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Basic Copyright Exceptions for Educators

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Basic Copyright Exceptions for Educators

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Introduction to Bryan Carson

Dr. Bryan M. Carson is Professor and Coordinator of Research Instruction, Grants, & Assessment at WKU Libraries. He received his B.A. in Economics from Adrian College, J.D. (law degree) from the University of Toledo, M.L.I.S. from the University of Michigan, and Ed.D. (Higher Education Leadership & Policy) from Vanderbilt University’s Peabody College of Education.

Bryan is a member of the Kentucky and Ohio bars. He has written extensively about intellectual property, access to information and legal issues relating to libraries, and has spoken at numerous state and regional conferences. Bryan is the author of The Law of Libraries and Archives (Scarecrow Press, 2007) and Finding the Law: Legal Research for Librarians and Paralegals (Scarecrow Press, 2011). Bryan has taught Master’s classes for WKU’s Library Media Education program. In 2010, he taught “Ethical and Legal Implications in Instructional Design,” which was the first online class in the U.S. on intellectual property.

Bryan is a member of the Kentucky and Warren County Bar Associations, the American Library Association, the Kentucky Library Association, and the American Intellectual Property Association. He was chair of the LAMA Governmental Advocacy Skills Committee (2005-2006), co-chair of the RUSA Access to Information Committee (2005-2006), chair of the Kentucky Library Association Library Instruction Round Table (2003-2004), and chair of the Kentucky SOLINET Users Group (2003-2004).
What Is Copyright?

Copyright is the basis of our system of publishing. It is copyright that gives authors the rights to their works of creation. Yet it is also copyright that allows us to use works. The copyright law is neither pro-author nor pro-user—it is neutral.

Having followed copyright law closely for over a decade now, the questions I receive most often involve whether it is legal to use specific works in the classroom. Usually the answer varies depending on the particular item and the exact situation, so I can’t really give a general rule. (This is my way of writing a disclaimer.) However, many questions can be answered with a basic understanding of the three main copyright exceptions that educators use. These provisions consist of: (1) the fair use doctrine, found in 17 U.S. Code section 107; (2) the library exception, found in 17 U.S. Code section 108; and (3) the education exceptions found in 17 U.S. Code sections 110(1) and 110(2). I will talk about the library exception and the education exceptions in later sections.

Copyright law is found in Title 17 of the United States Code. The current copyright act was adopted in 1976, and became effective in 1978. Prior to that time, a large body of judicial law had evolved dealing with the fair use doctrine. However, the drafters of the 1976 copyright act were able to bring these judge-made rules into the actual statute by codifying the fair use doctrine.

The Fair Use Doctrine

The fair use doctrine applies to many of the activities that occur at universities. If it were forbidden to quote the work of others, our scholarship and research would grind to a halt. This provision is found in 17 U.S. Code Section 107, and consists of the following language:

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.

The Four Factors in Detail

The four factors listed above are the basis of the fair use doctrine. When analyzing the use of a work, it is important to always look at all four of these factors.

Purpose and Character of Use

The “purpose and character of the use” involves asking whether the use is for the purpose of making money. If you make copies of an article and distribute them in class, your purpose is clearly non-commercial. The same reasoning applies if you are giving a talk at a professional meeting. However, presenting a continuing education seminar probably constitutes a “commercial” use, since providers typically charge for CE courses.

Nature of Copyrighted Work

The “nature of the copyrighted work” deals with the material itself. The use is more likely to be fair if the work is non-fiction or factual. It is less likely that the use of a fictional, literary, or creative work will be fair, although even then comment, criticism, teaching, and scholarship may provide a reason to use portions of a copyrighted work.

Amount and Substantiality

“The amount and substantiality of the portion used” does not lay out a specific amount. The amount must be “reasonable” (whatever that means!). There are many myths about this provision. For example, some people claim that
there is a specific page limit. Others believe that using a single chapter of a book is always fair use. These myths are not true. The amount that is “reasonable” is the amount that is necessary to use for the particular circumstances—and nothing more. My best advice is to use as little of the copyrighted work as you need.

**Effect of Use upon the Potential Market**

“The effect of the use upon the potential market” deals with whether your use will replace or affect sales. A good example of this is using a chapter from a textbook. When you assign a textbook, the publisher gets paid for the sale. But if you copy a chapter, the publisher doesn’t get paid. It is never fair use to copy and distribute a chapter from a current textbook instead of having students buy the book. (However, placing the chapter on reserve in the library may fall under the library exception, which I will discuss in a later section.)

