



IS FAIR ALWAYS LEGAL?

Copyright Best Practices for the Education Community & Beyond

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MB: I am a librarian, not an attorney.

DL: I am a paralegal, not an attorney.



We have been trained on current best practices for fair use of multimedia and print resources in the non-profit higher education and academic library setting.



We can provide suggestions based on current practice for classroom use and can make an educated referral when needed.

Disclaimer



Why educators need to know

What we thought we knew about copyright has changed dramatically over the last decade. We can tie these changes to several issues:

- Improvements to technological platforms for distributing and housing publisher content;
- Ability for copyright holders to use digital technology to discover infringements;
- Proliferation of lawsuits funded by the publishing industry to combat loss of revenue; and
- Decisions rendered in these lawsuits that changed the academy's interpretation of Fair Use and best practices] forever.

A Very Abbreviated Copyright Timeline

1600s England

Creation of the printing press necessitated that English booksellers provide some author protections in the form of book licensing in 1662.

1700s England

Parliament enacts the Statute of Anne in 1710 to establish a period of author ownership rights (14 years/renewable). Public domain after 14/28 years.

1787 United States

Article I, Sec 8 establishes exclusive rights (for limited time) to authors/inventors for their writings/discoveries.

Copyright Act of 1790

Based on the Statute of Anne using similar terms/timespans to encourage original works while supporting the public domain.

1870 Revision of US Copyright Act

Moved copyright registrations to the Library of Congress Copyright Office. In 1886 the Berne Convention established an international copyright treaty.

1909 Revision of Act

Expanded categories to all works of authorship and extended the term of protection to 28 years/renewable to 56.

A Very Abbreviated Copyright Timeline

1976 Revision of the US Copyright Act

Tech developments required a review of existing laws; the US also needed to be in line with international law and practices.

1976 Revision

Protections extended to the life of the author +50 years/works for hire 75. Fair Use was introduced; Sections 108 & 109 allowed for library exceptions.

1976 CONTU

New Tech Uses of Copyrighted Works established minimum standards for educational fair use which included interlibrary loan.

1994 CONFU

The Conference on Fair Use proposed guidelines for the electronic environment.

1998 Sonny Bono Act

Extended life of author protections from +50 to +70 years and made it easier to renew protections.

1998 DMCA

Digital Millennium Copyright Act making it illegal to circumvent technological controls over digital copyrighted works.

A Very Abbreviated Copyright Timeline

1999 Digital Theft Deterrence & Copyright Damages Improvement Act

Allowed for major increase in statutory damages for willful copyright infringements (piracy!)

2002 TEACH Act

Expanded types of materials used in distance education; but imposed limits on access and copying. Your campus DMCA becomes more critical!

2005 Family Entertainment & Copyright Act

Provided more penalties for motion picture piracy while also exempting home technology such as DVDs and DVRs.

2005-14 Google etc.

Numerous lawsuits by individuals and publishers ensue to limit various forms of use as widespread access to digital content begins to grow.

2006 Orphan Works

Recommendations provided to allow use of works in which an exhaustive search yields no authors or rights-holders.

2008/14 Cambridge v. Patton

“GSU lawsuit,” challenged e-reserves and LMS use; as of 2014 Fair Use decisions must be on a case-by-case basis; no more 10% rule. The case is still pending!

Risk

- The 2002 TEACH Act expanded fair use for distance education purposes; however, compliance with guidelines is required.
- An individual who willfully violates copyright may be personally named in a lawsuit and subjected to punitive damages.
- Faculty are not immune from statutory damages from the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999.



Title 17 of the U.S. Code



Copyright protects an author's original work that is fixed in a tangible medium of expression.



Protection is automatic— it is not necessary to register with the US Copyright Office.



Registering does yield additional protections and is advised for those who may gain profit from original works (such as inventions).

USC Title 17, Chapter 1, § 107

Limitations on exclusive rights

Four Fair Use Factors

1. What is the **PURPOSE** of the use?
2. What is the **NATURE** of the work to be used?
3. What **AMOUNT** of the work will be used?
4. What **EFFECT** will use have on the market for this work?



Factor One

Purpose and character of the use.

- **Strongly favors non-profit educational users.**
- The court made several useful rulings finding that factor one strongly favors libraries every time in this context.

Factor Two

Nature of the copyrighted work.

