

Copyright Issues in Teaching with Technology

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1. The author is not an attorney, and this paper does not constitute legal advice. The author's daughter is an attorney, and his son is in law school, but that doesn't count.
2. The information contained herein is not intended to supercede the [DWU copyright policy](#), which retains authority in all copyright matters related to Dakota Wesleyan University. This paper is intended to supplement the official policy and provide further guidance.

Introduction

The copyright law places college faculty members in an unusual conflict of interest situation. All of you have prepared lecture notes, conference presentations or other unpublished papers that represent your intellectual property and to which you are entitled copyright protection. Many of you have published materials, for which you have either retained the copyrights or assigned them to the publishers. You may even receive royalties or other forms of revenue from these publications. Thus, you are in a unique position to appreciate the copyright law, because it preserves your rights and attempts to protect your income stream from these materials.

However, as teachers and facilitators of student learning, you have a somewhat different perspective on copyright. In this role, you want the broadest possible access to copyrighted materials. You wish to duplicate journal articles, book chapters, and other printed materials of value and distribute them to your students. During your lectures, you want to display audiovisual materials and other works created by others. You'd like to provide your students maximum access to Internet resources. Each of these examples involves the intellectual property of others, and they are equally entitled to copyright protection.

This orientation to copyright is intended to assist DWU faculty (and students) in this latter role, using intellectual property owned by others in your teaching and learning activities.

A Brief Overview of Copyright

Copyright is one of four major categories of intellectual property protection, along with patents, trademarks, and trade secrets. Copyrights in fact are sometimes confused with patents. Copyrights cover *works of authorship* representing the tangible expression of ideas, requiring originality and some degree of creativity. Patents are issued for *inventions* that demonstrate novel, non-obvious, and useful products or methods. While works of authorship *may* be registered with the [U.S. Copyright Office](#), protection begins immediately after a work is fixed in a tangible form. Patent protection begins only after approval by the [U.S. Patent and Trademark Office](#). A further discussion of patents is beyond the scope of this paper.

The first forms of copyright protection in Europe followed not long after invention of the printing press. Congress enacted the first U.S. copyright legislation in 1790, a bill modeled

after the Statute of Anne, passed by Parliament in 1714. The law ([Title 17 of the U.S. Code](#)) has undergone several major revisions, the last in 1976 as Public Law 94-553. According to Section 102 of the current law, copyright protection subsists

“in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”

Fixed in a tangible medium of expression is a critical condition for copyright eligibility. The law thus covers any file you have created on your computer and either saved to disk or printed. It includes a work of art, a videotape or sound recording, a dramatic work, architectural drawings, your lecture notes, and even your vacation photos -- in other words, nearly any original expression that exists in a fixed form and can be perceived, reproduced, or communicated. Copyright protection does not extend to ideas themselves (only the *expression* of ideas), procedures, facts, principles, discoveries, titles, names, devices, machines, plans, slogans, familiar symbols, standard forms (such as blank checks, address books, and scorecards), and works consisting of common property (such as height and weight charts, common lists, and schedules), although some items in these categories may qualify for patent or trademark protection.

It is important to understand that the copyright law is a document in a perpetual state of change. The law was amended by Congress a total of 50 times between its enactment in 1976 and the end of 2002. (See the [current list of amendments](#).) Typically, about two dozen copyright-related acts are introduced in each 2-year congressional session. (You can track the status of proposed copyright legislation [online](#).) Most of these never become law, and of those that have survived the process and been enacted, few have been significant for the education community. However, some have. We will refer to these within this paper.

Copyright Registration

A work does not have to be published to be covered by copyright. Almost anything you create (see the exceptions above) *automatically receives copyright protection as soon as it is fixed in a tangible form*. Nor does the work have to be registered with the U.S. Copyright Office. The catch is that if the work is *not* registered and an infringement occurs, you are only eligible to recover actual damages. If the work *is* registered at the time of an infringement, you may be awarded statutory damages instead and recover all attorney fees, which can be substantial. Statutory damages can be a much greater amount. (See below.)

Works of any significance that may be compelling to others probably should be registered. The registration fee is quite reasonable (currently \$30), and all the necessary forms and instructions may be downloaded from the [Copyright Office web site](#) via a web browser and an [Adobe Acrobat reader](#).

Copyright Ownership

Copyright ownership normally resides with the author (or authors) of the work. For example, your students may be entitled to copyright protection for assignments, papers, and other works turned in to you, depending upon the nature of the material. (E.g., a term paper on colonial architecture would qualify, solutions to calculus problems would not.) Copyright ownership may be assigned to someone else, as is often the case with manuscripts submitted for publication.

An exception is made for “works for hire,” defined by [Section 101](#) of the copyright law as a work prepared by an employee within the scope of employment, or a work specifically ordered or commissioned under certain circumstances, in which case copyright is reserved for the employer or commissioner of the work. Does a college faculty member who must publish or perform other forms of scholarship as a condition for earning promotion and tenure thus retain the copyright to those works, or are they “works for hire,” with the copyright retained by the institution? Most colleges and universities have intellectual property policies that address these issues, and in most cases professors are allowed to keep the copyrights. Work that is supported by grants from external funding agencies may provide a tricky variation on this theme. Contracts must be written so that the ownership of intellectual property resulting from such projects is clearly designated and understood by all concerned parties.

