual supervision of instructor “**as an integral part**” of class by **accredited non-profit educational institution**
 - **Directly related** and of **material assistance** to teaching content of class
 - **Transmission limited** to those enrolled (or employees as part of their duties)
 - Institution has **copyright polices (*we do!*)** and **ensures copyright material is not available** digitally in a format free from technological protection to prevent recipients from keeping material longer than class session or transmitting material to others. (*Do your best to do this, given circumstances.*)

Fair Use is a defense to copyright infringement.



Fair Use Factors: never a bright line, balance of factors

Factors in 17 U.S.C. §107	Good Facts	Not as Good Facts
Purpose and Character of Use (by us)	Educational, academic, research, non-profit	Commercial, for-profit, fundraising
Nature of Copyrighted Work (copyright owner's)	Factual published work	Artistic, expressive, not published
Amount and Substantiality of Portion Used (by us)	Small amount with citation	Large portion, or the "heart" of the work
Effect of (our) Use on the (copyright owner's) Market	Won't impact sales of copyrighted work	Educational work whose market is gutted by copying

See also 17 U.S.C. §110 re classroom and e-learning use of materials.

Key Copyright Rules and Policies

RR 90101(7) – The Board of Regents will not assert an ownership interest in the copyright of scholarly or educational materials, artworks, musical compositions, and literary works related to the author’s academic or professional field, regardless of the medium of expression.

RR 90101(8) – Works for hire are owned by the Board of Regents.

UTS 107(1) – It is the policy of the System and its Institutions to respect US Copyright Law.

UTS 107(3) – Software copyrights also require compliance with terms of licenses.

UTS 107(4) – Fair use is allowed [consistent with Copyright Act].

Links to Useful Resources

List of online learning and copyright [Vendors with COVID-19 Access or Pro Bono](#) that could help provide free resources during COVID-19 transition

Link to [Resources on Copyright & Emergency Remote Teaching & Research](#)

UT Austin on TEACH Act <https://guides.lib.utexas.edu/copyright/teachact>

Fair Use Analysis: tinyurl.com/tvnty3a

Guidance for [Film and Media Fair Use](#)

Guidance for [Use of Images Fair Use](#)

Creative Commons (sharing works) <https://creativecommons.org/licenses/>

Questions?

If any questions arise, do not hesitate to contact your office of Legal Affairs or the Intellectual Property Counsel at the UT System Office of General Counsel.

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Backup slides

- There is no need for faculty to understand (or even look at) any of the materials on the following slides.
- They are included in case you are curious about more background on copyright law, or if you think they might be helpful.

Basic Copyright Law – cont.

When is a work protected?

- A work is under copyright protection the moment it is created and fixed in a tangible form that it is perceptible either directly or with the aid of a machine or device.

Does one have to register with the U.S. Copyright Office to be protected?

- No. In general, registration is voluntary.
- Copyright exists from the moment the work is created.
- The copyright owner does have to register, however, to bring a lawsuit for infringement of a U.S. work. See Circular 1, *Copyright Basics*, <http://www.copyright.gov/circs/circ01.pdf>, section “Copyright Registration.”

Exclusive Rights of the Copyright Holder

The Copyright Act (17 USC §106) generally gives the owner of copyright the exclusive right to do, and to authorize others to do, the following:

- **reproduce** the copyrighted work in copies or phonorecords;
- **prepare derivative works** based upon the copyrighted work;
- **distribute copies** or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- **perform** the copyrighted work **publicly**, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works;
- **display** the copyrighted work **publicly**, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work; and
- **perform the work publicly** (in the case of sound recordings) by means of a **digital audio transmission**.

Copyright Ownership in General

- The copyright in the work of authorship immediately becomes the property of the author who created the work.
- Only the author or those deriving their rights through the author can rightfully claim copyright.
- In the case of works made for hire, the employer and not the employee is considered to be the author.
- The authors of a joint work are co-owners of the copyright in the work, unless there is an agreement to the contrary.
- Copyright in each separate contribution to a periodical or other collective work is distinct from copyright in the collective work as a whole and vests initially with the author of the contribution.
- Regents Rule 90101 provides more details about ownership of copyright within the UT System.

