



Copyright and Course Reserves: Electronic and Media Reserves

An ACRL eLearning Webcast

March 11, 2020

Today

- Introduction to copyright and electronic/media course reserves
- Seven ways works can lawfully be circulated via electronic and media reserve
- Putting it all together

NOTE: Info vs. legal advice

Copyright and Course Reserves

An Introduction

Course Reserves

- Provide access to supplementary and required learning materials
- Usually via short-term access
- Three types
 - Print – books, DVDs, CDs, copies of articles, book chapters, lecture notes, practice tests, etc.
 - Electronic – Electronic copies of articles, book chapters, lecture notes, practice tests, etc.
 - Media – access to streaming copies of film and music

Survey!

Copyright Considerations

Providing print and electronic reserves involves taking advantage of rights granted to rightsholders under Section 106 of US copyright law:

- Making of copies
- Distributing copies

Doing it Right

Seven Options for Lawfully Circulating
Works via Electronic and Media Reserves

One of these Options will Likely Work

1. The work is in the public domain; or
2. The instructor holds the copyright; or
3. Linking; or
4. The use could be considered a fair use; or
5. The use falls under the TEACH Act; or
6. You obtain permission for the use; or
7. You obtain a license for the use

Option 1. The Work is in the Public Domain

- Works first published or registered with the U.S. Copyright Office prior to January 1, 1925 are in the public domain in the U.S., meaning they no longer have copyright protection
- For unpublished works, the term is the life of the author +70 years (2020 - 70 = 1950)
- Public domain can also include works of U.S. Federal Government (see Section 105) or works that have no copyrightable components

Recommended resource: Copyright Term and the Public Domain in the United States charts: <https://copyright.cornell.edu/publicdomain>

Option 2. Instructor is the Rightsholder

- PowerPoint presentations, notes, class assignments, etc.
- For published works (e.g. book chapters, articles, etc.), the instructor should first check their publication agreement to ensure they still have the rights to make copies available to others

Option 3. Linking

Generally, no copyright infringement considerations with linking to works made lawfully available

- Works in the library's online, licensed databases (though check license agreements first). For example:
Harvard Business Review (HBR) Academic licensees may not use this content in electronic reserves, electronic course packs, persistent linking from syllabi or by any other means of incorporating the content into course resources
- Works made freely and lawfully available online
- Can also include open access and Creative Commons works (be sure to use in compliance with their attached license).

Trivia!

Option 4. Fair Use (17 U.S.C. 107)

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

17 U.S.C. § 107

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Factor 1: Purpose & Character of the Use

- Teaching/Research/Scholarship
- Criticism/commentary
- Nonprofit institution
- Commercial use

Factor 2: The Nature of the Work

Explores the characteristics of the work being used...

- Nonfiction/factual
- Fiction/Creative
- Published or unpublished

Factor 3: The Amount & Substantiality of the Portion Used

- “The amount and substantiality of the portion used in relation to the copyrighted work as a whole”
- Think quantity and quality
- Consider the amount needed to serve the purpose of the use in relation to the work being used.
- This is a judgment call, and one you must be prepared to justify should your use of the work ever come into question!

There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use.

-Maxtone-Graham v. Burtchaell
803 F.2d 1253 (1986)

Myths and Misconceptions! Using less than 10% of a work or no more than 1 chapter is fair.

- Classroom Photocopying Guidelines (1976)
 - Can use 1 chapter or 10% of a work
 - No more than 250 words from a poem
 - Only 1 chart, picture or diagram from a work
- At best, hokey! At worst, misleading as a safe harbor against infringement

Read this: The Law of Fair Use and the Illusion of Fair-Use Guidelines by Kenneth D. Crews, [Ohio State Law Journal, Vol. 62, No. 2, 2001](#)

Georgia State Reserves Opinions:
<https://libguides.law.gsu.edu/gsucopyrightcase>

Factor 4: Effect on the Market

- Is your use resulting in lost revenue for the rightsholder?
- Could your use replace sale of the work?
- Could your use help the market for the item, e.g. comment, critique, parody?

Myths and Misconceptions! How do we determine market impact?

- Spontaneity, and cumulative effect (Classroom Photocopying Guidelines (1976))
 - Timing of the inspiration to copy does not allow for the asking of permission
 - Only one course at the school can be using the work
 - Copying can only be from so many works from a single author
 - Can only copy nine works in a semester
 - The copying of the material is for only one course in the school in which the copies are made.
 - Must seek permission for subsequent use
- At best, hooey! At worst, misleading as a safe harbor against infringement
- Reconsider fair use each instance the work is used to see if any circumstances have changed

Opinion Poll!