Duration of Copyright

How can you tell if a work is covered by copyright or has passed into the public domain? The answer varies, depending upon when the work was created, whether ownership resides with an individual or an employer or legal entity (a “work for hire”), and whether the work was published. Publication occurs when a work has been duplicated and distributed (e.g., handouts in a class or conference session), or when copyright ownership has been transferred for the purpose of publication. The public performance or display of a work with no copies made does not constitute publication.

[Laura Gasaway's web site](#) is an excellent reference for determining when works pass into public domain. In essence, it illustrates that *the earliest* that an eligible work created since January 1, 1978, published or unpublished, could possibly fall into public domain is the year 2048, by which time most of you will be cashing in your retirement annuities. Published works dating from 1964-77 will not fall into public domain until at least 2039. Our point is that unless a work is quite old, its copyright protection probably still exists, and any use of these materials beyond those specifically authorized by the copyright law or covered by applicable guidelines (see discussion below) likely will require permission. The fact that a book is out of print and the copyright holder cannot be located does not waive its copyright protection, although it makes the case for fair use more compelling.

Public Domain

Public domain works may be freely used in teaching, research, and any other form of scholarship. Works can enter the public domain several ways. This is not an all-inclusive list.

Expiration of copyright. Works become public domain when their terms of copyright protection expire. See [Laura Gasaway's web site](#).

Federal Government authorship. With the exception of some reference data published by the U.S. Department of Commerce, materials published by the U.S. Federal Government are specifically excluded from copyright protection and are in the public domain from the date of creation. However, works produced by an independent contractor with Federal funding *do* qualify for copyright protection. Hence, a videotape about AIDS research produced by a private contractor under a grant from the Department of Health and Human Services is copyrighted and receives the same protection as any other audiovisual work. Note also that restrictions on the Federal Government do not apply to states. The works of a state government may be copyrighted, with decisions on whether a work should be copyrighted or entered into the public domain left to the individual states ([Carroll, 2002](#)).

Abandonment of copyright. Although this rarely happens, an owner may relinquish the copyright to a work and dedicate it to the public domain. The abandonment of copyright requires an explicit and overt statement from the copyright holder ([Carroll, 2002](#)). This question has arisen numerous times regarding materials posted on the Internet, such as listserv or Usenet newsgroup messages or web pages. Unique issues related to the Internet will be discussed below.

International Copyright Protection

The [Berne Convention for the Protection of Literary and Artistic Works](#) was convened in 1886 to provide mutual recognition of copyright among nations and establish international standards for copyright protection. The treaty has been revised several times, the last in 1971. The United States became a signatory of the Berne Convention in 1988, and most countries in the world now adhere to Berne provisions. The effect of the Berne treaty is that the copyright laws of any signatory country apply *within that country* to the copyrighted works of an author from any other signatory country. In other words, within Japan, Japanese copyright law applies to a publication of an American author registered in the U.S.

Copyright Notice

As one result of U.S. adoption of the Berne Convention, works published after March 1, 1989 are no longer required to include the familiar copyright notice in order to qualify for copyright protection. However, in a copyright infringement suit, the presence of a copyright notice prevents the defendant from pleading “innocent infringement,” or lack of awareness that commission of the infringing act was wrong ([Carroll, 2002](#)). Thus, leaving the copyright notice off a published work serves no particular advantage.

The standard format for a copyright notice is © [name of copyright owner] [year]. The word “Copyright” may be used in the United States instead of the symbol ©.

Prior to adoption of the Berne treaty, the U.S. was signatory to the Buenos Aires Convention of 1911, which required placement of “All Rights Reserved” on copyrighted documents to ensure protection in all signatory countries. All countries that signed the Buenos Aires treaty are now signatory to the Berne Convention, and this notice no longer serves any legal purpose.

Ownership Rights and Exceptions

This paper is primarily concerned with the use of someone else’s copyrighted materials, not your own. According to [Section 106](#) of Title 17, copyright owners are granted the *exclusive rights* to do, or to authorize others to do, any of the following:

- Reproduce the copyrighted work.
- Prepare derivative works based on the copyrighted original.
- Distribute copies of the copyrighted work.
- Perform the copyrighted work publicly.
- Display the copyrighted work publicly.

These exclusive rights have significant implications for college faculty members, because effective teaching is difficult in many disciplines without displaying or providing copies of or performing the intellectual property of others, most often in the contexts of classroom activities or out-of-class assignments for students. Fortunately, the authors of the 1976

revision recognized that *under certain circumstances*, the use of protected materials could be acceptable without permission from the copyright holder. In fact, the sections describing limitations on exclusive rights consume about 80 percent of Chapter 1 of Title 17. Two are of particular importance to college teachers. Section 107 addresses reproduction and distribution under the concept of “fair use.” Section 110 establishes a “face-to-face teaching exemption” that allows classroom displays and performances.