- **Favors users of non-fiction.**
- If most works in question are scholarly non-fiction and more informational than creative in nature, this use strongly favors libraries.

(From [ARL, 2012](#))



Factor Two

- The rules are slightly different for creative works that are artistic, dramatic, musical, or literary.
- Sound recordings, broadcasts, and visual images/sounds in film or recorded format such as documentaries and even corporate training videos are also protected.
- Creative works usually require license prior to use. The terms will specify HOW a work can be used.

(From [ARL, 2012](#))



Factor Three

***Amount of the portion used
Favors users.***

- Fair use decisions must be conducted on a case-by-case (or work-by-work) basis.
- The 10% rule and other metrics were superseded by a wholistic approach to the entire case.

(From [ARL](#), 2012)



Factor Four

Effect of the use on the market or value of copyrighted work.

- **Favors publishers.**
- If there is a reasonably priced/available license for digital excerpts, it must be used.
- Otherwise, this favors libraries unless the amount used is too great as to harm the market for the entire work.

(From [ARL, 2012](#))



Good Faith

- Statutory damages can be assessed for infringement, but educators & librarians do enjoy some protections.
- If you had “reasonable grounds for believing” that your actions fell under fair use, the court may be required to reduce statutory damages to \$0.
- Even if the court disagrees, an action in *good faith* and may cut liabilities.



- Non-profit public higher education faculty, students, & librarians who implement *fair use in good faith for educational purposes* fall under a form of immunity that is usually not subject to punitive damages.
- Faculty must prove they acted in good faith.
 - A paper/email trail is recommended if/when seeking permissions to use copyrighted materials in an online or face-to-face class.
 - A paper/email trail is admissible in court.

■(according to [Copyright law for Librarians & Educators](#) by Dr. Kenneth Crews)

Sovereign Immunity



"Justice or In-justice-1&" by Sheba Also 17,000,000 + views is licensed under [CC BY-SA 2.0](#)

BEST PRACTICES



Any Classroom...

Online and F2F classrooms are not treated the same under fair use guidelines.

The rules are more stringent for the online environment.
Faculty can be sued!

The TEACH Act gave us more leeway while pending lawsuits and a litigious culture took it away.

Publishers' Marketplace – Pay to Play

Publishers provide several venues for obtaining revenue from distributed content which often supersedes fair use.

Violations can incur major penalties.

- Course Reserves (copyright clearance)
- Interlibrary Loan (copyright clearance)
- Online ePacks (through bookstore or publisher)
- Print Course Packs (bookstore/text publisher)
- Paid Digital Supplements
- Out-of-the-Box Courses



Authors' Revenge – Share & Share Alike

Authors, universities, and professional associations are now providing peer-reviewed scholarly content via open/free access! Open Access policies at hundreds of universities further support this movement.

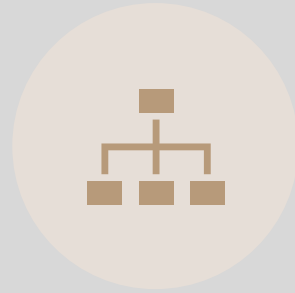
- Institutional Repositories indexed in Google Scholar
 - Includes digital books & peer-reviewed journals
- Open Educational Resources & Textbooks
- Open Journals and Papers
- Free Digital Supplements



Risk Assessment Exercise



Do a fair use self-review regularly; especially for items used every term.



Use only what is needed, when it is needed.



Always use legal copies; do not circumvent tech protections.



With digital content, obtain permissions from the author or rights holder.

Best Practices

Use

Use public domain resources. Always check terms of use especially for multimedia content.

Seek

Seek permission/follow terms/pay the fees when licensing music, videos, or images for an assignment.