Here are some resources for more information:

- The U.S. copyright law is found in Title 17 of the U.S. Code. A good place to locate this is at http://codes.lp.findlaw.com/uscode/17
- I maintain an intellectual property page with many links and an Intellectual Property internet search engine at http://libguides.wku.edu/intellectual-property

Fair use is a basic part of our system of copyright. But it is also a very complicated and not-always-intuitive doctrine. The best policy is to use as little as you need, or to rely instead upon the education or library exceptions.

Please bear in mind that there are many legal differences between copying articles for an in-person class and copying articles for online classes. Section 107 uses the terms “including multiple copies for classroom use.” However, this has been defined as meaning “traditional” face-to-face teaching. Distance education has a different set of rules which is found in section 110(2), known popularly as the T.E.A.C.H. Act (Technology, Education, and Copyright Harmonization Act). I will discuss this later in this booklet.

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**Copyright Exceptions for Education**

Copyright is a balance between the rights of the owner and the rights of the user. In the last section, I discussed the fair use provisions found in section 107 of the copyright act (17 U.S. Code, section 107). However, this is not the only exception available to educators. In this section, I will discuss the library exception in section 108, the face-to-face education exception in section 110(1) of the distance education exception in section 110(2) (known as the T.E.A.C.H. Act).

**Materials on Library Reserve and Copyright Law**

The copyright act contains a library exception in 17 U.S. Code, section 108. This section allows libraries to obtain items via interlibrary loan. Section 108 also provides the legal basis for placing items on library reserve. WKU Libraries rely heavily on this portion of the law, with print reserves in Cravens, the Educational Resources Center, Glasgow, Owensboro, and Elizabethtown/Radcliff/Ft. Knox.

Copyright best practices allow instructors to place items on reserve for one semester without asking for permission. However, if you wish to reuse the material for a future semester, you must ask permission. The copyright act provides rights for non-profit educators beyond the fair use provisions in section 107. There are exceptions for interlibrary loan and (perhaps in some circumstances) for library reserves. However, the most comprehensive copyright exception for face-to-face education is found in section 110(1). Thanks to section 110(1), you can perform or display copyrighted works in your classroom without worrying about the copyright police.

There is one aspect of the library exception that is controversial. Like many schools, Western Kentucky University scans items on reserve, creating E-reserves that integrate with class Blackboard sites. However, there is a difference of opinion between the American Library Association and the Association of American Publishers. The library interpretation is that E-reserves are covered by the existing exception in section 108. The publishers believe that scanning items for E-reserves requires permission every time, even the first time.
The difference of opinion between publishers and libraries came to a head in a copyright infringement case against Georgia State University. The case as decided in 2012, with Georgia State prevailing. (*Cambridge University Press et al. v. Patton et al.*) The interesting thing about this case, however, is that the ruling contains a number of new principles for determining whether a use is fair use.

As mentioned in this booklet, there are currently no definite rules that would make a particular use “fair” every time. There is no “safe harbor.” Each use requires a detailed analysis of the four factors of fair use. However, the judge in the Georgia State case has given examples of uses which—in her opinion—would be fair every time. The rules given by the judge are clear and easy, and may be a significant improvement for fair use.

However, at this time, the Georgia State case is only law in the Northern District of Georgia. This is not the law anywhere else in the United States. The case has been appealed, and will be heard by the 11th Circuit Court of Appeals (which hears appeals from Federal courts in Georgia, Florida, and Alabama). Because the appeal has not yet been heard, we do not know whether it will stand up. It is possible that the District Court could be overruled. Therefore, I recommend caution for the time being. Don’t rely on the Georgia State case yet, as it is too early. For more information on this case, see: [http://www.educause.edu/initiatives/policy-and-security/educease-policy/resources/georgia-state-copyright-case-resources](http://www.educause.edu/initiatives/policy-and-security/educease-policy/resources/georgia-state-copyright-case-resources)

**Performances Defined**

The term “perform” is defined in the copyright act (Title 17 U.S. Code Section 101) as follows:

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.

This definition includes showing films, playing music, performing a dance, or reading plays, novels, or poetry.

**Displays Defined**

The copyright act (Title 17 U.S. Code Section 101) defines “display” as:

To show a copy of [a work], 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.

Displays include using kits, photographs, slides of artwork, charts in a PowerPoint, etc. In some circumstances, showing an article to students may be a display, but only if you have the students give it back at the end of the class period. (Otherwise it is a handout, and you will have to rely on fair use.)

