COPYRIGHT *in Higher Education*

THE stakes of a copyright violation can be high. It is important to use material that is legal. It is preferred that you use your own content or copyright-free content. That said, there are many ways to legally use copyrighted content with suffice. These methods are explained ways that may allow you to use the content, but copyright is a quagmire of clauses and conditions. Where do you even begin when evaluating whether you can use specific content?

You start with this infographic. We designed it to be easy to use. By answering questions with "yes" or "no" you should arrive at a recommendation about whether you can use the content in question.

Let's start by defining copyright. According to Fishman "copyright is a legal device that provides the creator of a work of art or literature, or a work that conveys information or ideas, the right to control how the work is used" (Fishman, 2008, p. 6). Copyright was created to give the author of a work economic incentive to create new works to advance the progress of knowledge (Loren, 200, para. 12)

If you're viewing this infographic then we can only assume that you have a specific piece of content you want to troubleshoot. Perhaps it's a video, book excerpt, article, etc.

Start by asking...

Did you create the content?

- YES → Use the media
  - **Self Created**: If you created the content, then you are legally the copyright owner. Proceed to use the material without restriction.
- NO → Do you want to pay for the media?
  - YES → If you want, Choose license
    - **CC**: A Creative Commons (CC) license is one of several licenses that allow the public the flexibility of an alternative to the default "all rights reserved" that applies when an author wants to give people the right to share, use, and build upon a work that he has created. CC provides an author flexibility and protects the people who use his work from fear of being sued for a claim of copyright infringement as long as they abide by the terms of the license specified in the license by which the author distributes his work.
    - There are several types of CC licenses. The author can choose the combination that he/she/they feel/s/ comfortable with.
    - **Attribution**: Others may copy, distribute, display and perform the work and make derivative works and works based on it only if they give the author or licensor the credits (attribution) in the manner specified by these.
    - **Share-alike (SA)**: Others may distribute derivative works only under a license identical ("not more restrictive") to the license that governs the original work. Without this option, others may not alter/adapt/remix the work, even for personal use, without your permission.
    - **Non-commercial (NC)**: Licensees may copy, distribute, display, and perform the work and make derivative works and remixes based on it only for non-commercial purposes.
    - **No Derivative Works (ND)**: Others may only copy, distribute, display and perform only verbatim copies of the work, not derivative works and remixes based on it.
  - NO → Is the media copyrighted?
    - NO → Purchase and use the media
      - **Purchased?**: There are many stock photo, video, and music libraries out there. When you purchase media you are legally allowed to use it as long as you follow the terms and conditions of your purchase. Check the fine print. This is a common for versions of stock media.
    - YES → Is the media in Public Domain?
      - **Public Domain**: Intellectual property, including copyrights, patents and trademarks, are granted for a limited period of time. When the rights have been forfeited, lost/ended/expired, or were never granted, the work is in public domain.
      - Typically, copyright expires not 70 years after the death of the author.
      - There are many resources for to find public domain media.
      - YES → Use the media
      - NO → Is the media licensed Creative Commons?
        - YES → Use the media according to the terms
        - NO → Assume Copyright
    - YES → Did you obtain permission from copyright holder?
      - YES → Use the media. Give credit to creator
      - NO → Did you offer fair fee, $125 or "best offer"
        - YES → Use the media according to the terms
        - NO → Assume Copyright
      - **Permission**: It is possible to get permission from the copyright holder to use their work. You must follow the terms and conditions specified by the rights needed. It may be a monetary transaction or you may need to contract the owner and negotiate payment. Get permission in writing.
    - NO → **Claim an Exception?**: Don't give up yet. There may be an exception to copyright that you can legally claim to use the media. Consider the clues. You may hard-based your case on Fair Use, §110, §108 and the Teach Act.

FAIR USE

Fair Use, as the name implies, allows a person to legally use copyrighted material. The use must be determined to be fair according to the courts. Claims are evaluated on a case by case basis. As such, there is no formula to ensure fair use. Use your judgment and study up.

There are four general criteria that courts use to determine Fair Use. Is it an acceptable purpose? Did you transform the work into your own? Does your use affect the adversely market? Did you use a relatively small portion? Is the content factual? This flowchart will help determine if your use is considered fair according to these qualifications.

Historically, some cases were considered Fair Use when only meeting one qualification, but you have a stronger case if you use more than one. The purpose of your use is the only qualification that can alone determine if you are allowed to use a work. Otherwise these are presented in an arbitrary order.