Check

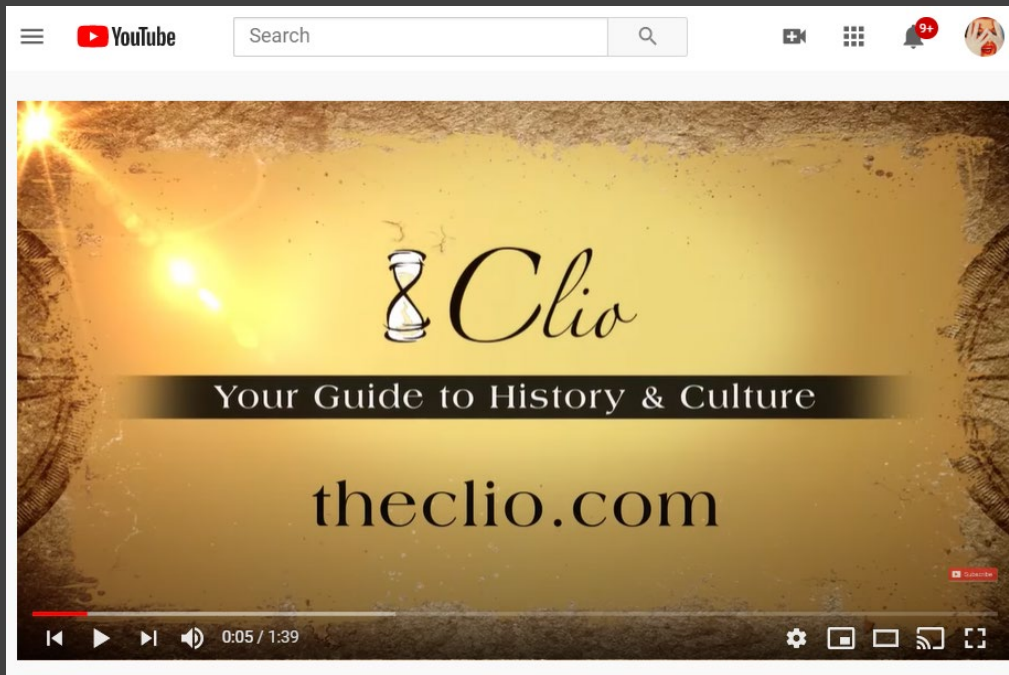
Check with colleagues to see if there are purchased music, clips, image databases available for student use.

Use

Use library resources purchased for classroom use (follow the terms of use for each one!)

Best Practices

Link, Link, Link



- Do not download a PDF, video, or image you find on the web for your course.
- Link or embed the item instead.
- To date, lawsuits that challenged a users' ability to link to an item have not been successful.
- Just be aware links on the open web can disappear at any time!

Use

Most publishers allow for online classroom use, but always use their preferred methods of distribution.

Check

Check all documentation before posting materials; even free sites have terms of use that must be followed.

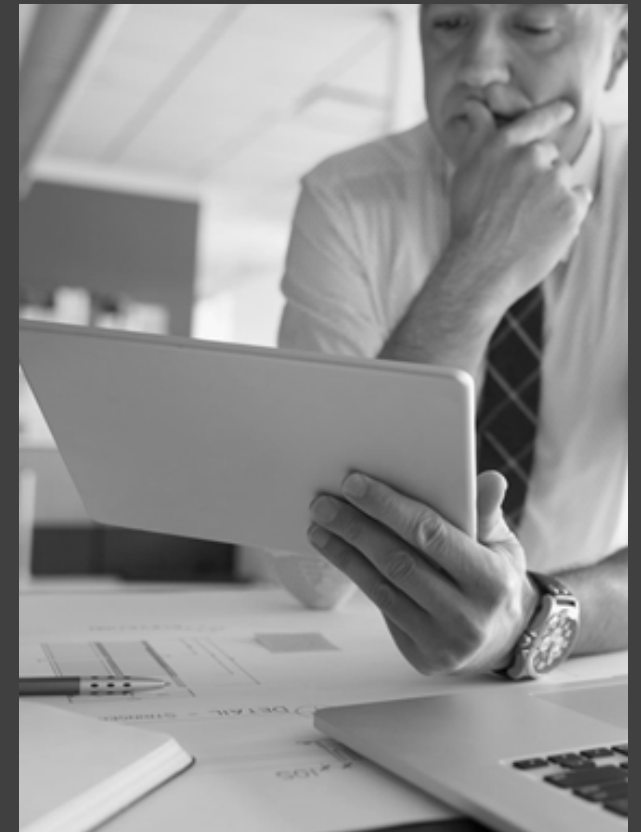
Check

Check to see if there are other resources available (Open Educational Resources or Library databases)

