

The IU Office of Vice President and General Counsel (OVPGC) wishes to thank Beth Cate, Associate Professor, IU School of Public and Environmental Affairs, for her assistance in preparing the below materials. Questions concerning the subject matter of this FAQ should be directed to the OVPGC.

IMPORTANT NOTICE: The following is a general Q/A format presentation of what many experts regard as a nuanced and complex legal subject matter area. In addition, it is one in which advice will vary depending on the specific facts involved in each question or matter. Seemingly slight factual variations can alter the analysis and outcome of a given question or scenario. Therefore, it is very important to consult with counsel before taking any action in this area, and to not rely exclusively on the information contained in this Q/A. Nothing contained on this site or its related links may be construed as legal advice from the OVPGC on a given matter. Members of the IU community should consult the OVPGC directly on specific legal issues or matters.

What is a copyright?

A copyright is a set of rights that someone has with respect to his or her own original expression, as long as s/he has “fixed” or recorded that expression in some tangible form for more than a transitory period of time. The Constitutional purpose of granting a copyright is to “promote the progress of science and the useful arts.” Copyright does this by giving creators enough rights to control and be compensated for the use of their expressive works that they are incentivized to create and distribute those works, which benefits the public and allows human culture to thrive.

Subject to some very important limits discussed below, the owner of a copyright in an original work of expression has the exclusive right for the duration of the copyright to copy the work in whole or part, adapt it to a different form (*e.g.*, translate it into another language, develop a screenplay from a novel, make a jazz arrangement of a pop song), and publicly distribute, display, and perform the work.

How does sharing material with my students for class purposes implicate copyright law?

An instructor wishing to make use of another person’s copyrighted work must determine whether her use implicates the copyright owner’s exclusive rights under the copyright law, which requires her to get the copyright owner’s permission for that use, or whether she may proceed without permission. If permission is required, the instructor must then consider whether she already has been granted that permission, generally called a “license,” directly or through IU, or whether she still needs to obtain permission.

When do I not need a copyright owner’s permission to use her work in connection with my class?

The copyright law contains several provisions that authorize certain *limited* uses of copyrighted works without the copyright owner’s permission. The most important for teaching purposes are:

- “Fair use”

- The classroom teaching exemption
- The “TEACH Act” exemption for distance learning
- Library copying provisions
- Copying and adaptation for students with print disabilities

What is “fair use” and how do I determine whether a use is a "fair use"?

A “fair use” of a copyrighted work is a limited use for a purpose that serves important public policy interests and that does not significantly undercut the economic incentive for creation of that type of work. The copyright law recognizes that its ultimate goal is to enhance the public welfare through the proliferation of creative works. Accordingly, it grants the public certain limited rights to use a copyrighted work without permission from or payment to the copyright owner, so that the owner cannot stifle or prevent those valuable uses, while at the same time requiring a user to get permission for uses that, if widespread, would supplant markets for the work that the creator is entitled to exploit and thus undermine the incentive to create in the first place.

First, you should check that your proposed use is of a type that the copyright law calls out for favored treatment under the law, namely “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” While this list is not exhaustive, these are likely to be the uses that receive the most favorable fair use analysis from courts. Courts have also included parody and, to a lesser extent, satire, as valuable forms of social commentary that may qualify as fair uses in some cases.

Second, you must evaluate and balance together in good faith several factors set out in the copyright law, and come to a reasonable conclusion as to whether or not your proposed use is fair given the cumulative impact of those factors and how your proposed use serves or disservices the ultimate purpose of copyright. Note that your “fair use” analysis may be different for online instruction than for in-person instruction, depending on the model of online instruction used.

Factor One: The purpose and character of the use. To evaluate this factor you should consider two things. First, is the use commercial or nonprofit and educational in nature? Nonprofit educational uses tend to weigh in favor of a finding of fair use, while commercial uses tend to weigh against such a finding.

Also, is your proposed use “transformative” in that it integrates the copyrighted work with substantial original material to create a new expressive work, or uses the copyrighted work for a different purpose? Transformative uses tend to weigh in favor of a fair use finding, because copyright’s ultimate purpose is to nurture the development and dissemination of new expression. Simply reproducing existing works and using them for the same purpose as the original disfavors a finding of fair use, because it does not add to the corpus of human expression and harms the market for the original work, which undermines the incentive to create it in the first place.