- Does your purpose qualify for fair use?
  - YES → Try to also meet other qualifications
    - Did you transform the work into something new, a new meaning?
      - YES → Use with caution. Cite sources. Try to also meet other conditions
      - NO → Will likely need to meet other conditions or attempt §110
    - **Transform?**: Did you copy someone's work verbatim or did you transform it into something new? Transformative uses are not always and vice versa such as a parody, or a critique of the original, or adding in a search engine.
    - Creating a completely new work from a copyrighted source can be a fair use.
    - **Didn't Transform?**: Just because you didn't transform the work, it doesn't mean you can't claim fair use. Consider other qualifications.
  - NO → Likely cannot claim Fair Use. Attempt §110. See if library has equivalent content in database
- **Acceptable Uses**: The purpose of your intended use of the work is a factor to consider when determining whether a use is fair.
  - Fair Use provides the statutory framework for determining whether something is a fair use and identifies certain types of uses—such as criticism, comment, news reporting, teaching, scholarship, or parody, non-profit, and research—as examples of activities that may be fair use. Quote from: (Loren, 2009, para. 3)
  - In general, commercial and for profit purposes weigh against fair use. And entertainment for entertainment's sake is not considered a fair use.

- Does the work in question make use of a small portion of the whole work?
  - YES → Use with caution. Cite sources. Try to also meet other conditions
  - NO → Will likely need to meet other conditions or attempt §110
- **Small Portion**: A use is more or better of fair use if it uses a proportional small portion of the whole work. 250 words in a 500 word poem is less fair than 250 words in a 1000 word book. Especially if that work is not the "heart" of the work. This will weigh in favor against other qualifications. Consider the "heart" of the work on the portion alone. A small portion of a copyrighted work can be considered infringement.
- **Not a Small Portion?**: Just because you used a large portion of a work, it doesn't mean you can't claim fair use. Consider other qualifications. Especially if the portion is not the "heart" of the work. This will weigh in favor against other qualifications. Consider the "heart" of the work on the portion alone. A small portion of a copyrighted work can be considered infringement.

- Will your use adversely affect the market?
  - NO → Will likely need to meet other conditions or attempt §110
  - YES → Will likely need to meet other conditions or attempt §110.
- **Affect Market**: A good question to ask is whether you are taking or taking a sale that the owner would have otherwise made.
- **Affects Market**: If you believe that your work will affect the market, the profit of the subject fiction work then it is likely to not take fair use. Consider if the work is/ will be intended/used for use if you offer/the market. Is there a market for work with little profit?

- Is the content factual?
  - YES → Will likely need to meet other conditions or attempt §110.
  - NO → Will likely need to meet other conditions or attempt §110.
- **Little Effect to Market**: Just because your use wouldn't affect the profits of the copyright owner, it doesn't mean that your use is fair. Many works are in the public domain that copyright protects. Many were also meet other qualifications.
- **Factual Content**: Facts and non-fiction (or called factual) are not. Artist of fiction, fantasy, and fiction, facts and data, the central ideas, and ideas are not protected. For instance, is a documentary is factual or creative?
- **Not Factual**: Creatively arranged/composed/written/recorded/photographed is fair game. It should preclude other from using the same but he suggest that you must adapt criteria.

§110 "The Classroom Exception"

U.S. Code, Title 17, Ch 1, §110 (¶1) a.k.a. "The Classroom Exception"

U.S. Code, Title 17, Chapter 1, §110 (¶ 1) (The Classroom Exception) provides exemptions to the Copyright law for academic use of copyrighted material. If you meet the requirements for The Classroom Exception then you can use the material without permission. This exception allows faculty to a face to face class or an accredited nonprofit educational organization to use certain material for instruction. If they meet the criteria faculty may show a film, perform or listen to music, perform or show a play and show images or slides. Start by asking whether you will use the material online.