Fair Use

The terminology of the law is quite explicit. Congress stipulated that “the fair use of a copyrighted work...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright” ([Section 107](#)). The law does not say, “the use of a copyrighted work...is not an infringement...” It specifies, “the *fair use* of a copyrighted work...” (emphasis ours). This is an important distinction, because the myth seems to persist in academe that if a use is for educational purposes, it is legal under fair use, but that is not the case. Only a *fair use* is legal, and fair use cannot be applied until four essential factors have been considered.

From our perspective as users of protected works, we would want the four factors to be easily applicable and clear-cut, so that decision-making could be relatively simple and precise. Unfortunately (from our perspective), the four criteria are excruciatingly ambiguous and complex. This was intentional on the part of the law’s authors, because a virtually infinite number of possible fair use scenarios exist, and Congress wished to provide a flexible structure for assessment that could be applied to all cases without the need for constant revisions to the law. Thus, each fair use situation must be individually judged on its own merits against the four factors.

Remember that the four factors help you judge only whether a copyrighted work can be used *without permission*. Even if the factors weigh against fair use, you still may be able to use the materials if the owner grants approval. Permissions will be discussed below.

- *The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.*

Educational or nonprofit uses of protected materials tend to weigh in favor of fair use. Reproduction for the purposes of criticism, commentary, and news reporting, even if for commercial purposes, also are more likely to be considered fair use. “Transformative” works that use the old material in new ways are more likely to be favored than cases of simple duplication of an original.

- *The nature of the copyrighted work.*

Works of nonfiction presenting factual material are more likely to be considered fair use than fictional and artistic works based on creative expression. Published materials are generally favored more than unpublished works. Audiovisual materials are more questionable than printed works, and reproduction of materials designed to be consumable, such as workbooks and preprinted answer sheets, is rarely considered fair use.

- *The amount and substantiality of the portion used in relation to the copyrighted work as a whole.*

This factor has both quantitative and qualitative aspects. In many cases, a reproduction involves a journal article, photograph, illustration, cartoon, or other short publication in which the entire work is desired. The fact that the work may appear with other materials and constitute a small percentage of the total content of the publication is irrelevant. Courts are more likely to favor a use that took no more of the published original than was necessary to meet the user's purposes. Care must also be taken to ensure that the portion taken, even if a small amount of the entire work, does not contain the essence or heart of the original.

- *The effect of the use upon the potential market for or value of the copyrighted work.*

While this factor is often considered the most important of the four, it may also be the most misunderstood. A professor may feel that a reproduction is justifiable because as an isolated event the financial harm to the copyright owner is minimal. However, the courts consider effect in the context of the potential impact if the professor's act were a widespread practice. Potential harm to derivative works may also be taken into consideration. Reproductions from scholarly publications are particularly questionable, because in many cases higher education is the primary market for those products, and financial loss is easier to demonstrate.

Face-to-face Teaching Exemption

Fair use for the most part involves reproduction of protected materials. Public performance and display of copyrighted works is a different matter entirely, and classrooms are considered public. [Section 110](#) permits the performance or display of a work during the face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, with a lawfully-made copy (if applicable). This section covers activities such as the reading aloud of literature, performance of dramatic works by class members (but *not* by actors not associated with the class), performance of compositions in music classes, and display of videotapes and other audiovisual materials. As with the duplication of materials, permission should be sought in cases of performance or display that do not appear to comply with these conditions.

The House of Representatives Report (94-1476) accompanying the 1976 law noted specifically that the face-to-face teaching exemption did not extend to the transmission of audiovisual materials into the classroom from a location outside the building. This is problematic for libraries and media centers that transmit videotapes from centralized collections into classrooms via campus networks. The distribution of materials in this manner requires specific licensing agreements with the copyright holders.

Section 110 cannot be applied to training events that take place in for-profit settings, for example in proprietary institutions and industry. Classroom display of materials such as videotapes in for-profit locations should be covered by licensing agreements when the materials are purchased.

Guidelines

Congress recognized early on that the non-profit educational community could be assisted by guidelines that help define acceptable practices under fair use. The House Report contained two sets of guidelines that had been carefully negotiated by educator and publisher groups during the development of the law, one for classroom copying and one for educational uses of music. In 1979, a third set of guidelines was negotiated and approved covering off-air recording of broadcast programming for educational purposes.

As the digital age progressed, the shortcomings of the 1976 law and existing guidelines became more and more evident. In 1994, the Clinton Administration convened the [Conference on Fair Use](#) (CONFU) to address contemporary fair use issues in the digital environment. For two-and-a-half years, representatives of nearly 100 proprietary, educational, and governmental organizations met collectively and in smaller working groups to develop guidelines for distance learning, image collections, multimedia, electronic reserves, and interlibrary loan.

