

# Rutgers University Copyright Guidelines for Online and Hybrid Teaching

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*These guidelines have been prepared for the use of instructors university-wide.*

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When using copyrighted works for online and hybrid teaching, including for an Online program, instructors have a number of **access options** and a number of **legal options**. Certain **considerations** discussed below are intended to guide instructors in making copyrighted material available to students.

## **Access options:**

### ***Displaying or performing works in the physical classroom***

*Displaying or performing works (text, images, musical, audio, and audiovisual works) during a class session in face-to-face teaching is permitted, provided that audiovisual works displayed or performed in the physical classroom have been lawfully made.*

Under the exception in Section 110(1), in a classroom or similar place devoted to instruction in a nonprofit educational institution, it is permissible to display or perform any work, even in its entirety, provided that when using a motion picture or other audiovisual work, the copy used has been lawfully made. Pirated versions must not be used.

This exception only covers physical classroom use for viewing and listening. It does not cover reproduction and distribution of materials as handouts or assignments, use in course management systems, or e-reserve. For streaming of audiovisual works other than in physical classroom, please see section on "Streaming audiovisual works" below.

### ***Providing electronic access of course materials to students***

*For reproducing, distributing, displaying, or performing works (text, images, musical, audio and audiovisual works) electronically as reading assignments, illustrations, or source materials, there are a number of options.*

- To link to, rather than copy, works available online, such as to content lawfully posted on YouTube. This is the recommended means of making material available to students because it is easy and involves the least amount of legal or budgetary concern. Links should only be made to lawful material.
- To place electronic versions of the material in the course management system. This involves a license review or a fair use assessment, or both, by the instructor.
- To place the material with Rutgers University Bookstore for compilation as a digital coursepack. The Bookstore will obtain copyright permissions and the costs will be passed on to the students in the cost of the coursepack, <http://www.facultyenlight.com/?storeNbr=660#create-coursepacks>.
- To place electronic versions of the material in the Rutgers University Libraries e-reserve system, [http://www.libraries.rutgers.edu/rul/lib\\_servs/course](http://www.libraries.rutgers.edu/rul/lib_servs/course). This involves a license review or a fair use assessment, or both, by the instructor.
- In the case of audio and audiovisual works, to make use of the Rutgers University Libraries Streaming Media Clips for Reserves Service or Clips from Analog Tapes or DVDs Service, for compilations of short clips, <http://www.libraries.rutgers.edu/rul/lib/media/services.shtml>.

## Legal options:

- To use works and resources licensed by Rutgers University Libraries, for which the licenses (typically viewable as "terms and conditions" or "terms of use") permit such use.
- To use other Internet resources for which the online licenses (typically viewable as "terms and conditions" or "terms of use" on websites) permit the use.
- To use open access materials that have been made available under terms that permit the intended educational use.
- To use one's own content, for which copyright was retained by the instructor or for which the instructor has retained rights for educational uses even if copyright was transferred to another entity.
- For non-licensed works, to make an assessment as to whether the fair use limitation in copyright law might justify the use without prior permission or payment of a royalty. If the use exceeds what would be considered fair, the instructor should either use alternate material or obtain permission.
- To obtain permission from the copyright holder if the use is not permitted under a license or if the use exceeds what would be considered fair (payment might be required, with costs covered by department or instructor).
- To obtain permission using the Copyright Clearance Center Get Permission Service which secures copyright permissions for a fee (costs covered by department or instructor), <http://www.copyright.com/content/cc3/en/toolbar/getPermission.html>
- To order a digital coursepack from Rutgers University Bookstore that will obtain permissions using the Copyright Clearance Center (costs passed on to students in the cost of the coursepack).
- Additionally, an option is to use *public domain materials* that do not implicate the rights of copyright holders.

## Putting it all together: considerations in selecting material and making it available

In selecting copyrighted material for use in courses, the following considerations should guide instructors' decisions. A primary consideration is whether the material being used is subject to a license or is not subject to a license. Special rules for streaming audiovisual works are discussed below.

### Consideration No. 1: Whether the work being used is subject to a license

#### *Licensed works*

Most material found online is licensed and is governed by the terms and conditions of the license, a form of contract. Because contract law prevails over copyright law, the terms and conditions of the license prevail over a direct application of copyright law.