- Will you use online?
  - YES → Attempt to meet TEACH Act criteria (¶ 2)
    - **Online?**: The Classroom Exception deals specifically with face to face instruction. If you are using your content online then you need to meet the more strict section TEACH Act.
  - NO → Attempt to meet criteria for The Classroom Exception
    - **Not Online**: The Classroom Exception deals with face to face instruction that are presented in a face to face classroom. If you are not in the classroom or you are trying to meet the other criteria.
    - Will the presentation or display be by an instructor or pupil?
      - YES → You must meet other conditions before being able to use The Classroom Exception.
      - NO → Cannot claim The Classroom Exception. Consult with library
      - **Instructor or pupil?**: The performance or display must be by an instructor or pupil. Consult with school/ legal/ marketing.
    - Will the presentation or display be in a classroom or place devoted to instruction?
      - YES → You must meet other conditions before being able to use The Classroom Exception
      - NO → Cannot claim The Classroom Exception. Consult with library
      - **Place of Instruction**: In order to qualify for this exemption, the presentation or display has to be in a place that is dedicated to instruction. If it is a place that is used for other purposes it is not a place for The Classroom Exception.
      - **Not a Place of Instruction**: In order to qualify for this exemption, the presentation or display has to be in a place that is dedicated to instruction. If it is a place that is used for other purposes it is not a place for a legal classroom exemption.
    - Was the copy you are using legally made?
      - YES → Use with caution. Cite sources. Double check with library if unsure.
      - NO → Cannot claim The Classroom Exception. Consult with library.
      - **Legally Made Copy?**: One qualifier for The Classroom Exception is the legal copy. If you are using a copy you are using legally made? Did you download a copy? Did you download a copy? Digital image from the Internet.
      - **Not Legally Made**: Typically, if you are using an illegal copy, you are not legal. Check the present or illegal to fix it.

TEACH Act

The TEACH Act is technically §110, ¶ 2. This is a provision added in 1110 that deals specifically with classes taught **online. You cannot claim the TEACH Act for classes taught face-to-face.** In order to qualify for the TEACH Act exemption, the institution must be a nonprofit educational institution or a government agency (Supporting University then the following criteria are already met for you. For the fourth one, if you set up the material in Brightspace correctly before you meet the criterion. Check to see if you meet the other 3 criteria.

- ... My institution is a nonprofit accredited educational institution or a government agency
- ... It has a policy on the use of copyrighted materials
- ... It provides accurate information to faculty, students and staff about copyright
- ... Its systems will not interfere with technological controls within the materials I want to use
- ... The materials I want to use are specifically for students in my class
- ... Only the students in my class will have access to the materials
- ... The materials will be provided at my direction during the relevant lesson
- ... The materials are directly related and of material assistance to my teaching content
- ... My class is part of the regular offerings of my institution
- ... I will include a notice that the materials are protected by copyright
- ... I will use technology that reasonably limits the students' ability to retain or further distribute the materials
- ... I will make the materials available to the students only for a period of time that is relevant to the content of the class session
- ... I will store the materials on a secure server and transmit them only as permitted by this law
- ... I will not make copies other than the one I used to make the transmission
- ... The materials are of the proper type and amount for fair use/teach
  - Entire performances of nondramatic literary and musical works
  - Reasonable and limited parts of dramatic literary, musical, or audiovisual work
  - Digitized versions of analog materials (Digitized versions of analog materials are allowed in face-to-face teaching
- ... The materials are not among those the law specifically excludes from its coverage:
  - Materials specifically marketed for classroom use for digital distance education
  - Textbooks, workbooks, and other consumables
  - Textbooks, coursepacks, electronic reserves and similar materials typically purchased individually by the students for independent review outside the classroom or class session
- ... If I am using an analog original, I checked before digitizing it to be sure:
  - I copied only the amount that I am authorized to transmit (Fair Use)
  - There is no digital copy of the work available except with technological protections that prevent my using it for the class in the way the statute authorizes

- Do you meet all 17 conditions?
  - YES → Use the work claiming the TEACH Act. Cite the source.
  - NO → Cannot claim the TEACH Act. Consult with library
- **TEACH Act**: Check the conditions above.
- **TEACH Act**: If you meet all 17 conditions then you can use the material. If you meet the less restrictive version (see below) then you can use the conditions in order to make a valid claim.
- **TEACH Act**: If you cannot meet all 17 conditions then you are NOT able to use the material in your online course. Consult with your supporting University the library to review your options.

List of sources used to develop this flowchart

https://en.wikipedia.org/wiki/Public_domain
https://www.copyright.gov/title17/92chap1.html#107
https://www.copyright.gov/fair-use/more-info.html#c_n_will_in_copyright
https://www.lib.umn.edu/copyright/faqs
https://copyright.columbia.edu/basics/fair-use.html
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https://www.law.cornell.edu/uscode/text/17/110
http://www.copyright.com/wp-content/uploads/2013/04/E-Teach-Act.pdf
http://www.lib.umn.edu/copyright/teachingfaqs#teachact
http://hsgcollection.org/Pdf/2013Fdn/Copyright-flowchart.pdf

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