

Copyright in Action: Considerations for Instruction

Sections 110(1) & 110(2)



Overview

- » Face-to-Face Instruction
- » Online Instruction
- » Questions

Face-to-Face Classroom Instruction



Scenarios

- » I'd like to have students read poetry or excerpts from books out loud.
- » I'd like to have my students act-out scenes from a play
- » I'd like to show a movie in class
- » I'd like to play music as part of class instruction
- » I'd like to show images of famous/historical works of art
- » I'd like to use pictures I've found on the internet in my PowerPoint presentation
- » I'd like to make copies of an article from a magazine (or journal, or of a book chapter) to distribute to students

What is the instructor looking to do?

- » Make a performance a work?
- » 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 USC 101)
- » Examples
 - I’d like to have students read poetry or excerpts from books out loud.
 - I’d like to have my students act-out scenes from a play
 - I’d like to show a movie in class
 - I’d like to play music as part of class instruction

What is the instructor looking to do?

- » Make a display of a work?
- » 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 USC 101)
- » Example
 - I'd like to show images of famous/historical works of art

What is the instructor looking to do?

- » Are they looking to make a copy of a work and the display or distribute it?
- » Examples
 - I'd like to use pictures I've found on the internet in my PowerPoint presentation
 - I'd like to make copies of an article from a magazine (or journal, or of a book chapter) to distribute to students

Options

- » 17 USC 110(1)
- » Fair Use

The Face-to-Face Teaching Exemption (17 USC 110(1))



Face-to-Face Teaching

Notwithstanding the provisions of § 106 the following are not infringements of copyright: performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made.

Breaking it Down

- » **The performance or display of a work**
- » **By instructors or pupils**
- » **In the course of face-to-face teaching activities**
- » **Of a nonprofit educational institution**
- » **In a classroom or similar place devoted to instruction**
- » **Are not infringements of copyright**

Breaking it Down

- » **Unless!**
- » In the case of a **motion picture or other audiovisual work**
- » The performance of the work, (e.g. “playing it”) or the display of individual images
- » **Is given by means of a copy that was not lawfully made under this title (U.S. Copyright Law, Title 17 United States Code) and that the person responsible for the performance knew or had reason to believe was not lawfully made.**

Essentially

- » At nonprofit educational institutions
- » Performances and displays of works by students and instructors
- » Made in classrooms or similar places devoted to instruction (e.g. the library)
- » Are not infringements of copyright so long as, when using motion pictures or audiovisual works, they aren't bootleg/illegal copies.

What is a 'Lawfully Acquired' Copy?

- » A copy you have purchased
- » A copy owned by the library or borrowed through a legitimate library lending service such as OhioLINK or Interlibrary Loan
- » A copy the instructor has borrowed from a colleague
- » A copy the instructor has acquired lawfully (conference materials, purchased at a garage sale, etc.)

Performance Scenarios

- » I'd like to have students read poetry or excerpts from books out loud.
- » I'd like to have my students act-out scenes from a play
- » I'd like to show a movie in class
- » I'd like to play music as part of class instruction

Display Scenarios

- » I'd like to show images of famous/historical works of art
- » I'd like to show stills from a movie

Recommendations

- » Work with faculty to acquire items for the library's collection
- » Help them understand options for requesting works through consortia/ILL

FAQ's

- » What about showing “reward/distraction” movies
- » What about recording things off TV to show in class?
- » Can I make photocopies of a play to distribute to students to read from instead of buying 20 copies of it?

Copying for Classroom Instruction



Copying and Distributing works for Face-to-Face Classroom Instruction

- » Are they looking to make a copy of a work?
- » Examples
 - I'd like to use pictures I've found on the internet in my PowerPoint presentation
 - I'd like to make copies of an article from a magazine (or journal, or of a book chapter) to distribute to students
 - I'd like to make copies of this play to hand-out to students to memorize. Neither I nor my department can afford to buy copies for every student in the class.

Fair Use

- » Making and distributing copies of copyrighted works is an exclusive right granted to rightsholder under Section 106 of US copyright law.
- » But, we do have the fair use exception found in Section 107 of US copyright law that can be considered in these situations!

Fair Use (17 USC 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. 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.

Tips and Recommendations

- » Check out my OhioNET webinar from back in April.
 - Overview of the law
 - Resources and tools for learning more about fair use and making fair use determinations
- » Remember!
 - Educational use does not automatically make it a fair use.
 - “Rules” like using one chapter or 10% of a work only are made-up arbitrary limits that hold no force of law and provide no safe harbor from claims of copyright infringement.

Copying and Distributing works for Face-to-Face Classroom Instruction

- » I'd like to use pictures I've found on the internet in my PowerPoint presentation
- » I'd like to make copies of an article from a magazine (or journal, or of a book chapter) to distribute to students
- » I'd like to make copies of this play to hand-out to students to memorize. Neither I nor my department can afford to buy copies for every student in the class.