Works Made for Hire

- US Copyright Law, 17 USC § 101, defines a “work made for hire” as:
 - a work prepared by an employee within the scope of his or her employment; *or*
 - a work specially ordered or commissioned for use as:
 - a contribution to a collective work
 - a part of a motion picture or other audiovisual work a translation
 - a supplementary work
 - a compilation
 - an instructional text
 - a test
 - answer material for a test
 - an atlas
 - If the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Public Domain

Not protected by copyright or other IP laws

How a work becomes within the public domain?

Dedication

Expiration of Copyright

Not Copyrightable

Just because it is available for no charge or easily accessible on the internet does not mean it is within the public domain.

Seek Permission from Copyright Owner

What if the item is not within the scope of the Academic CCC license and there is no convenient license to use?

- The next step is to try to find who owns the copyright (Author, publisher, other?) and get written permission to use the work
- US Copyright Office (www.copyright.gov) is a good resource
- Use “Search Records” <http://www.copyright.gov/records/index.html> to find copyright owner
- But what if one cannot find who owns the copyright?
 - Then you fall back on “fair use”

Fair Use

- Fair Use is a defense against a claim of copyright infringement (17 USC §107)
- The Copyright Code (17 USC §107) contains a list of the various purposes for which the reproduction of a particular work may be considered fair, such as criticism, comment, news reporting, teaching, scholarship, and research.
- Section 107 also sets out **four factors** to be considered in determining whether or not a particular use is fair use:
 1. The **purpose and character of the use**, including whether such use is of 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.

Fair Use – Factor 1 Purpose and Character of Use

- The **purpose and character of the use**, including whether such use is of commercial nature or is for nonprofit educational purposes.
- Examples of transformational purposes that tip the balance in favor of fair use include
 - Criticism
 - Commentary
 - News reporting
 - Parody
 - Repurposing a work, providing a new context, or otherwise adding value to the work
 - These uses are strongly transformative when they use a work in a new way *and* serve a new market from the one the original was intended to serve
- Examples of uses that support a finding a fair use even if there is no transformational purpose include
 - Nonprofit
 - Educational
 - Personal
- Commercial use tends to tip the balance in favor of the copyright owner

Fair Use – Factor 2 Nature of the Copyrighted Work

- The **nature of the copyrighted work**
- Examples of uses that tip the balance in favor of fair use include
 - Factual Work
 - The work is published
- Examples of uses that tends to tip the balance in favor of the copyright owner include
 - Imaginative Work
 - The work has not previously been published
- If the work is a mixture of factual and imaginative then there is little effect on the balance between fair use and the rights of the copyright owner (basically this factor cancels itself out)

Fair Use – Factor 3 Amount and Substantiality of the Portion used

- The **amount and substantiality of the portion used** in relation to the copyrighted work as a whole
- Examples of uses that tip the balance in favor of fair use include
 - Using only a small amount of the work
 - i.e. 1 Chapter of a Book
 - 10% of less of the work
 - Using an appropriate amount to achieve a transformative purpose
- Examples of uses that tends to tip the balance in favor of the copyright owner include
 - Using more than a small amount or the amount needed to accomplish a transformative purpose
- This factor depends, to some extent, on the first factor
 - For instance, if you conclude under the first factor that your purpose is transformative, you can use an amount of the work that is appropriate to accomplish that purpose.
 - A nonprofit transformative use of a whole work could be fair use if the amount is appropriate for the purpose, while a commercial use of a whole work would normally weigh significantly against fair use, unless the whole work were the appropriate amount to accomplish that purpose.)

Fair Use – Factor 4 Effect of the Use

- The **effect of the use** upon the potential market for, or value of, the copyrighted work.
- Examples of uses that tip the balance in favor of fair use include
 - Proposed use is transformative and not merely duplicative (first factor) and amount used is appropriate for the transformative purpose (third factor)
 - Proposed use is not transformative, but amount is small (10%/1 chapter)
 - Original is out of print or otherwise unavailable
 - Copyright owner is unidentifiable
 - No license to the work is available
- Examples of uses that tends to tip the balance in favor of the copyright owner include
 - Use is not transformative
 - Competes with (takes away sales from) the original
 - Avoids payment for permission (royalties) in an established market (i.e. a license is available)
 - This last example is particular important if the use is not transformative. If the use is transformative the existence of a licensing scheme becomes less important