The outcome was disappointing. Negotiators had considerable difficulty finding common ground, with educators and librarians resisting guidelines they felt were overly restrictive and copyright owners concerned about giving up too much. The sides in the interlibrary loan discussions were so far apart that no workable draft ever appeared from that workgroup. Drafts were developed by the distance learning, image collections, and electronic reserves workgroups but failed to achieve much support. Only the multimedia guidelines workgroup, which had already been functional for a year before the establishment of CONFU, developed a document achieving consensus support, but even these guidelines drew strong opposition from higher education and library organizations. In May 1997, CONFU elected neither to endorse nor reject any of the drafts. Its participants agreed that the opportunity to meet and negotiate had been healthy, and that discussions should continue.

Thus, we have guidelines at least in draft form for many of the technology applications college faculty might encounter today. Remember that the guidelines are just that -- guidelines. They do not identify absolute limits that cannot be exceeded. They may represent "safe harbor" standards, because the endorsing organizations have agreed not to pursue litigation as long as the guidelines are followed. A prominent copyright attorney once pointed out to us that no one has ever been successfully litigated for following the guidelines. Intellectual property specialists in higher education emphasize that the guidelines represent the minimal level of acceptable behavior, and the actual boundaries may well exceed the limits specified. The true limits can only be determined by the courts, although none of us wants to be the test case.

The guidelines will be discussed within the context of the specific applications described below.

Applications in the Real World of Teaching

So, what are the direct implications of all this for your role as a college teacher? We must begin this section by repeating the disclaimer at the beginning of this paper. The author is not an attorney, and the suggestions contained herein should not be construed as legal advice. This paper is intended to provide guidance only. Questions about copyright interpretations that could potentially involve litigation should be directed to the Dean's office for referral to the university attorney, if appropriate.

Printed Materials

When you purchase a book, you buy the cover, binding, and pages. You acquire the right to read the intellectual property the book contains, but your "ownership" is restricted to the physical book itself. Under the "first sale doctrine" described in [Section 109](#), you have the right to resell the book, give it away, or otherwise dispose of it, but beyond that point your rights are rather limited. Further use of the content of books, periodicals, and other printed

materials, including reproduction for distribution to students, must be governed by existing guidelines or the criteria for fair use.

Single copies for teaching or research. The [Guidelines for Classroom Copying in Not-For-Profit Educational Institutions](#) specify that single copies of the following may be made for the purposes of scholarly research or use in teaching or preparation to teach a class:

- A chapter from a book.
- An article from a periodical or newspaper.
- A short story, short essay or short poem, whether or not from a collective work.
- A chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper.

These guidelines extend to student research related to a course or their own scholarship. Note that in each instance the permissible use is in the singular. Multiple items from the same source would not be acceptable. The guidelines are also painfully vague. For example, do they permit professors to routinely make overhead transparencies from Dilbert or Foxtrot cartoons because they appear in different newspaper issues? The guidelines seem to imply permissible use, but this is not one we'd care to test in a court case.

Academic libraries are permitted to make single copies for patrons, both faculty and students, essentially according to the same restrictions, as long as the copies become the property of the user and are for the purposes of private study, scholarship, or research. [Section 108](#) exempts libraries and their employees from liability for infringements committed on an unsupervised photocopier, as long as a copyright warning notice is displayed on or near the copier, and places liability for infringement directly on the patron whose reproductions exceed the boundaries of fair use.

Multiple copies for classroom use. Do you duplicate journal articles on the department copier and pass them out in your class? The guidelines permit the reproduction and distribution of copyrighted materials (no more than one copy per student in the course), *as long as the tests of brevity and spontaneity and the cumulative effect test are met.*

- The *test of brevity* places limits on the length of materials to be reproduced, such as 2,500 words for a complete article and one illustration per book or periodical issue. See the guidelines for limits on other publication types.
- The *test of spontaneity* requires that "the inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission." With contemporary technologies such as electronic mail and faxes available for seeking permission, these two events should be pretty close together. Also, since spontaneity is rarely measured in terms of semesters, this test effectively prohibits use of the same materials in subsequent academic terms without permission.
- The *cumulative effect test* requires that no more than one item may be copied from the same author, nor more than three from the same collective work or periodical volume, in the same academic term. Moreover, the guidelines set the maximum number of multiple copying activities, of any kind, for any single class in any single course term, at nine.

By now, you may have concluded that the classroom copying guidelines are quite restrictive. Unless a publication is fresh off the press and the tests of spontaneity and brevity can be met, you may find it more convenient to go through the permission process and have students pay the licensing fee in the form of a purchase price.

The information age and resulting explosion of knowledge have made it difficult for publishers to keep textbooks current. As a result, many faculty have turned to coursepacks as a means of providing up-to-date information to students, either supplementing or replacing textbooks. Coursepacks are compilations of readings that may include journal articles, book chapters, conference papers, and other publications, copyright-cleared and sold by bookstores or copy services. If you compile the list of publications you wish to include in a coursepack, the [DWU Bookstore](#) can help you obtain the appropriate clearances and compile the coursepack for sale to the students. The sale price will be determined by the licensing fees.