**Lawfully Using Performances or Displays in Face-to-Face Classes**

Section 110(1) allows teachers or students to perform or display a work “in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction. . . .” In order to qualify for using section 110(1), you must be able to satisfy the following requirements:

1. The content must be face-to-face.
2. The copy must be legally made and legally obtained.
3. The performance or display must be at a non-profit educational institution.
4. The performance or display must be “in a classroom or similar place devoted to instruction.” Note that this provision includes activities that occur in the library, auditoriums, etc.
5. The performance or display must be made for the purpose of education.

Please note that there must be a genuine pedagogical reason for the performance or display. If you have a performance to entertain or reward students, it will not fall within the section 110(1) exception. On the other hand, the exception is broader than just scheduled classes. Departments and clubs are permitted to show films outside of class, as long as the performance is accompanied by a lecture explaining the historical, cultural, or educational purpose of the film. (This part of the statute goes hand-in-hand with the “similar place devoted to instruction.”)
Distance Education and the T.E.A.C.H. Act

In my previous sections on copyright law, I discussed basic principles, along with the fair use provisions found in section 107 of the copyright act (17 U.S. Code, section 107), the library exception in section 108, and the face-to-face (F2F) education exception in section 110(1). This time, I will discuss the distance education exception in section 110(2), which is popularly known as the T.E.A.C.H. Act.

What is the T.E.A.C.H. Act?

The T.E.A.C.H. Act was intended to help level the playing field for distance education classes. Until this provision was adopted, distance education classes simply could not legally do many of the things that F2F classes could. While still more restricted than in-person teaching, the current provisions of the statute do allow greater flexibility when teaching online.

The T.E.A.C.H. Act applies to performances and displays. The kinds of work most often displayed in classes include written stories or articles, images, or musical scores. Generally, a performance includes films and videos, musical or dance recordings, etc. Showing students the script for a play is a display, while reading or acting the play would be a performance.

Under the F2F exception, instructors can show any kind of performance in full. This means that I could show an entire film (fiction or nonfiction), as long as it has been put in context with an accompanying lecture. It is also legal to link or show videos from YouTube or open websites. However, the distance education exemption only allows teachers to transmit in full “nondramatic literary or musical work[s].” Dramatic films and plays may not be transmitted in full. However, the statute does allow transmission of “reasonable and limited portions” of dramatic works, as well as “display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session.”

The lesson to take away from this portion of the statute is that you should not show an entire dramatic film or play. Show the students only the reasonable and limited portions that pertain to the course material. That way you will fall under the provisions of the distance education exemption. And, of course, the copy you use must be made legally. An illegal copy is an illegal copy, so if you use it in a class, you will still be in violation of the law.

Other Things to Know about the T.E.A.C.H. Act

The T.E.A.C.H. Act only applies to accredited non-profit institutions. While for-profit schools are allowed to perform or display work under the F2F provisions, for-profit schools, such as Daymar College and the University of Phoenix, are not able to take advantage of section 110(2) and must pay to license the work.

There are several other requirements you must comply with in order to claim the protection of the T.E.A.C.H. Act. In order to rely on section 110(2), the performance or display must be made as part of a regular class that is offered for credit. The material must be related to the teaching content of the course, and it must be made available only to students enrolled in the class. The statute also directs that the material must be available to students for no longer than the class session, and there must be technological protections so that students can’t download or further disseminate the material.

In order to comply with these provisions, you should make sure that any materials you transmit are behind the password wall in Blackboard. This will ensure that only those students who are enrolled in the class will be able to access the content.

To prevent students from downloading or passing on the materials, use technologies such as Flash or streaming video. This will fulfill the requirement for “technological protections.” Since most distance education courses don’t really have a “class session,” I recommend making that material available only for the week in which your class is covering the related content. Once that week is up, remove the material or make it unavailable to students.

The T.E.A.C.H. Act does not apply to works made specifically for distance education classes. This means that you must obtain a license in order to use digital objects, “canned” online classes, and films which are made specifically for use in distance education classes. Since these works have been created specifically for online courses, there would be no way for the creator to get paid if they were part of the T.E.A.C.H. Act exemptions.
The statute requires institutions to “provide notice to students that materials used in connection with the course may be subject to copyright protection.” The easiest way to accomplish this is to include a disclaimer in your syllabus and with the actual materials themselves. I recommend something similar to the following language:

Materials used in connection with the course may be subject to copyright protection. Copyright law prohibits any further reproduction, duplication, or distribution of these materials.