Option 5. The TEACH Act

- The Technology, Education and Copyright Harmonization Act, or TEACH Act was passed by Congress in 2002 to address copyright issues in distance education
- Found (mostly) in Section 110(2) of US copyright law
- Requires collaboration of many on campus:
 - Instructor
 - Institutional/Administration
 - Information Technology (IT)

Instructor Responsibilities

- The performance or display is made by, at the direction of, or under the actual supervision of an instructor; and
- It is an integral part of a class session; and
- The performance or display is directly related and of material assistance to the teaching content of the transmission

Institutional/Administration Requirements

- Accredited nonprofit educational institution; and
- Must have institutional policies in place regarding copyright; and
- Must provide informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and
- Must provide notice to students that materials used in connection with the course may be subject to copyright protection.

IT Requirements

- To the extent technologically feasible, to limit access to only those students enrolled in a course and those who may need to access them as part of their administrative responsibilities; and
- Must find ways to prevent students from retaining works “for longer than the class session” and to limit the “unauthorized further dissemination” of copyright works outside the class learning environment.

Works that can be Made Available Under TEACH

Notwithstanding the provisions of section 106, the following are not infringements of copyright

- The performance of a nondramatic literary or musical work;
- Or reasonable and limited portions of any other work;
- Or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session

Performances

To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

17 U.S.C. 101

Definitions

- **Nondramatic Literary Work** - Generally, works that are intended to be read. Examples include fiction and nonfiction, poetry, reference work.
- **Nondramatic Musical Work** - playing of instruments, singing of songs
- **Dramatic Works** - Works that portray a story are intended to be performed for an audience.
- **Any Other Work** - motion pictures and other audiovisual works, sound recordings.

What is Reasonable and Limited?

- 2001 Senate Report tells us that “What constitutes a ‘reasonable and limited’ portion should take into account both the nature of the market for that type of work and the pedagogical purposes of the performance.” (S. Rept. 107-31 - Technology, Education and Copyright Harmonization Act of 2001. 107th Cong., (2001-2002))
- “The exhibition of an entire film may possibly constitute a ‘reasonable and limited’ demonstration if the film’s entire viewing is exceedingly relevant toward achieving a educational goal; however, the likelihood of an entire film portrayal being ‘reasonable and limited’ may be rare.” (CRS Report RL33516 (2006))

Displays

To “display” a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

17 U.S.C. 101

Displays

May make a display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session

- Sharing of images
- Sharing of an article, pages from a book, etc.

Works that Can't be Made Available Under TEACH

- Digitization of works produced or marketed primarily for online education
- Works that are made from a copy that was not lawfully acquired – OR—that the transmitter knew or had reason to believe was not lawfully made and acquired

Recommendations

- It takes a village, but is doable
- For performances, only digitize as much as needed to teach a work, though full work may be justifiable!
- Stream audio and media files
- Use the institution's learning management system to limit access
- Work with school administrators to provide copyright education
- Remember, you don't have to use TEACH! Fair use can absolutely be considered for making works available as part of online education

Option 6. Obtaining Permission

- Not required for nonexclusive licenses, but it's a good idea to have it documented in writing
 - This includes student work!
- Securing Permission
 1. Contact the rightsholder
 2. Request their permission to use the work providing detailed info on who, what, and how

Recommended Resource: Sample permissions letters available via Columbia's Copyright Advisory Services Office:

<http://copyright.columbia.edu/copyright/permissions/requesting-permission/model-forms/>

Option 7. Obtaining a License

- Copyright Clearance Center: <http://www.copyright.com/>
- Swank Motion Pictures: <https://www.swank.com/>
- License rights for various uses including making copies, posting a digital copy online, commercial republication, etc.
- Permissions fees are involved, often based on the number of pages being used and the number of students in your class
- Who will be responsible for paying these fees?

In the News

The Georgia State Lawsuit

Cambridge University Press v. Becker (GSU Case)

- Litigation brought against GSU by three publishers, backed by the Copyright Clearance Center and the American Association of Publishers, in 2008 over GSU's electronic reserve service
- Three District Court opinions and two Appellate Court decisions (almost 1,000 pages total)

So Far...

