



COPYRIGHT ESSENTIALS

What Educators Need to Know in Today's Remote and Hybrid Learning Environments

With the massive shift to fully remote or hybrid learning, educators have been challenged to provide an engaging experience for learners and try to maintain some semblance of the traditional in-person classroom environment. For remote instruction, educators rely on the ability to share materials digitally via online platforms like Zoom and Google Classroom, and learning management systems such as Blackboard Learn, Canvas, and Seesaw. But sharing materials with students digitally may require different copyright permissions than in-class usage — and it's not always clear exactly when or how to obtain these rights.

Here are some basic copyright essentials that will make it easier for educators to navigate both fully remote and hybrid learning environments and minimize disruption of the flow of critical information to engage and teach students.

What is copyright?

By definition, copyright is the exclusive right of a creator to make copies and derivatives of their original creative works, such as books, photographs, maps, videos, etc. Not only does copyright protect the rights of the creator, but it also promotes creativity and learning by creating a clear path for users to copy, make derivatives of, and reuse that content.

How do you get permission to use copyrighted works?

Copyright permission can typically be obtained through an author, their agent, or their publisher. Many rights can also be obtained through collecting societies for different media, including reproduction rights organizations (RROs) for text, such as Copyright Clearance Center (CCC). Copyright-compliant custom course materials providers such as XanEdu will typically handle permission needs on your behalf, for both print and secure digital use. Some materials, such as Open Educational Resources, can be published under a so-called "open license," such as those promoted by Creative Commons. These materials can be used under the license terms without seeking additional permission.

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Whether materials are used by individual permission or under a Creative Commons license, it's important to maintain good records of your sources and permissions. Failure to do so can create liability and compliance headaches and can also cost schools extra money if they pay for something more than once.

What is fair use?

Fair use is a legal defense to engaging in an activity that infringes on someone else's copyright but for which the user is excused by the law. Determining whether a particular use is fair use is dependent on a number of factors (discussed further below); and to make things more complex, the same activity can be determined to be a fair use — or not — based on the nature of the use and the context surrounding it. If you make a photocopy of a newspaper article for a homework assignment, that is almost certainly fair use. An instructor might also photocopy an article from this morning's newspaper and distribute it to her class under fair use, but if she asks for those copies to be made by a for-profit copy shop, the landscape may shift. The copy shop is likely to need a license because it is a third-party business that would be profiting from the creator's work and has enough time to seek permission. If the article becomes part of a required curriculum for the school, permission for that wide and preplanned use by students and faculty is likely to be needed. And if it becomes required curriculum year after year, the licensing requirement is even stronger.

How do I determine when a use is covered under fair use?

Under the fair use doctrine, someone can ordinarily reproduce limited portions of a work for purposes such as commentary, criticism, news reporting, and teaching. However, there are no fixed rules that say that the use of a specific number of words, a certain number of musical notes, or a certain percentage of a work, is automatically a fair use. And the fact that the user is an educational or not-for-profit organization also does not mean that a use is automatically a fair use. Everything is determined on a case-by-case basis.

Because fair use is a legal defense for engaging in an activity that would otherwise be infringing, it's important to review the four factors courts look at in determining whether to apply fair use to the type of use in question. These four factors, stated in the Copyright Act, are:

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.

Please note that no one of these factors is determinative of fair use; a judge is directed by the law to analyze all four factors individually and then together, possibly giving them different weights depending upon the circumstances, in order to reach a conclusion that a use was or was not a fair use.

The image shows the word 'FIPS' in a large, white, sans-serif font, oriented vertically on the right side of the page. The letters are stacked: 'F' at the top, 'I' below it, 'P' below that, and 'S' at the bottom. The background is a dark blue grid pattern.

As the U.S. House of Representatives indicated in its report on fair use and classroom reproduction leading up to the current Copyright Act, uses are more likely to be fair if they are brief, non-systematic and spontaneous. Regular, repeated uses in classrooms, and required reading for standard curricula, typically require permission. More information about this issue can be found in a helpful document from the US Copyright Office entitled *Reproduction of Copyrighted Works by Educators and Librarians*.

Is “fair use” the same for all types of works?

No, even though the language of the fair use statute is the same. As courts look to “market harm” in evaluating whether a particular use is a fair use, materials created for classroom use, and then copied without permission for classroom use, will ordinarily receive greater protection in a fair use analysis than those not typically used in a classroom.

What impact has the pandemic had on fair use?

When the COVID-19 pandemic first emerged and schools were no longer able to conduct on-site teaching, many educators were forced to begin remote teaching with almost no notice or training. Because of the spontaneous nature of this emergency, it would have been difficult for instructors to obtain all the permissions necessary to use remote learning content. This unique spur-of-the-moment scenario weighs heavily in favor of the fair use exception. That said, many publishers were quick to support educators by granting no-cost broad licenses so they didn’t need to worry about permissions or fair use.

As the circumstances of this pandemic become more normalized and remote learning becomes more planful, fair use analysis factors will likely return to pre-COVID conditions. Educators will no longer be able to rely on the effect of the pandemic on the fair use analysis in the same way they could in March 2020. Going forward, policies will need to be set more methodically by each learning institution so it’s clear to instructors how and when they need to obtain permissions.

What is the TEACH Act?