Online Education



Sharing Work With Students Online

Works may be shared with students through a controlled content management system (e.g. Canvas or Blackboard) if:

1. The material is in the public domain, or
2. The instructor holds the copyright in the work, or
3. You have licensed access to the work, or
4. The instructor links to content made legally and freely available online, or
5. The use falls under one of the exemptions found in US copyright law, or
6. The rightsholder grants permission for the use (this includes student work!), or
7. A license is obtained to use the work

Option #1. Using Public Domain Works

- » Works published before 1923 in the US are in the public domain. Use them anyway you like!
 - Project Gutenberg: <http://www.gutenberg.org/>
 - Hathi Trust: <http://www.hathitrust.org/>
 - Google Books: <http://books.google.com/>
- » Works published between 1923-1978 – It depends.
 - Peter Hirtle's Public Domain Chart: <https://copyright.cornell.edu/publicdomain>
- » Works created by the U.S. Federal Government
 - Keep in mind that these can have copyrightable components. Check the title page of the document or, if in doubt, contact the agency that produced the work.

Option #2. The Instructor holds the Copyright

- » PowerPoint presentations, notes, class assignments, etc.
- » For published works, including books, book chapters, worksheets, etc., check the instructor should first check their publication agreement to ensure they still have these rights!

Option #3. You Have Licensed Access to the Work

- » Works in the library's collection
 - Check to see if there are any license restrictions on these resources!
- » Open Access and Creative Commons Works
 - Directory of Open Access Journals: doaj.org/
 - Creative Commons: creativecommons.org/
 - Be sure to use in compliance with the attached license
- » What about sharing passwords to sites, e.g. Netflix?

Option #4. Linking

- » There are no copyright concerns when linking to materials legally made available on the web
 - News sites
 - Educational sites
 - Youtube (not bootlegged videos!)

Option #5. Utilizing the Exceptions

- » Fair Use (17 USC 107)
- » Library Copying (17 USC 108)
- » TEACH Act (17 USC 110(2))

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

The TEACH Act, Line-by-Line (though out of order)

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
- » by or in the course of a transmission, if—

The TEACH Act, Line-by-Line (though out of order)

- » The performance or display is made by, at the direction of, or under the actual supervision of an instructor
- » [Is] as an integral part of a class session offered
- » As a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution;
- » The performance or display is directly related and of material assistance to the teaching content of the transmission;

The TEACH Act, Line-by-Line (though out of order)

- » The transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to—
 - Students officially enrolled in the course for which the transmission is made; or
 - Officers or employees of governmental bodies as a part of their official duties or employment; and

The TEACH Act, Line-by-Line (though out of order)

- » In the case of digital transmissions, applies technological measures that reasonably prevent—
 - [The] retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and
 - Unauthorized further dissemination of the work in accessible form by such recipients to others; and
 - Does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination;

The TEACH Act, Line-by-Line (though out of order)

- » The transmitting body or institution—
 - Institutes policies regarding copyright
 - Provides 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
 - Provides notice to students that materials used in connection with the course may be subject to copyright protection

The TEACH Act, Line-by-Line (though out of order)

- » Except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks
- » Or a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired

Oy!

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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

Definitions

- » **Dramatic Works** - Works that portray a story are intended to be performed for an audience.
 - Frequently [represents the action as it occurs](#) rather than simply narrating or describing the action.
 - Examples of dramatic literary works include plays and radio and television scripts
 - Examples of dramatic musical works include opera and musicals.
- » **Any Other Work** - motion pictures and other audiovisual works, sound recordings, etc.

What the TEACH Act Allows

- » The [full] performance of a nondramatic literary or musical work
- » Reasonable and limited portions of any other work

What is Reasonable and Limited?

A report put forward by the Senate in 2001 states 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.”

- U.S. Congress, Senate, Technology, Education and Copyright Harmonization Act of 2001. 107th Cong., 1st sess., 2001, S. Doc. 7, serial 107-31, 7-8

A Congressional Research Service report put forward in 2006 states “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 an educational goal; however, the likelihood of an entire film portrayal being ‘reasonable and limited’ may be rare.”

- Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8.15[C][2][a] (2006).

What the TEACH Act Allows

- » The display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session.

What the TEACH Act Does Not Allow

- » 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

TEACH Act Compliance

- ✓ Nonprofit educational institution
- ✓ At an institutional level, copyright policies, notifications, and educational programming must be in place to help establish the appropriate use of protected works in an educational setting
- ✓ Technological measures must be put into place by system administrators to limit access to only those students enrolled in a course
- ✓ 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

Recommendations

- » Only digitize as much as needed to teach a work (clips), though full work may be justifiable!
- » Stream all audio and media files
- » Use a Content Management System/Learning Management System to limit access
- » Work with school administrators to provide some type of copyright education

Option #6. Obtaining Permission from Rightsholder

- » 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
- » Sample permissions letters are available online:
<http://copyright.columbia.edu/copyright/permissions/requesting-permission/model-forms/>

Option #7. Obtaining a License to Use the Work

- » 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?