- District Court (2012): Five infringement out of 48 (down from 99)
- Appellate Court (2014): Remanded
- District Court (2016): Four infringements out of 48
- Appellate Court (2018): Remanded
- District Court (2020): Ten infringements out of 48

What's Next?

- Publishers could appeal
- Parties could settle

Takeaways

“The case continues to devolve into insignificance.”

-Kevin Smith

“So, what have we learned from this copyright case . . .? The first thing that comes to mind is that this case has been a giant waste of time and resources.”

-Krista Cox

Takeaways

- Make thoughtful determinations of fair use
 - 1st factor - Favors nonprofit educational use
 - 2nd - Creative works can be used for education
 - 3rd factor - Use reasonable amounts
 - 4th factor – Licenses need to be considered but are not definitive
- Have a copyright policy for e-reserves that is based on the law, and make thoughtful applications of the law (not the Guidelines!)
- Some guidance from the TEACH Act?
- Pay attention to what happens next, but don't let this case scare you into draconian practices or even eliminating such a service

Tips and Best Practices

One of these Options will Likely Work

1. The work is in the public domain; or
2. The instructor holds the copyright; or
3. Linking; or
4. The use could be considered a fair use; or
5. The use falls under the TEACH Act; or
6. You obtain permission for the use; or
7. You obtain a license for the use

Make Thoughtful Decisions

Recommended resource: A Framework for Analyzing any U.S. Copyright Problem: <https://www.k-state.edu/copyright/docs/CopyrightFramework.pdf>

1. Is the work protected by copyright?
2. Is there a license that covers my use?
3. Is there an exception (user right) that covers my use (e.g., 109)?
4. Is my use a fair use?
5. Do I need permission from the copyright owner?

Reserves Copyright Policy

- Can serve as a guide for instructors and library staff
 - In support of the teaching and learning mission of the library and academic institution, reserve services will be made available in compliance with US copyright law
 - Library reserve services are made available in compliance with US copyright law, including user rights such as the first sale doctrine and fair use
- Questions can be directed to [insert name and contact info]

Copyright Education and Chain of Command

- Those working with reserves should have an understanding of the basics of copyright and the user rights found there
- Learning never stops, so seek continued opportunities to engage with the law
- Making determinations will become easier overtime
- Who will make them?
- Will they be documented, and how?
- What about the tricky/higher risk decisions?

Get to Know your Legal Counsel

- Your institution will likely have an Office of General Counsel or attorneys in the community they work with
- Let them know what you are doing
- Discuss policy development and practices
- Can they help with education?
- Accept that you may be the educator!
- Can they help with tough decisions?

Remember the Mission!

- We confidently address legal issues in other areas
 - Privacy law
 - Employment law
- Don't ignore copyright, but also don't let it scare you to the point that you are not making services and resources to patrons
- There are protections for us in the law
 - Sovereign immunity
 - 504(c)(2) - The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under [section 107](#), if the infringer was an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords

Questions?

Carla Myers
Coordinator of Scholarly Communications
Miami University
myersc2@miamioh.edu



This work is licensed under a [Creative Commons Attribution-NonCommercial 4.0 International License](https://creativecommons.org/licenses/by-nc/4.0/).

Tools and Resources

Using Tools

- These decisions are very subjective and need to be made by the person utilizing the protected work
- Only work if you are completely honest!
- Keep a copy as a record of decision?

ALA Fair Use Evaluator

<http://librarycopyright.net/resources/fairuse/>



What this tool can do for you:

- Help you better understand how to determine the "fairness" of a use under the U.S. Copyright Code.
- Collect, organize & archive the information you might need to support a fair use evaluation.
- Provide you with a time-stamped, PDF document for your records [\[example\]](#), which could prove valuable, should you ever be asked by a copyright holder to provide your fair use evaluation and the data you used to support it. [\[why is this important?\]](#)
- Provide access to educational materials, external copyright resources, and contact information for copyright help at local & national levels.

What this tool cannot do for you:

- This tool does not provide legal advice. It records the information you provide it as well as your own judgment on the fairness of the use. See the tool [\[disclaimer\]](#) for more information.
- Only a court of law can definitively rule on whether a use is fair or unfair. This tool does not assume or predict a court outcome.