Finally, the statute requires institutions to create policies regarding copyright and to provide educational materials on copyright to faculty, staff, and students. (In fact, that is what this booklet is doing.) Teaching students about copyright law is not only required for distance education classes, but should also be a vital part of their education. In the next section, I will talk about how to teach students about the legal and ethical use of materials.

**Using Remix to Teach Writing and Copyright to Teach Plagiarism**

I have struggled for years with the issue of how to teach students about copyright. Faculty can learn in seminars, booklets (such as this one), or even through questions when situations arise. Students, however, tend to require more formal instruction in order to make lessons stick. I have often thought that copyright should be taught alongside plagiarism, which is a traditional way of handling the topic. Recently, however, I have begun to believe that teaching students about copyright first might actually do more than traditional approaches to help students understand plagiarism. Meanwhile, I have also learned about some new methods for teaching writing that may also help students learn about copyright.

**The Relationship between Copyright & Plagiarism**

Copyright and plagiarism are not the same, but they are definitely related. Just as following copyright law represents the legal use of information, avoiding plagiarism represents the ethical use of information. Although beyond the scope of the current discussion, I think most people would agree that law and ethics are cousins. For those of you who are interested in this topic, I recommend an article I co-authored entitled “Why Talk about Legal & Ethical Issues?” (Carson & Carson, 2010, p. 64). Retired WKU philosophy professor Jan Garrett also has an essay entitled “Basic Observations on Law and Morality” (Garrett, 2001).

**Who May Need to Teach about This?**

Many classes deal with academic integrity on some level. While writing classes teach students to properly cite materials, all faculty members want to be sure that students submit their own work and give proper attribution to their sources. A writer should never use more of the original source than is needed to make the point. The proper use of quotation marks can transform the original into a new work while still maintaining the integrity of both.

Copyright law also deals with maintaining integrity while transforming a work. Fair use provides a balance between the rights of copyright owners and copyright users. We should always review and apply the four principles of fair use (purpose, nature, amount and effect on the market).

Faculty should model appropriate use of resources if they want their students to learn. Throughout this booklet, I have tried to make the point that one should only use the minimum amount necessary for the purpose. If a 5-minute clip will enhance your class, don’t show the entire film. Of course, this is the same type of analysis that writers must make when quoting or paraphrasing. (It also models good behavior for the students.)

**Sample Lessons**

In 2010, I was privileged to attend the Popular Culture Association/American Culture Association joint conference, where I learned about some really innovative methods for teaching writing. Several presenters discussed their use of audio and video editing to teach students about point of view, voice, and the necessity for revision (Martin, Fontana,
Hocks, 2010; King, Mullins, & McNely, 2010). But of course, these methods also raise issues of copyright law. In both sessions, the presenters discussed how they taught students about the legal use of source materials. It was at this conference that I gained my sudden insight about teaching copyright law.

Creativity is not just creating new content. It is also about transformative use, e.g., selecting the content, editing, creating the story, and putting it all together with an original creative spark. This is not only true in writing, but also in copyright law. “Transformative use” is actually a legal term. The alphabetical arrangement of the White Pages in a phone book lacks the creative spark necessary to invoke copyright protection (Feist Publications, Inc. v. Rural Telephone Service Co., Inc., Vol. 499 U.S. Reports page 340 [1991]). However, the novel The Wind Done Gone (Gone with the Wind told from the perspective of black slaves) had a transformative use that prevented it from violating copyright law (SunTrust Bank v. Houghton Mifflin Company, Vol. 268 Federal Reporter 3d Series, p. 1257 [11th Circuit 2001]).

English professor Mary Hocks used an interesting method to teach writing at Georgia State University. Her students recorded themselves reading their work aloud and then edited their recordings. By moving parts around, cutting, enhancing, splitting, mixing, and trying different takes, Hocks’ students learned writing principles such as voice, the necessity of separations (i.e., paragraphs), etc. Most students who have “writer’s block” think that they have to write a perfect paper the first time. They don’t see the process of revision and editing that goes into the final product. By editing their recordings, students were able to see the work that goes into paper and to relate that work to familiar settings. (This is also an argument for combining English and speech classes, as well as teaching technology to students. In fact, the speaker referenced USC’s “Multimedia Across the Curriculum” program.)

Other projects have used remixing to teach writing and principles of copyright law. In 2005, video editor Robert Ryang created a remix version of The Shining, rearranging images and dialogue to create a trailer for a heart-warming father-son story. This remix inspired a digital storytelling project at Ball State University using videos from the Kansas State Digital Ethnography Project. The original source material was there, but the storyteller controlled what was pulled from the digital stream, changed order of events, and put it all together to tell a story. Once an item is in the digital stream, it can be remixed more to tell more stories.