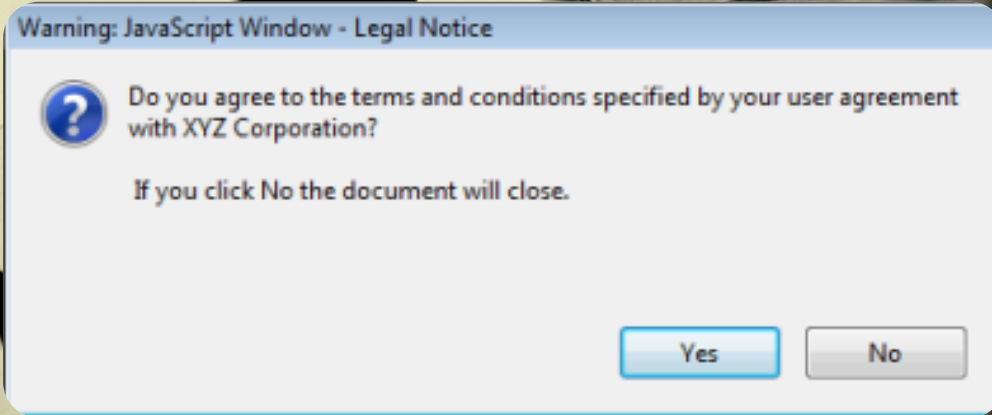
Use

Use the university bookstore services to obtain legal copies of ePacks, course packs, or textbook supplements.

Best Practices



Best Practices



Terms of Use

All sites that provide educational or commercial content have terms that supersede fair use and must be adhered to.

Often the author only requires proper attribution.

With others, copies and/or specific types of use are prohibited.

Best Practices



**CHANGE COURSE
READINGS OR
RESERVES EACH
YEAR.**



**OBTAIN CCC
CLEARANCE FOR
FOUNDATIONAL
ITEMS USED EVERY
TIME.**



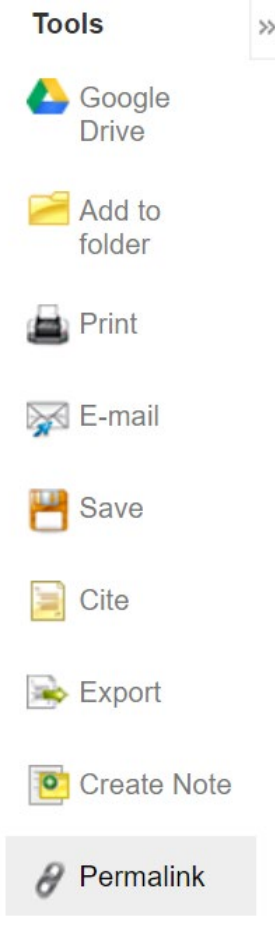
**USE A COPYRIGHT
CHECKLIST & SAVE A
TRAIL FOR EACH
ITEM.**



**PLACE ALL
COPYRIGHTED
MATERIAL IN THE
LMS AFTER
CLEARING
PERMISSIONS.**

Best Practices

Ask a librarian for help!



- Always link to publisher resources. Most publishers provide a permanent or stable link to their content.
- Cut/paste their citation into your online course.
- This ensures proper attribution and that stats & royalties get counted for the original copyright owners.

Include a Syllabus Disclaimer

TEMPLATE:

***Fair Use of Copyrighted Works:** Please note that the instructor may use some works that are copyrighted by the publisher or original author. These works are provided to students under the Educational Fair Use provision of Title 17 of the US Code and are not to be shared with individuals who are not enrolled in this course.*



Licensing Tools

IMPORTANT - it is your responsibility to abide by any terms of use presented for each service.

- Copyright Clearance Center (CCC): <https://www.copyright.com/>
- ASCAP: <http://www.ascap.com/>
- BMI: <http://www.bmi.com/>
- Motion Picture Licensing Corp: <http://www.mplc.org/>
- Swank: <https://www.swank.com/>
- YouLicense: <http://www.youlicense.com/>
- XanEdu: <http://www.xanedu.com/higher-education/educators/course-packs/>

Royalty-Free Content

Most of these items may be free to use for educational purposes; however, they still have terms of use that must be followed.

- Creative Commons: <http://search.creativecommons.org/>
- Royalty Free Getty Images: <http://www.gettyimages.com/creative-images/royaltyfree>
- Wikimedia: <https://commons.wikimedia.org/>
- Library of Congress TPS Program: <http://www.loc.gov/teachers/tps/>

Is your use legal?



**Examples
and Q&A**