Before you go through the process of building a coursepack, make sure that the publications are not already online in full text, and free to the DWU community. [Layne Library](#) subscribes to several services that provide full-text of publications to faculty and students.

Computer Software

Computer software falls into four general categories: commercial, shareware, freeware, and public domain. Commercial software licenses permit the making of one archival copy, which may only be used if the original becomes damaged or nonfunctional. Additional copies, for example for a second office or home computer, are legal only if permitted by the specific license for that software. Many higher education institutions, including Dakota Wesleyan, have negotiated site licenses that permit multiple copies of some software at reduced rates. Contact the [Information Systems Help Desk](#) for information about software available at DWU.

Shareware and freeware also receive copyright protection. Both are widely available from software archives on the Internet and other sources. Shareware licenses permit you to install the software on your computer and try it out. If you decide to keep it and continue to use it, then you must pay the specified fee to the copyright holder. You may make an archival copy of shareware under the same conditions as for commercial software. Freeware, also commonly known as "open source" software, is just that. It may be installed, used, copied, and even modified without payment of any fee. About the only limitation on freeware is that it cannot be redistributed for profit by anyone except the copyright holder, although derivative versions may be distributed by anyone as freeware. Public domain software, which must be clearly marked as such, is fair game.

Illegal software on your computer carries a risk, both to you and to the university. The [DWU Computer Policy](#) specifies that only software officially purchased and licensed by the university may be installed on university-owned computers. Copyright holders are becoming increasingly aggressive in obtaining search warrants to find out if their software has been pirated.

Classroom Use of Video

[Section 110](#) permits unlimited classroom display of videotapes that have been purchased or rented by the university and are intended or licensed for educational use. This section also permits non-profit educational use of videotapes and DVDs marked "For Home Use Only," such as entertainment films bought over the counter for personal use. The [Motion Picture Licensing Corporation](#) has acknowledged that these media may be used in a classroom setting under Section 110.

Off-air recording. We also have fairly clear-cut guidelines regarding classroom use of television programs. The [Guidelines for Off-Air Recording of Broadcast Programming for Educational Purposes](#), negotiated in 1979, permit the classroom use of television programs taped off-air, under certain conditions. The guidelines only apply to *broadcast* programming, in other words the programs of stations that reach this area *over-the-air*, and not to cable channels. For example, the programming of a Sioux Falls television station received through a cable TV system may be taped, but the Discovery Channel and the Arts & Entertainment Network do not fall under the guidelines.

A program recorded off-air may be displayed once and repeated once in each class section only within 10 consecutive working days following the date of taping. The tape may be retained for an additional 35 days for your own review and evaluation purposes but cannot be shown to students during this time without permission from the broadcaster. Following this 45-day period, the guidelines require that the tape be erased. Programs must be taped in their entirety, including the copyright notice, but undesired sections may be omitted during classroom playback. Any single program may be taped only once by or for the same faculty member and may not be recorded again if it is re-broadcast.

Classroom use beyond that permitted by the guidelines requires permission. Local broadcasters normally are quite willing to permit extended use of programs produced by their own stations. However, permission may be more difficult to obtain from the major networks and cable programmers. The reason, quite simply, is that many of their programs are offered for sale, either by sales divisions of the networks themselves or by authorized distributors, normally at quite reasonable prices. For example, see the Public Broadcasting System's "[Shop PBS](#)" web site. [C-SPAN](#) is the one major exception, offering all its programming for unlimited educational use, and the [A&E](#) family of networks (including the History and Biography Channels) does offer some of its programs to educational institutions under a license that permits unlimited use for two years after videotaping.

Music

[Guidelines for Educational Uses of Music](#) accompanied the 1976 copyright law revision and were directed primarily toward music faculty. The guidelines permitted:

- Emergency copying to replace purchased copies not available for an imminent performance.
- For academic purposes other than performance, single or multiple copies of excerpts of works that do not constitute performable units and do not exceed 10 percent of the whole.
- Recordings of student performances for evaluation or rehearsal purposes.
- Single copies of sound recordings owned by the institution or the faculty member for the purpose of constructing aural exercises or examinations.

Specifically excluded were copying for the purpose of performance and copying as a substitute for purchase, except as permitted above.

[Section 110](#) permits both the playing of legally-acquired audio and video recordings of music in a classroom as well as the in-class performance of copyrighted musical compositions by the students and/or faculty member. The course topic is irrelevant. Such learning activities may be equally valuable in the languages, history, art and aesthetics, and myriad others besides music department courses. The House Report on the law clarified that this provision would include guest lecturers "if their instructional activities remain

confined to classroom situations," but not to singers or instrumentalists brought in from off campus for the purpose of presenting a program.

It is important to recognize that licensing requirements exist for public performances. The use of music in multimedia productions of both DWU staff and students should be informed by the [Fair Use Guidelines for Educational Multimedia](#), which will be discussed below.