Signed by President George W. Bush on November 2, 2002, the Technology, Education, and Copyright Harmonization (TEACH) Act was the product of discussion and negotiation among academic institutions, publishers, library organizations and Congress. It provides additional copyright exceptions for use of certain materials in distance learning, subject as well to certain compliance obligations necessary to avail oneself of the exceptions. For example, in order to avail itself of the TEACH Act, an institution must have implemented a reasonable copyright compliance policy. More information about the TEACH Act can be found [here](#).

What are the criteria that must be met in order for the use of copyrighted materials in distance education to qualify for the teach act exemptions?

- The institution must be an accredited, non-profit educational institution.
- The use must be part of mediated instructional activities.
- The use must be limited to a specific number of students enrolled in a specific class.
- The use must either be for ‘live’ or asynchronous class sessions.

The image shows the word "TEACH" in a large, white, sans-serif font, oriented vertically on the right side of the page. The letters are stacked from top to bottom: T, E, A, C, H. The background is a dark blue grid pattern.

- The use must not include the transmission of textbook materials, materials “typically purchased or acquired by students,” or works developed specifically for online uses.
- The institution must have developed and publicized its copyright policies, specifically informing students that course content may be covered by copyright and include a notice of copyright on the online materials.
- The institution must implement some technological measures to ensure compliance with these policies, beyond merely assigning a password. Ensuring compliance through technological means may include user and location authentication through Internet Protocol (IP) checking, content timeouts, print-disabling, cut and paste disabling, etc.

Assuming all of the appropriate criteria are met, what does the TEACH Act enable educators to do within remote learning environments?

The TEACH Act facilitates and enables the performance and display of copyrighted materials for distance education by accredited, non-profit educational institutions (and some government entities) that meet the TEACH Act’s qualifying requirements. Its primary purpose is to balance the needs of distance learners and educators with the rights of copyright holders. The TEACH Act applies to distance education that includes the participation of any enrolled student, on or off campus.

Under the TEACH Act:

- Instructors may use a wide range of text, visual, and audiovisual works in distance learning environments.
- Students may participate in distance learning sessions from virtually any location and do so on either a synchronous (“live”) or asynchronous basis.
- Participants enjoy greater latitude when it comes to storing, copying and digitizing materials.

Note: the exemptions under the TEACH Act specifically do not extend to:

- Electronic reserves, coursepacks (electronic or paper) or interlibrary loan (ILL)
- Textbooks or other digital content provided under license from the author, publisher, aggregator or other entity
- Conversion of materials from analog to digital formats, except when the converted material is used solely for authorized transmissions and when a digital version of a work is unavailable or protected by technological measures

If instructors read books aloud during remote learning, is that covered by fair use?

Under the Copyright Act, performance or display of a work (other than an audio-visual work) by instructors or pupils during face-to-face teaching activities is non-infringing. The TEACH Act sets forth the rules regarding when it is allowed in the context of distance learning.

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Can an instructor use a link to the original source within curricula without infringing copyright?

It depends. If the link directs users to a legitimate, non-infringing copy of the work, it's allowed. But you may not link to online content if that copy is infringing. While it's not always easy to tell the difference, legitimate sites will typically have a connection with the creator or the copyright holder. For example, a New York Times article on the New York Times website is going to be lawful, while the same article on a file sharing site or random website is likely to be an infringing use itself and the link to it compounds the infringement.

If an instructor posts a link to a work within an LMS for students to access — rather than a PDF of the work — is that copyright infringement?

It depends. If the link directs users to a legitimate, non-infringing copy of the work, it's allowed. But you may not link to online content if that copy is infringing. Again, look to the legitimacy of the site to determine the difference.

If an instructor gives credit to the creator (i.e., including in-text citations and a references or works cited list), is the instructor allowed to post copyrighted material to an LMS or website without permission?

No. Giving credit is not a substitute for permission.

Is acquiring verbal permission sufficient?

Under copyright law, non-exclusive permission does not need to be in writing. With that said, because of liability issues, you should always carefully document any permission you obtain, even if it is not written. That could simply mean writing a note that documents who you spoke with and exactly what they said regarding permissions. It's also good to confirm by email or other means, if possible.

If a teacher creates a curriculum, is it really owned by the employer (the school)?

A work created within the scope of employment is typically owned by the employer. However, in an academic setting, districts will often set a policy regarding rules on ownership of curriculum created by teachers. In such a case, teachers should refer to that policy.

Does a teacher own the rights to the content he/she created outside of the school day?

Under copyright law, works created outside the scope of employment are owned initially by the creator. However, teachers should always refer to the district's policy.

Can an instructor reuse images found on Google?

Images on the web are protected by copyright, and photographers are known to be active in protecting their rights. Images will often have licensing information, photo credit, or some way in which the image copyright owner can be contacted for permission to reuse. Unfortunately, many people reuse photos online without permission and remove ownership and licensing information. As such, you cannot rely on the absence of licensing information as an excuse to use images.

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What is the public domain?

Works in the public domain can be freely used by anyone without restriction. They include works of the U.S. federal government, works published in 1925 or earlier (as of January 1, 2021) and works published after 1925 that failed to comply with certain formalities under older copyright laws. Note that recent translations or adaptations of older works may be protected by copyright even if the original works are now in the public domain.



Copyright Clearance Center (CCC) builds unique solutions that connect content and rights in contextually relevant ways through software and professional services. CCC, with its subsidiary RightsDirect, collaborates with customers to advance how data and information is integrated, accessed, and shared while setting the standard for effective copyright solutions that accelerate knowledge and power innovation. CCC is headquartered in Danvers, Mass. with offices across North America, Europe and Asia. To learn more about CCC, visit www.copyright.com.



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