The use of sound editing or remixing can also help teach students to understand their responsibilities. Each of these classes involved teaching students about copyright, fair use, and the spark of creativity that constitutes transformative use. Digital natives have grown up with remixing and sampling. Even when they don’t know the technology, students understand the importance of referencing the original while adding a spark of creativity.

**Presenting It to Students**

The lesson is to talk with students about what it means to remix in digital storytelling and to sample in Hip-Hop. Talk to students about differences between words only; words and sound; and words, sound, and images. (The more you use, the less likely that the use is fair.) Tell students what constitutes transformative use. (After all, this is what a judge will analyze when dealing with a claim of fair use.)

I have come to realize that the traditional way of teaching copyright literacy by analogy to plagiarism may be backwards. Students understand the basic concepts of sampling and remix. Talk to students about what constitutes a transformative use. Show them how to properly sample and remix. And teach them how to avoid claiming others’ work as their own while still telling original stories. Not only will students learn about editing, they will also gain an understanding of the role of citations in papers and how to avoid plagiarism. Copyright and remixing are more than just an add-on to plagiarism and citations. They are pedagogical tools for teaching writing and citations in an academic paper—and in the real world.
Ask a J.D.

FAQs on Fair Use and Films

This first appeared in FaCET’s Teaching with Film booklet, 2007.

(Note: The information in this FAQ is current as of January 2013. Please check the copyright laws and intellectual property policies that are referenced in order to obtain the most updated information.)

1. What conditions do I have to meet in order to show all or part of a film in class?

In order to show a film in class, you need to make it a part of your classroom curriculum. Section 110(1) of the Copyright Act (Title 17, U.S. Code) allows “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.” The film must be a part of the classroom instruction, and may not be used for entertainment or reward purposes. You should always introduce the film with an explanation of the context of the film which relates to the subject being taught. You should also include a class discussion of the film, and should provide one or more handouts with information about the film, such as a bibliography of materials for further study or other pertinent information. For assistance with creating a bibliography, please contact your department’s liaison librarian in the University Libraries.

2. Are the conditions different for clubs or departments that want to show films?

The conditions for showing a film outside of class are almost exactly the same as they are for showing a film in a regular classroom. Section 110(1) of the Copyright Act allows films to be used “in a classroom or similar place devoted to instruction.” This has been interpreted to mean the library, the student center, lecture halls and auditoriums, etc. However, the film must be accompanied by a lecture that explains the film’s educational significance. This lecture needs to be slightly longer than that which would be given in a regularly scheduled class, since it must be clear that there is an academic and educational purpose for the showing of the film. The film must not be shown for entertainment or reward purposes, but must clearly be shown for an educational reason. You may choose to include one or more handouts with information about the film, a bibliography of materials for further study, and other pertinent information. In addition, you must not charge any admission, and should not advertise the film off campus.

3. Does a department have to own the films shown by its professors or clubs?

In order to show a film under the educational exemption to copyright, the film must be a legal copy that was legally made. You may not use an illegal (pirated) copy of a film. The film should be owned either by the university (i.e. the library, a specific department) or the campus organization that is showing the film. Rented films may also be shown, subject to the requirement that they be shown for a genuine educational purpose. You may also use a rented film, such as one from Netflix.

4. May I show films from my own collection?

If you have purchased or rented a legal copy of a film, you may show it to your classes once (this includes multiple sections of the same class). If you decide to show the film again in the future, you need to obtain permission from the owner of the copyright.

There are certain limited conditions under which you may tape a program from television and bring it into class. If the film is a part of the regular instructional activities of a class, it may be used once per class section. The film should be accompanied by an introduction, and should relate to the subject matter of the class. You must use the taped program within two weeks of the time you have taped it, and must destroy the tape (or take it home for your personal collection) once you have finished showing it. If you wish to show the program to future classes, you will need to obtain permission from the copyright owner.
5. May I show the same film every year?

You may use the educational exception found in the section 110 of the Copyright Act for a single semester, although you may show the same films to multiple sections. However, if you wish to show the film in a future semester, you should obtain copyright permission.

Some films in the library collection have classroom and public performance rights, so they may be shown in class at any time over multiple semesters. Other films do not have these rights. TOPCAT will indicate which films have public performance rights. For more information, call Michael Franklin at 270-745-6166.