Internet Resources

On the surface, it would appear that the Internet presents a whole new "can of worms" related to copyright issues. However, while ease of access and reproduction may lead one to believe that the rules are different, they really are not. E-mail messages, Internet mailing list (e.g., "listserv") postings, the contents of web pages, icons, photographs and other digital images, FTP files, and other materials available through the Internet are fixed in a tangible medium of expression and meet all the legal requirements for copyright protection, just like any other form of intellectual property. Does the deliberate and purposeful placement of information on such a public forum as the Internet imply that copyright has been abandoned? Very clearly, the answer is no, not without an explicit statement to that effect on the part of the copyright holder (which is often someone other than the poster) ([Templeton, 2004](#)).

E-mail messages. The author of an e-mail message retains the ownership of that message. Most copyright authorities agree that a person-to-person message can be saved, printed, and forwarded to a limited group of other individuals interested in the same subject without the permission of the originator under the concept of "implied license," but implied license does not extend to reposting that personal message to a listserv. For example, a professor should not redirect a personal message from a student to the course listserv without the student's consent. Moreover, forwarding a message received via one listserv or newsgroup to another without permission may also extend beyond the boundaries of implied license, if the forwarded message is likely to reach an essentially different audience or is sent through a different distribution system. When in doubt, ask permission before you forward.

Subscribers to a listserv normally grant to the list owner the right to archive the postings, often on a web site, so that messages can be reviewed if desired. Depending upon the list topic, access to the archive may be password-protected or otherwise restricted. Listserv postings in courses discussing sensitive or controversial topics, such as death and dying or the psychology of bisexuality, will likely be quite subdued if students know the archives are open to the public.

Archives represent the limit to which messages may be compiled. For instance, messages on a specific topic may not be collected and then republished in any form such as a printed anthology without the expressed permission of each message author.

What about the practice of including all or a portion of a received message within a reply, as a point of reference to clarify the response? As long as the portion used is not taken out of context and does not alter the originator's intent, this appears to fall under the "comment" or "criticism" provisions of fair use. Paraphrasing elements of the original message in one's own terms is not an infringement, because the copyright law applies only to the *expression of ideas* (the originator's own text) and not to the ideas themselves. The sender of such a message has an ethical obligation to attribute the ideas to the originator and not claim credit for them.

Web pages. When you access a page on somebody's web site, you are not viewing the page directly on that site's server. Your browser copies all the files associated with that page (hence the long download time in some cases) into the memory of your own computer and reassembles them there for your reading enjoyment. Thus, the copying of files is an essential prerequisite before a web page can be viewed. This is how the web works. Site webmasters expect that their files will be copied for that purpose. However, this is where the line is drawn. Any additional copying, including printing and saving, must be governed by the criteria for fair use.

Copying individual pages or articles. The simple presence of Print and Save buttons on your browser tool bar should not imply that all web pages are fair game. The Consortium for Educational Technology for University Systems (CETUS), a joint project of the California State University, State University of New York (SUNY), and City University of New York (CUNY), has published a [fair use handbook](#) that addresses this issue, among others. CETUS (1995) suggests that the copying of a short Internet document for personal use, including research, likely falls within fair use but urges faculty to consider all four fair use criteria on a case-by-case basis. The CETUS handbook does not discuss making multiple copies of Internet publications for distribution to students, such as incorporation in coursepacks. The guidelines and recommendations for other printed materials (see above) are equally applicable to web documents and other files retrieved from the Internet.

The fair use criteria are particularly important when you consider copying from web sites that are password-protected and open only to subscribers or members, or sites that contain documents that are available commercially.

Use of copyrighted materials in your own web pages. The use of copyrighted materials in the development of course and personal web pages presents a different set of issues. You must be certain that the materials you incorporate into your web site are either licensed appropriately or are justified under fair use. Be especially careful about copying images, such as photographs, logos, and icons from the web and inserting them into your site. Yahoo provides links to [hundreds of web sites](#) that offer web graphics for your use, but read the licensing agreements carefully. Some are available without restriction, while others require attribution and still others charge for these resources. And don't ever, ever, EVER download anything from a Disney site and use it in your course without the appropriate permission!!

Photographs and Digital Images

The reproduction of photographs, illustrations, graphic designs, and other still images present an perplexing copyright dilemma because intellectual property may be involved at several levels. For example, you may wish to make a slide from or digitize a textbook photograph. The book and the photograph may be copyrighted separately, and depending upon the subject matter, the original object may also be protected. Moreover, the chain from the original to the photo in your book may involve intermediate steps, each entitled to copyright protection. Even if the original object is in the public domain, the photograph and book probably are not.

[Section 110](#) permits the classroom display of photographic material that has been lawfully acquired. In other words, slide or digital image sets purchased for educational use from someone authorized by the rights holders are the safest alternative. The "lawfully acquired" condition may apply to slide or digital image sets compiled locally from books and magazines using a copy stand. The [Guidelines for Classroom Copying](#) indicate that one picture per book or periodical issue is permissible. The [CETUS \(1995\) fair use guidelines](#)

suggest that “a small number of images from any one textbook” (p. 26) may fall under fair use, particularly if slides are not available from the publisher. Any slide making or imaging beyond these guides requires a very careful consideration of the four criteria for determining fair use.