- If the work is in electronic format in a licensed database made available by Rutgers University Libraries, the terms and conditions of the end user license agreement apply.
  - The best option is link to the work through a permanent URL rather than copy it to a secondary access mechanism (course management system or e-reserve). Students with NETIDs may access the work directly from the RUL database.
  - If the instructor wishes to copy/download the work and to place it in a secondary access mechanism, the instructor needs to read the end user license agreement, typically readable by clicking on "Terms and Conditions" or "Terms of Use" or "Copyright" on the database site. Read the terms and conditions, or terms of use, carefully. They will indicate whether the work may be reproduced or downloaded for educational purposes and whether the licensor permits use of the material through secondary access mechanisms. Please comply with the online license.
- If the work is otherwise available online, it is likely governed by a mass-market online license. Terms and conditions of the online license agreement apply.

- The best option is link to the work rather than copy it to a secondary access mechanism (course management system or e-reserve).
  - If the instructor wishes to copy/download the work and to place it in a secondary access mechanism, the online license is typically readable by clicking on "Terms and Conditions" or "Terms of Use" or "Copyright" on the website. Read the terms and conditions, or terms of use, carefully. They will indicate whether the work may be reproduced or downloaded for educational purposes and whether the licensor permits use of the material through secondary access mechanisms. Please comply with the online license.
- In both cases, if a reference to "fair use" in the terms and conditions indicates that the license agreement has incorporated the fair use limitation, the instructor should assess the fairness of the use as is done with unlicensed material, as explained below.

### *Unlicensed works*

Print material and other analog material generally is not made available under a license, and thus is generally subject directly to copyright law. Consider the legal and access options above for unlicensed material. In assessing whether fair use may apply to use of works, the following considerations will be helpful.

### **Consideration No. 2: The fair use limitation for unlicensed works**

Limitations and exceptions in copyright law provide for a balance between the rights granted to authors and copyright holders, on one side, and those of people seeking to use their works, on the other. A number of limitations and exceptions in U.S. law enable uses of copyrighted works without prior permission or payment of a royalty. One of these is fair use.

The fair use limitation in Section 107 of the copyright law is perhaps the most important exception for educational institutions. It is also the most difficult to understand. Unlike other exceptions, it does not provide specific instructions. It is a general exception intended to provide flexibility for interpretation of the law, by a court, in specific cases if a use is challenged by a rightsholder. The key to understanding fair use is in understanding that it does not define up front what exact uses may be made of a work and what uses would be infringing. The law does not state exactly the amounts or extent of third party works that may be used in keeping with fair use. The fairness of uses is determined by judges in court actions. Outside of litigation, the fairness of uses may only be anticipated by faculty, students, and staff by using reasonable judgment.

The fair use limitation establishes that certain uses may be found not to be infringing, for purposes including criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research, based on four factors. The four factors are:

- Purpose and character of the use
- Nature of the copyrighted work
- Amount and substantiality of the portion used in relation to the work as a whole
- Effect of the use upon the potential market for or value of the work

Fair use assessments are made on a case-by-case, work-by-work basis because the circumstances surrounding each work and its use are different in each situation.

Weighing for fair use are situations when the

- *Purpose* involves education, research, criticism, comment, news reporting, transformative use, parody, non-commercial use.
- *Nature of the work* is published, factual, informational, nonfictional.
- *Amount used* is a small portion, a small quantity, or part that is not the "heart of the work."

- *Effect on the market or potential market for the work* is not to interfere with the market, replace a sale, harming the interests of the rightsholder.

Weighing against fair use are situations when the

- *Purpose* involves commercial use, entertainment, non-transformative use.
- *Nature of the work* is unpublished or highly creative.
- *Amount used* is a large portion, large quantity, or the "heart" of the work.
- *Effect on the market or potential market for the work* is to interfere with the market, replace a sale, harming the interests of the rightsholder.

One of the most helpful resources for understanding fair use is the Fair Use checklist created by noted copyright attorney Kenneth Crews, <http://copyright.columbia.edu>.

### The sliding scale of fair use

Restricting access of a work to the specific needs of the teaching purpose makes the fair use assessment stronger. Less is often more. The following measures are important when preparing online and hybrid courses. This section does not apply at Rutgers to streaming audiovisual works.