6. May I show the same film to multiple sections of a class?

There are no differences between showing a film to a single class and showing it to multiple sections of the same class. In each section, you should follow the same format, i.e. introduce the film with a lecture, supply handouts, and provide time for class discussion of the material.

7. May films be shown in ITV or Online courses?

This is a more difficult question. All of the restrictions listed above for face-to-face classrooms also apply to ITV and online classes; however, there are additional restrictions. The current copyright law makes no distinction between ITV and Internet classes. Under certain circumstances, section 110(2) of the Copyright Act allows the transmission of “a nondramatic literary or musical work or reasonable and limited portions of any other work . . .” The Copyright Glossary at Washburn University (http://www.washburn.edu/copyright/glossary/) defines dramatic and non-dramatic works as follows:

- Dramatic is defined as a story in which the narrative is not related but is represented by dialogue and action.
- Therefore, dramatic narrative would include plays and motion pictures. Non-dramatic literary works would include poetry, novels, and textbooks. Non-dramatic musical works covers both song and musical composition.

If you wish to use an entire film in an ITV or Internet class, you should obtain permission from the copyright owner. However, you may use “reasonable and limited” portions of dramatic works, including films. “Reasonable and limited” is defined in the context of the Fair Use defense in copyright law. This means that you may use a short clip, which you then discuss. However, you may not transmit an entire film without copyright permission.

In order to legally transmit an entire non-dramatic work—or reason-able and limited portions of dramatic works—to an ITV class, the transmission must be made under the supervision of the teacher of the class, and it must be directly related and of material assistance to the teaching content of the class. As with a face-to-face course, it must be a legal copy that was legally obtained. The transmission must only be available to students who are enrolled in the class, and you must make sure they are not able to retain the material after the class transmission is done.

8. If I want students in my class to see several films over the course of a semester, can I require them to join Netflix?

You may require a student to join Netflix or a similar service. This is similar to requiring the purchase of a particular textbook from the book- store. Of course, some students are able to borrow books from other students, and don’t have to actually spend the money to buy the book. Similarly, the reality is that some students may be able to obtain movies from friends, roommates, etc. These students would then not need to join Netflix.

I have an additional word about Netflix. If joining Netflix or another movie rental service is a requirement for the class, some types of financial aid funds may help pay for the membership, just as some financial aid will pay for textbooks and supplies. My suggestion is to put a statement on your syllabus, in the same section where you talk about textbooks and supplies, explaining that students are required to join “Netflix or a similar service.” This will allow for some flexibility, while still allowing some students to be able to use their financial aid awards for membership.

9. May I post film clips inside my Blackboard course for students to study?

If you wish to post film clips in Blackboard or other course management software, you will need to work with Academic Technology and Distance Learning to make sure that the students are not able to copy the material or to
retain it at the end of the class. Also, you must make sure that only registered students are able to obtain the material. (That is why you should use Blackboard rather than an open website.) Since there are significant technical challenges in retaining control of the material once it goes online, I would suggest using Netflix or other rental services if you plan to use more than a limited amount of material from a film.

10. If a student can't be in class for a film showing, can I make a copy for her to take home?

Under copyright law, you are restricted from making copies, so making a copy of a film for a student would violate the law. In addition, there is no telling what the student will do with it when he or she has finished watching the film. My suggestion for students who are unable to be in class is to place the film on reserve in the library.

11. May I put films on reserve in the library?

Absolutely! An individual student viewing a film is not considered a public performance; rather, this is an individual use of a video or DVD.

The rules do vary, however, depending on whether the library (or the department) owns the film, or whether it belongs to the faculty member. In 1984, the U.S. Supreme Court discussed “time shifting” in Sony Corporation of America Et Al. V. Universal City Studies, Inc., volume 464 United States Reports p. 417 (1984). Better known as the “Betamax Case,” the Supreme Court stated that it was not a violation of copyright law for viewers to record programs and view them later. Similarly, if a film may be shown legally in the classroom, leaving it for an individual is nothing more than time shifting. Because educational exception in Section 110(1) of the Copyright Act allows films to be used “in a classroom or similar place devoted to instruction,” the library is a permissible place to house a film.

Remember, however, that a faculty member may only show a film from his or her personal collection for one semester without asking for rights. Similarly, an individually owned copy of a film can only be placed on reserve once without obtaining the permission of the copyright owner. This must be a legal copy that has been legally made. Since a program that has been taped off the air must be destroyed (or placed in a home collection) within two weeks of the date of taping, you may only keep taped programs on reserve for up to two weeks.