[Guidelines for the educational use of digital images](#) were drafted by a CONFU working group but were quite restrictive and failed to garner much support in the educational community. The draft does provide some insight into the limits to which some copyright holders perceive fair use. The guidelines include the following selected provisions:

- Only lawfully acquired analog images may be digitized.
- Educational institutions may not digitize images that are already available in usable digital form for purchase or license at a fair price.
- Educational institutions may display and provide access to images digitized under these guidelines through a secure electronic network, provided that access is controlled via a password or PIN and restricted to students enrolled in the course.
- Use of images digitized from a known source may only be used for one academic term; subsequent use requires permission. If permission is not received, subsequent use is subject to the four-factor fair use analysis.
- If the rights holder is unknown, the image may be used for three years from first use, provided that the institution conducts a reasonable effort to identify the rights holder and seek permission.
- Images digitized under these guidelines may be used in face-to-face teaching, independent study by students, and research and scholarly activities at the institution.
- The images may not be used in publications without permission.

Multimedia

The display of a multimedia program in a classroom as part of an educational activity is clearly permitted by [Section 110](#). However, incorporation of copyrighted materials in the development of a multimedia work presents an extraordinarily complex set of issues. Some of these concerns were addressed in the [Fair Use Guidelines for Educational Multimedia](#) completed in 1996 as part of the CONFU process and the subject of a Nonlegislative Report adopted by the U.S. House of Representatives. The multimedia guidelines thus have been accepted by Congress and the U.S. Copyright Office but were not endorsed by CONFU and have been vigorously opposed by some higher education and academic library organizations as too restrictive.

Briefly, the guidelines permit student and faculty use of copyrighted materials in multimedia productions for face-to-face instruction, independent learning settings, presentation at peer conferences, and retention in professional portfolios with the following limitations:

- Permission from the copyright holder(s) must be obtained for use following a two year period beginning with the first instructional use.
- No more than 10 percent or 3 minutes, whichever is less, in the aggregate of a copyrighted motion media work (e.g., video or film) may be used.
- No more than 10 percent or 1,000 words, whichever is less, may be used in the aggregate of a copyrighted work consisting of text material.
- No more than 10 percent or 30 seconds, whichever is less, of the music and lyrics from an individual musical work may be used.
- No more than five photographs or illustrations by a single artist or photographer may be incorporated.

- No more than two copies of the completed production may be made for student or faculty use, with a third copy permitted for the purposes of preservation and reproduction to replace damaged, lost, or stolen copies.

Distance Education

Section 110 extended certain provisions of the face-to-face teaching exemption to instruction delivered by transmission to remote locations, including college credit courses. Allowable activities included performances of *non-dramatic* musical and literary works and the display of photographs, illustrations, maps and other printed materials, still images from videotapes, and 35mm slides as long as they are not shown in sequence from a copyrighted program.

The law specifically excluded the performance of dramatic works and the display of audiovisual materials, defined in the law as works that consist of a series of *related images* intended to be shown by the use of machines. Thus, according to the original 1976 copyright law, a course that was “transmitted” could not include a videotape or videodisc, or consecutive images from a photographic series without permission. The frame of reference at that time was television-based distance education, but the same concepts applied to web-based instruction. Obviously, this restriction was problematic for faculty who used video and other media materials in their conventional classroom teaching, that they wished to continue to use in their online courses.

This situation has since been relieved, thanks to probably the two most significant revisions to the copyright law for educators, the [Digital Millennium Copyright Act](#) of 1998 (the link is to a PDF document) and the [Technology, Education, and Copyright Harmonization Act](#) (also a PDF) of 2002 (known as the “TEACH Act”). The TEACH Act in particular was a long anticipated blessing for distance educators, because it revised Section 110 and loosened the restrictions. However, strings were attached. The changes provided by the TEACH Act do not apply unless certain institutional requirements are met. These new requirements include the following:

- ◆ The provisions only apply to accredited non-profit educational institutions, such as Dakota Wesleyan.
- ◆ The educational organization must have a published policy regarding teacher use of copyrighted materials, and an ongoing copyright training program for faculty, staff, and students in place. DWU does have a [copyright policy](#) in place, and this publication and web site are essential components of the training program.

Other requirements of the Act relate to faculty use of the materials and the materials themselves.

- ◆ Access to the digitized materials must be restricted to students enrolled in the course.
- ◆ The digitized materials must be used in the same manner in an online course as they would be in a face-to-face (F2F) course. For example, if a videotape segment would have been displayed by the teacher in the F2F setting, it may be digitized for the online course. If students would have viewed the tape independently in a learning resources center instead of the face-to-face classroom, the TEACH Act would not apply. Moreover, the digital materials must only be available to the students during approximately the same time period in which they would be available to a F2F class.
- ◆ In the case of a videotape, only the essential portions that the teacher would display in the F2F classroom may be digitized for online instruction. In many cases, that would not be an entire tape.