Scenarios & Common Questions

- » What about sharing video with students?
- » Can I post an article I received via ILL to Canvas/Blackboard for students to access and use?
- » What about subsequent use?
- » What about those PowerPoint presentations and class materials provided by a textbook publisher?

In Summary



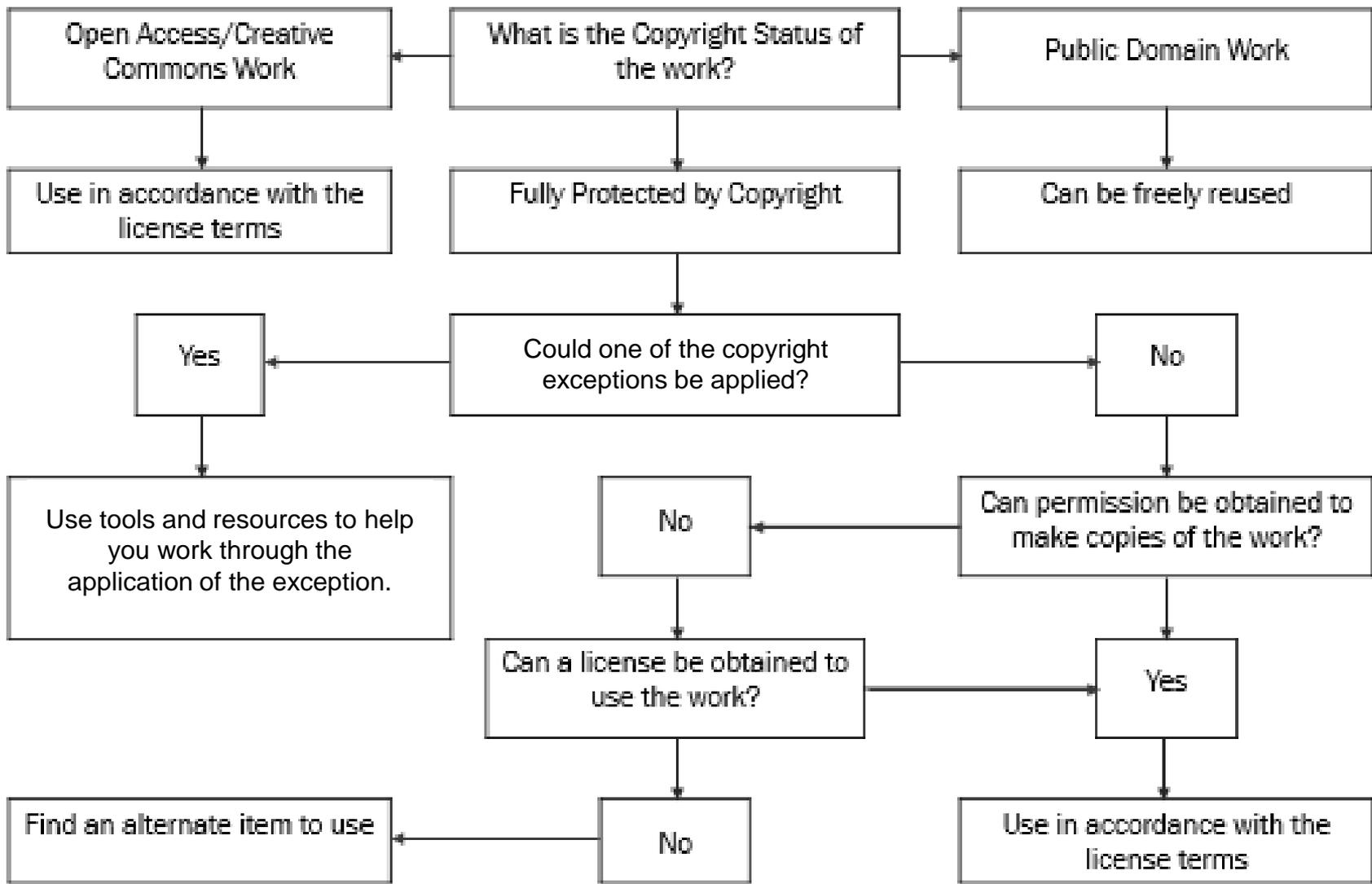
Face-to-Face Instruction

- » Section 110(1) will cover a lot!
- » Consider fair use for making copies of works available to students

Sharing Work With Students Online

Works may be shared with students through a controlled content management system (e.g. Canvas or Blackboard) if:

1. The material is in the public domain
2. The instructor holds the copyright in the work, or
3. You have licensed access to the work, or
4. The instructor links to content made legally and freely available online, or
5. The use falls under one of the exemptions found in US copyright law, or
6. The rightsholder grants permission for the use (this includes student work!), or
7. A license is obtained to use the work



Questions?



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