This restriction is not true, however, if the film is owned by the library or by another division of WKU! In that case, the film may be placed on reserve an unlimited number of times. This situation falls within the library exception to copyright law found in Title 17 U.S. Code Section 108. If you plan to show a film semester after semester, you should ask your library liaison or your department to purchase a copy. Items that are on reserve are listed in TOPCAT, the library catalog.

You may place items on reserve in the Visual and Performing Arts Library (VPAL) on the second floor of Cravens Library, or at the Educational Resources Center. In addition, you may place items on reserve in Glasgow, Owensboro, or Elizabethtown/Radcliff/Ft. Knox. The faculty member may choose whether he or she wishes to have the film kept in the library and loaned for two hours, or whether students may be allowed to take the film home overnight. (Each facility has a place where students may watch videos and DVDs.) While some electronic reserves are available through Blackboard, films are not included. There are just too many technology and copyright issues to be able to do this. If you need to stream video to your classes, contact Academic Technology or the Office of Distance Learning.

These materials may be checked out by anyone who has a WKU ID, not just those in a specific class. Please allow enough time (at least 2 days) for library staff to process the material. If you have any questions about putting films on reserve, please call our reserve specialist, Michael Franklin, at 270-745-6166.

12. May I convert a film from videotape to DVD or other digital format?

As with most legal questions, the answer is “it depends.” Films owned by an individual may not be duplicated onto a DVD. For university-owned films, Section 112(a)(1) of the Copyright Act allows one copy to be made under certain circumstances. If the university owns a DVD copy then the videotape may not be duplicated; however, if the film is only available on videotape, you may create one copy on DVD. This copy will be in effect a replacement for the videotape, and may be used by the university in the same way as the original.
It is permissible to digitize a university-owned video if you are planning to use the film in a face-to-face class or to place it on reserve in the library. You may also use a digital version of a video in an ITV or online class if you comply with all of the conditions and restrictions listed above. (See questions #7 and #9.)

Converting a video to a digital format requires special equipment. The Faculty Center for Excellence in Teaching (FaCET) has this equipment available for use; for more information, contact FaCET at 745-6508. The Technology Resource Center, located in MMC room 257, also has video digitization equipment; for more information, contact Josh Marble at 745-3755.

13. If I tape my lecture for students because I will be away at a conference, who owns the rights to that tape?

The answer to this question is different at WKU than at many campuses. Normally, what you create at work belongs to the university. However, WKU has decided to allow faculty members to retain the rights to books and articles, as well as class lectures.

Under the default provisions of the Copyright Act (section 101), anything made by an employee in the scope of his or her employment belongs to the employer. However, WKU has chosen to make changes to this rule. The Western Kentucky University Intellectual Property Policy (available at https://www.wku.edu/ip/) states that:

[T]raditional products of scholarly activity which have customarily been considered to be the unrestricted property of the author or creator are exempted from this general policy. Such traditional products include books, monographs, articles, reviews, and works of art (including paintings, sculptures, plays, choreography, musical compositions); and individual course materials such as syllabi, exams, transparencies, study guides, workbooks, and manuals. Also included are instructional software, webpages, and internet-based instructional materials developed by faculty members in the course of their usual scholarly, pedagogical, and service activities. The latter include projects undertaken during sabbatical leaves, faculty fellowships, and other special assignment periods intended for such activities.

This portion of the university’s intellectual property policy includes “traditional products of scholarly activity.” Just as syllabi, exams, and lecture notes are included in this policy, so too would be a taped lecture by the faculty member. You will own the rights to any lectures that you tape for your classes.

14. If I want to film or record a speaker on our campus, what permissions do I need get?

If you plan to film or record a speaker, you must obtain his or her written permission first. The written permission must include information on the way in which the recording is going to be used and whether it will be put to commercial use. If the lecture is to be used solely for educational purposes (which would be the most common situation), you should have a provision in the agreement dealing with ITV and online class transmissions. You should also have a clause in the agreement stating where the recording will reside (in the department, in the library, at FACET, etc.). If the recording is going to be placed in the library, the agreement should state whether it is available for checkout and/or interlibrary loan. The agreement should discuss whether the university has the right to duplicate and distribute the recording. Finally, the agreement should state whether the university has permission to show this recording publicly, or whether it must only be shown to students.

For informational purposes, the form the library uses for podcasting is available online; however, this form may not be suitable for all purposes.