- ◆ The materials must have been lawfully acquired.
- ◆ The students must be notified of the relevant copyright information for the materials and that the materials are protected by copyright law.
- ◆ The materials may be digitized for online use only if digital versions are not already available.

If these provisions are met, the TEACH Act has opened the door to a much wider range of instructional technologies in distance education than were permitted by the old Section 110. Online courses may now permit performances of nondramatic literary and musical works and “reasonable and limited portions” of dramatic and audiovisual works, including video. The Act also eliminated the requirement that students receiving the instruction be located in a classroom or other site devoted to instruction. In other words, students at home now are eligible.

Use of Student Intellectual Property

Works created by Dakota Wesleyan University students for the purposes of fulfilling class assignments or degree requirements are considered to be the intellectual property of their student creators, who retain ownership. Ownership of works created by student groups working collaboratively is shared among the group members.

Faculty members sometimes wish to display student works in their classes, either current or subsequent, within a face-to-face class or via some electronic means such as MyWeb or in the Jenzabar course management system. According to the copyright statute, the rights holder has the exclusive right to display the work. If faculty intend to display student works in this manner, students should be notified in the course syllabus or assignment instructions, and they should be given an opportunity to request that their works not be displayed. For example, verbiage similar to this can be used:

Your paper will be posted on the course web site on Jenzabar so that your fellow students can benefit from your work. This is roughly the equivalent of making a report in a conventional face-to-face class. If you have an intellectual property problem with that, contact your instructor to state that your work cannot be displayed. If your work is posted, it is anticipated that others will download it for future reference, and that they will respect your intellectual property.

In this way, you can give your students the opportunity to “opt out”. A release form may be used by faculty in lieu of syllabus notification, as long as the form is signed by the students prior to display of their works. This form of permission may be preferable, since it requires an overt release on the part of the students whose work would be displayed, rather than an implied, by-default release.

If work of former students is to be displayed to a current class, make sure that you obtain permission from those students *in writing* and specify the conditions. Do this before you reveal the work to your current students.

Liability for Infringement

For the most part, copyright is civil law, not criminal law. Unless you make and sell pirate copies of videotapes or computer software or enjoy some other financial gain, you could be sued for copyright infringement but not sent to prison. The copyright holder has the choice of seeking *statutory damages*, which can be as much as \$150,000 per instance if the plaintiff can prove in court that the infringement was willful, or *actual damages* to recover

lost revenues. If you haven't made a business out of the infringements, the former is more likely.

You are liable for damages even if you did not realize you were committing an infringement. However, [section 504](#) of the law (which for some reason is entitled "Remedies for infringement," as if it is a substitute for ibuprofen) provides that college employees, including faculty, may not be subject to statutory damages "in any case where the infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107..." Thus, according to this "good faith fair use defense," if you were truly convinced that your use of the protected materials was fair use and have left no evidence to the contrary, you may (emphasize *may*, at the discretion of the court) escape statutory damages, even if the act in question was not fair use. On the other hand, you will be liable for your own attorney's fees, and the court may direct you to pay for the plaintiff's legal costs as well, and these can be significant.

Seeking Permission

Several times in this paper, we have urged you to seek permission when in doubt. Start by contacting the author or publisher. If no address or phone number is provided, you might be able to obtain that information from the [Bookstore](#) or [Layne Library](#). The [Copyright Clearance Center](#) also has contact information for thousands of authors and publishers.

If at all possible, contact the copyright holder by phone to clarify precisely to whom your request should be addressed. A phone call gives you the opportunity to discuss the specific circumstances of your request and negotiate fees, if applicable. Whether your means of contact is phone, fax, letter, or e-mail, the rights holder will need the following:

- Your personal contact information, including name, position, institution, mailing address, phone and fax numbers.
- Complete identification of the item you wish to use, including title, author, publication title and date, volume and issue, page numbers (if applicable), and amount desired.
- Detailed description of your intended use, including purpose, course name, number of copies, means of distribution, need in multiple academic terms (if applicable), and other relevant information.
- Date by which you need permission. (Provide at least six weeks if possible).

Permission may be granted over the phone, but get it in writing on the copyright holder's letterhead if at all possible, either by mail or fax. Obtaining permission in a tangible form confirms who provided permission for what, and when. Additional guidance and a sample permission request letter may be found in the [CETUS \(1995\) handbook on fair use](#).

References

Carroll, T. (2002). **Copyright FAQ**. (<http://www.tjc.com/copyright/FAQ/>)

Consortium for Educational Technology for University Systems. (1995). **Fair use of copyrighted works: A crucial element in educating America**. Seal Beach, CA: California State University Chancellor's Office. (<http://www.cetus.org/fairindex.html>)

Templeton, B. (2004). **10 big myths about copyright explained**. (<http://www.templetons.com/brad/copymyths.html>)

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