- **Limit the amount used.** Reasonable, limited, educational, scholarly uses of materials weigh toward fair use. Using an amount appropriate to the purpose and tied to critical analysis will weigh toward fair use. Using excessive amounts of a work beyond what is needed for the educational purpose may weigh against fair use. It is sometimes difficult to justify fair use for large portions of works or for entire works. For example, Rutgers University Libraries does not hold that fair use applies to entire books or to entire journal issues in e-reserve. For graphical works (photographs, illustrations, images, cartoons) typically the whole work is needed. Using low resolution copies and thumbnails is a way of limiting the amount used.
- **Provide access only to students in class, and consider the size of the class.** A basic rule in making course materials available to students is to limit access to the enrolled students. There is no need to place course materials on the open Internet. Please do not post course materials on open websites unless you are the copyright holder. The size of the class may be an additional factor; there is a difference between using materials for a class of five and a class of five hundred. For example, it is widely accepted that for massive open online courses (MOOCs) that enroll large numbers of students, use of copyrighted works is rarely justified as a fair use.
- **Provide access only for the term of the class.** Please ensure that course materials are disabled at the end of a class term. Repeated, extended use of the same works from semester to semester may alter the fair use assessment and require reconsideration as an activity justified under fair use. It is important to consider frequency and extent of use. This factor of "aggregation" is an important consideration for Online courses that extend beyond a single semester and involve re-use of the same course material over time. Use of the same photocopied or scanned material in multiple courses or for long-term use triggers a more careful assessment and may require permission.
- **Discourage further distribution.** Please discourage students from further distribution of course materials beyond the class. This may be accomplished by informing students about copyright law and inserting this notice on the class syllabus and on copies of the course materials: "This material is subject to the copyright law of the United States (Title 17 U.S. Code) and is for the use of students in [Course 101] only. Further reproduction or distribution is prohibited."
- **Avoid using material in a way that substitutes for textbooks or "consumable" workbooks, or for works marketed for online education.** When use of copyrighted works directly conflicts with an educational market, the use is far less likely to be considered fair. Please avoid using material to substitute for textbooks or consumable workbooks, and avoid using materials that were produced or marketed as educational products primarily for digital instructional activities.

- **Assess the availability through purchase or licensing.** When copyrighted materials are in still in print and being marketed, and/or when a licensing mechanism is available for use of the copyrighted work, the fair use argument may be weakened because the use conflicts with a market for the work. Consider the following additional factors in the assessment: whether the work is available for purchase, and whether the work is available through a license. The date of publication and the publisher may also be considered. Recent works by commercial publishers or content producers raise more questions, for example, than older works that are no longer commercially available or available under a license, and for which rightsholders are no longer in business.
- **Always provide attribution.** When reproducing materials for use in the course management system or through e-reserves, please provide a full citation on the copy.
- **Use works lawfully.** Make a good faith effort to ensure that works used in online and hybrid courses are lawfully made, lawfully acquired, and/ or lawfully made publicly available.

### **Consideration No. 3: When the license does not permit the use or the use exceeds a fairness assessment**

The Rutgers University Copyright Policy encourages members of the university community to be responsible users of copyrighted works and to take full advantage of fair use rights in their research, teaching, and service activities, <http://policies.rutgers.edu/PDF/Section50/50.3.7-current.pdf>. But if the use is not permitted under a license or if it the use exceeds what would be considered fair, the instructor should consider either using alternate material or obtaining permission for the use.

### **Consideration No. 4: Streaming audiovisual works**

Rutgers guidelines on streaming audiovisual works are based on legal counsel's interpretation and opinion of current law.

- Generally streaming of audiovisual work in online and hybrid courses is permissible if:
  - The audiovisual work is in the public domain
  - The copyright holder has given permission
  - The instructor is the rightsholder
  - The audiovisual material is licensed for use and license clearly allows for the use
  - Online terms and conditions allow for the use and the material has been lawfully made and lawfully made publicly available
- For other situations, Rutgers does not authorize streaming entire audiovisual works in the course management system, on e-reserves, on websites, or elsewhere without permission or a public performance/ streaming license. Costs for such licenses, as with other types of permissions, would need to be covered by departments or instructors.
- Other options are available to instructors that are becoming popular nationwide as universities and colleges expand their online and hybrid courses:
  - **Students use personal online streaming services.** Instructors may suggest that students view films on Amazon Prime or Netflix as one-time views or through personal subscriptions. This is an inexpensive option, considered to be the equivalent of purchasing an inexpensive textbook.  
  
For audio works, a similar array of online music streaming services is also available as an inexpensive alternative.
  - Rutgers University Libraries offers services for creating compilations of short audio and film clips for use in line and hybrid teaching. See <http://www.libraries.rutgers.edu/rul/libs/media/services.shtml>:
    - Streaming Media Clips for Reserves Service
    - Clips from Analog Tapes or DVDs Service
  - **Link to lawful content on YouTube.** YouTube is a source both of content that has been lawfully made and made publicly available and of unlawful content. When using YouTube

for courses, instructors should make a good faith effort and a common sense judgment to determine that content has been lawfully made and posted. In addition, because the YouTube online license restricts uses to individuals for "information and personal use," it is recommended that instructors link to YouTube rather than copying videos to the course management system.