An important caveat related to the first factor: The copyright law expressly includes teaching and “making multiple copies for classroom use” as an example of a type of fair use. This

suggests that Congress anticipated and expected that fair use encompasses some limited amount of “straight copying” of material to share with students, even if that is not inherently transformative.

Factor Two: The nature of the copyrighted work. To evaluate this factor, you should consider two things. First, is the work published or unpublished? While fair uses may be made of unpublished works, courts tend to give them greater protection against unlicensed use. Second, is the work highly factual in nature, or more creative and expressive (e.g., is it more like an anatomy textbook identifying the parts of the human body, or is it a novel or poem or play)? Because copyright protects only expression and not facts or ideas, there are often fewer copyrightable aspects of highly factual works to begin with and hence they have somewhat “thinner” copyright protection than highly creative works.

Factor Three: The amount and substantiality of the portion used in relation to the copyrighted work as a whole. To favor a finding of fair use, the amount of a work taken must be no more than is reasonably necessary to serve the purpose for the copying. The amount of the original work that may be claimed as a fair use varies depending on the nature of the use – for example, when producing a parody one must copy enough of an original to alert the audience to what is being parodied. Copying material for course readings is not a transformative use to begin with, and “fair use” copying for course reading use is consequently limited to relatively small amounts of a work.

Factor Four: The effect of the use upon the potential market for or value of the copyrighted work. Assessing this factor involves considering the impact of the proposed use, if it became widespread, on both current markets for sale and licensing of the work, and markets that the copyright owner is reasonably likely to develop or license others to develop. If the portions of the work you want to use are available to be licensed at a reasonable price in a format that is reasonably convenient for your proposed use, this tends to disfavor a finding of fair use. If what you want to use is not available for licensing at a reasonable price and/or or reasonably convenient format, that tends to favor a finding of fair use.

The fact that a license is available does not automatically eliminate the potential for fair use, nor does the fact that you inquire about a license eliminate your ability to later rely on a good faith, reasonable conclusion that your proposed use is fair.

What are some key points to remember about “fair use”?

- Separate from and in addition to other fair use considerations, an instructor should only post material to her course website if she or IU has a lawfully obtained copy of that material (“lawfully obtained” includes, e.g., purchasing a copy, borrowing a copy from a library, or receiving a copy as a gift or donation).
- The smaller amount of a copyrighted work you use without permission, the likelier it is to fall within fair use. So, when copying material to post as readings for students, stay within the “fair use” boundaries discussed above or else seek a license for the copying. IU licenses a wealth of copyrighted works for student and faculty use; consult a librarian if you have a question about whether a particular item is already licensed.

- In all events, only use the portions of a work that are needed to fulfill your pedagogical purpose and no more (i.e. don't assign a whole chapter when a handful of pages will suffice and the rest isn't needed for important context to understand those pages).
- In using sound recordings or audiovisual works, in particular, consider the method of delivery (e.g., streaming vs. download) in thinking about the effect that your use will have on the market for those works.
- It is vital that instructors make good faith, reasonable decisions about whether a given use is a fair use and doesn't require a license. It is University policy to defend and indemnify instructors against legal claims arising from their University activities if the instructors acted in good faith and consistent with applicable law. No single factor is determinative and the factors are substantially interconnected.
- In weighing the factors together to reach an ultimate conclusion on whether a proposed use is a fair use or one that requires the copyright owner's permission, you may consult the "Fair Use Checklist," by clicking on the below link. The checklist was created by Kenneth Crews (Columbia University, formerly at IUPUI) and is designed to help you identify facts regarding your proposed use that generally favor or disfavor a finding of fair use, and to weigh the factors together to come to an ultimate conclusion. Save a copy of the Fair Use Checklist and any other notes or materials that reflect your fair-use analysis in case the need arises later to explain the reasoning behind a given fair use decision.

<http://copyright.columbia.edu/copyright/fair-use/fair-use-checklist/>

- Additional links that may be helpful:

<http://copyright.lib.utexas.edu/index.html#build>

<http://copyright.columbia.edu/copyright/>

<http://fairuse.stanford.edu/>

<http://web.law.duke.edu/cspd/>

<http://cyber.law.harvard.edu/>

<http://www.copyright.gov/>