[Make a Fair Use Evaluation](#)

[Learn More about Fair Use](#)

Local Copyright Information
© 2008 Michael Brewer & ALA Office for Information Technology Policy



Kenneth D. Crews' Fair Use Checklist

<https://copyright.columbia.edu/content/dam/copyright/Precedent%20Docs/fairusechecklist.pdf>

Fair Use Checklist
Copyright Advisory Office
Columbia University Libraries
Kenneth D. Crews, Director
<http://copyright.columbia.edu>

Name: _____
Institution: _____
Project: _____
Date: _____
Prepared by: _____

Purpose

| Favoring Fair Use | Opposing Fair Use |
|--|--|
| <input type="checkbox"/> Teaching (including multiple copies for classroom use) | <input type="checkbox"/> Commercial activity |
| <input type="checkbox"/> Research | <input type="checkbox"/> Profiting from the use |
| <input type="checkbox"/> Scholarship | <input type="checkbox"/> Entertainment |
| <input type="checkbox"/> Nonprofit educational institution | <input type="checkbox"/> Bad-faith behavior |
| <input type="checkbox"/> Criticism | <input type="checkbox"/> Denying credit to original author |
| <input type="checkbox"/> Comment | |
| <input type="checkbox"/> News reporting | |
| <input type="checkbox"/> Transformative or productive use (changes the work for new utility) | |
| <input type="checkbox"/> Restricted access (to students or other appropriate group) | |
| <input type="checkbox"/> Parody | |

Fair Use Checklist p. 2

Nature

| Favoring Fair Use | Opposing Fair Use |
|--|--|
| <input type="checkbox"/> Published work | <input type="checkbox"/> Unpublished work |
| <input type="checkbox"/> Factual or nonfiction based | <input type="checkbox"/> Highly creative work (art, music, novels, films, plays) |
| <input type="checkbox"/> Important to favored educational objectives | <input type="checkbox"/> Fiction |

Amount

| Favoring Fair Use | Opposing Fair Use |
|--|--|
| <input type="checkbox"/> Small quantity | <input type="checkbox"/> Large portion or whole work used |
| <input type="checkbox"/> Portion used is not central or significant to entire work | <input type="checkbox"/> Portion used is central to or "heart of the work" |
| <input type="checkbox"/> Amount is appropriate for favored educational purpose | |

Effect

| Favoring Fair Use | Opposing Fair Use |
|---|--|
| <input type="checkbox"/> User owns lawfully purchased or acquired copy of original work | <input type="checkbox"/> Could replace sale of copyrighted work |
| <input type="checkbox"/> One or few copies made | <input type="checkbox"/> Significantly impairs market or potential market for copyrighted work or derivative |
| <input type="checkbox"/> No significant effect on the market or potential market for copyrighted work | <input type="checkbox"/> Reasonably available licensing mechanism for use of the copyrighted work |
| <input type="checkbox"/> No similar product marketed by the copyright holder | <input type="checkbox"/> Affordable permission available for using work |
| <input type="checkbox"/> Lack of licensing mechanism | <input type="checkbox"/> Numerous copies made |
| | <input type="checkbox"/> You made it accessible on the Web or in other public forum |
| | <input type="checkbox"/> Repeated or long-term use |

Most recent revision: 051408

Think Through Fair Use

Thinking Through Fair Use - My Analysis

Name/title of document or item to be used

Factor #1: Purpose and character of the use
[\(more info\)](#)

| | |
|---|---|
| Favors Fair Use | Weights Against Fair Use |
| <input type="checkbox"/> Educational, scholarly, and research uses, and/or news reporting | <input type="checkbox"/> Commercial activity |
| <input type="checkbox"/> Criticism or commentary | <input type="checkbox"/> Profiting from use |
| <input type="checkbox"/> Non-profit use, including personal uses | <input type="checkbox"/> Decorative or other non-critical, non-commentary use |
| <input type="checkbox"/> Transformative use (creates a new work with a new purpose), including parody and transformative technologies | |

Notes: Enter additional thoughts regarding the purpose of your proposed use.

Overall thoughts on your purpose

| | | | | |
|--------------------------|--------------------------|-----------------------|----------------------------------|----------------------------------|
| <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> |
| strongly favors fair use | somewhat favors fair use | neutral | somewhat weighs against fair use | strongly weighs against fair use |

Tip: Think of checklist tools as a list of things to consider and a way to help you work-through/balance the factors, not an exercise in checking and counting boxes.

<http://www.lib.umn.edu/copyright/fairthoughts>

TEACH Act Resources

- TEACH Act Toolkit:
<https://www.lib.lsu.edu/services/copyright/teach/index>
- Copyright Crash Course TEACH Act:
<https://guides.lib.utexas.edu/copyright/teachact>