If you have a question, please consult with the university attorney. To access this sample form, go to http://libguides.wku.edu/intellectual-property and click “Recording Agreement” for the “Release and Authorization Agreement for recording a lecture.”

This type of agreement has not always been done. Creating a written agreement may seem very formal. However, if you come to an agreement ahead of time, you will be able to avoid any problems or misunderstandings that may arise later. I always recommend getting these kinds of agreements in writing. It solves problems before they arise.
15. If I film students for a project or students film each other, what permissions are necessary?

As with a campus speaker, it is best to get everyone to agree up front about what will happen with the recording, whether it will be destroyed at the end of the class, who owns the copyright, and how the recording is going to be used. It is better to avoid problems ahead of time rather than to have to face conflicting interpretations afterwards.

16. May I download a video from a website and show it in class?

If a video is found on an open website, there are no copyright issues for classroom or ITV use. Similarly, an online class may include links to videos that are freely available on the web. In fact, this type of linking is better than trying to use materials from videos or DVDs.

You may assume that anything you find on the Web may be used in class. If the copy on the web is not legal, the copyright owner will go after the website owner rather than the professor who uses it in good faith. If you learn that the copy is not legal, you should of course stop using it. In any case, as long as you are using it in good faith that it is a legal copy, you will not be subject to any repercussions for using it. Usually, if the online copy is illegal, the website simply disappears.

You may also use multimedia materials (videos, music, etc.) that are included in databases that the library has licensed. For example, the library has subscriptions to the Naxos Music Library and the Vanderbilt Television News Archive. The Naxos Music Library is a collection of online Classical music, Jazz, World, Folk and Chinese music. (Naxos also includes notes on the works being played as well as biographical information on composers and artists.) The Vanderbilt Television News Archive contains over 30,000 individual network evening news broadcasts from ABC, CBS, NBC, and CNN, along with many special news-related programs (such as ABC's Nightline since 1989).

You may play these materials in your classroom or via ITV. You should not post clips from Naxos in Blackboard; rather, link the students to the database, tell them what to view or listen to, and let them log in themselves through the library’s website.

If you are giving a synchronous lecture to the students in an online class via Blackboard, you may play clips as part of that lecture. Nonetheless, because of technical concerns, it is probably better to ask the students to log into the databases themselves in order to see or hear the material. That can help to avoid bandwidth problems and other technical issues that might arise during the synchronous lecture.

17. May I upload to the web films made by students?

Before you upload a film made by students, you should obtain permission from the person who made the film. Although copyright law places student work in the same category as work for hire, the Western Kentucky University Intellectual Property Policy allows students to retain ownership of the work they perform as part of their classes. Therefore, the same rules for other films also apply to films made by students.

18. I obtained rights for my students to publicly perform a play. May I make and sell copies of this production?

The answer to your question depends on the language of the contract that you signed to obtain the rights. You should read the contract, and speak with the university attorney about this.

If you record the performance and sell it, the recording would be considered a derivative work. Section 102 of the copyright act (Vol. 17 U.S. Code Section 102) states that your school would own the copyright to the original portion, while the original copyright owner would still own the copyright to the underlying work.

There are four separate provisions of the copyright law that are involved, namely

1. the right of reproduction,
2. the right of performance,
3. the right to prepare derivative works, and
4. “mechanical rights” which involve physical recreations of a work, such as each copy of a DVD.
According to Vol. 17 U.S. Code Section 106, the copyright owner has the right to restrict reproductions, public performances, and the preparation of derivative works. In most cases, the licensing agreements for plays and musicals grant the right to publicly perform the work, but not the right to reproduce it or to prepare derivative works.

In some cases, the agreements will also contain a limited number of public performances. Each time the recording is played, this is considered to be a performance. If the licensing agreement contains such a clause, you will be limited in the number of public performances, and would be barred from selling the recording.

The limitations on public performance do not mean that you can't record the musical and show it to the students who are involved. Nor does it prevent you from placing a copy of the musical in the library and checking it out to students. These uses would fall within the Fair Use provisions of the copyright act. However, selling the performance to the public might be more problematic.

In other words, it depends on the language and scope of the contract that you signed when you licensed the play.

**19. Where can I get further information on copyright law?**

Go to the library's Intellectual Property website at http://libguides.wku.edu/intellectual-property. There are links to major Websites on copyright, trademark, patent law, and international intellectual property resources. There are also links for finding news and articles on intellectual property. The website also includes links to the WKU Intellectual Property Policy, as well as various offices on campus that deal with intellectual property issues.
References


