**Copyright During the COVID-19 Pandemic**

The California State University respects the intellectual property rights of others and recognizes that complying with federal copyright laws is important to the success of our faculty and the CSU's educational mission. The COVID-19 pandemic has raised many questions about the permissible use of materials and content as campuses have migrated courses that were traditionally taught in-person to a virtual format. Faculty are understandably concerned about how to best use their course materials in this new digital format, including works from third parties that may be protected by copyright. While many of the same rules that apply to in-person instruction also apply in a virtual format, it is important to be mindful of the copyright principles summarized below that are particularly relevant to virtual instruction.

There are several exceptions to the Copyright Act that may allow faculty to use some copyrighted materials created by third parties in their educational content. These include the Fair Use exception and the TEACH Act (Technology, Education, and Copyright Harmonization Act of 2002), also known as the Distance Learning exception. Although not discussed here, there are additional exceptions for in-person instruction under the Classroom Use Exception.

Brief summaries of the Fair Use exception and TEACH Act (Distance Learning exception) are provided below; however, the application of these exceptions is not always straightforward and the best practice is to obtain permission from the owner of copyrighted materials before using them or to use materials in the public domain whenever possible. If you have any questions about whether the use of copyrighted materials is permissible, please contact your appropriate campus resources or University Counsel.

**Fair Use**

The Fair Use exception is a limitation on the exclusive rights provided to creators and authors of content under copyright law. It specifically allows for the use of copyrighted materials, within limits, for purposes of criticism, comment, parody, news reporting, teaching, scholarship or research. When determining if a use qualifies as Fair Use, you must consider the following four factors:

- the purpose and character of the use, including whether the use is commercial in nature or for non-profit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

While all four factors must be analyzed and no one factor is more important than another, for purposes of translating content to a virtual format during this pandemic, the two factors that will require the most analysis are the amount and substantiality of the work used and the effect of the use on the copyrighted work. Faculty must consider:

- how much of the copyrighted work they intend to use (even using 10% of a work can be too much if you use the "heart" of the work);
- the 10%, 1 chapter, or 1000 words rule of thumb does not work and has been repeatedly held to be invalid;
- whether they intend to use more of the copyrighted work than truly needed for their educational purpose;

- whether the use of the work could impact the ability of the creator to license or sell the work;
- whether the work you are creating competes with the original; and
- whether the original is available for license.

**TEACH Act**

Under the TEACH Act (Distance Learning exception), faculty may use copyrighted materials for online or distance learning without infringing another's copyright if all of the following requirements are met:

- the copyrighted materials must be provided at the direction of or under the supervision of an instructor (i.e., they are not to be distributed to students for self-study);
- the copyrighted materials must be an integral part of the course curriculum (i.e., if asked, the instructor should be able to explain why the specific materials are used and how they relate to the educational programming);
- the amount of copyrighted material used must be comparable to what would typically be shown in a live classroom setting (e.g., not what the students would be recommended to review on their own, or an entire chapter if you would only cover a paragraph or page in class);
- students must be provided notice that the materials used are subject to copyright protection;
- only those enrolled in the course may have access to the copyrighted materials (i.e., the online course must be closed to anyone not enrolled in the class rather than being accessible to the general public);
- the University may display or perform the entirety of non-dramatic literary or musical works (e.g., poetry and short story readings, and all music other than opera, musicals, and music videos) or no more than reasonable and limited portions of any other types of performance (including audiovisual works, plays, opera, musicals, and other dramatic musical works); and
- importantly, use of the following copyrighted materials online without an appropriate license is not permissible: 1) course packs; 2) entire textbooks; 3) digital materials designed for online uses; 4) works that are not lawfully obtained; and 5) print or analog materials converted to digital formats, unless no digital version is available.

**FAQs**

1. Will posting material online or in a virtual classroom impact any rights I have in the course materials?

   No, posting materials online for use in a virtual class does not impact any rights that you may have in the course materials.

2. Can I copy an entire textbook and make it available to my students for my online and/or virtual classroom course?

   No, copying an entire textbook would generally fall outside the limits allowed under the Fair Use doctrine or the TEACH Act (Distance Learning exception). You can, however, copy limited portions of the textbook for use by students and make it available online.

You can also check with the campus library to determine whether the campus has a license for electronic copies of any textbooks or for assistance in obtaining any licenses.

3. I would normally show an entire movie as part of my in-person class instruction. Am I allowed to show that same movie now that my class has moved to a virtual format?

   Showing an entire movie in a classroom where instruction takes place with enrolled students physically present, and the film is related to the curricular goals of the course, is generally legal, so long as the movie was obtained lawfully (i.e., rented or purchased). But for online instruction, you will need to evaluate the four Fair Use factors to determine how much of the particular book, movie or other copyrighted work you may use, as showing an entire movie online is generally not considered Fair Use. Additionally, under the TEACH Act (Distance Learning exception), you can display or perform reasonable and limited portions of movies and other works.

4. Can I make materials available online to my students (e.g., an entire book or large sections of a book or movie) for them to study on their own?

   Under the TEACH Act (Distance Learning exception), you may not make materials available to students to study on their own outside of the virtual class. Therefore, you need to evaluate the four Fair Use factors to determine how much of the particular book, movie or other copyrighted work you may make available to students for independent studying.

5. Can I use the same materials in my virtual classroom that I would use when teaching in-person?

   Generally, yes, though special consideration should be given to how much of any third-party created materials you are using, whether the students are using the materials for self-study or as part of a lecture, and whether the use would fall under fair use or the Distance Learning exception.

6. Can I use an image I found on the internet on a slide in my virtual lecture?

   Faculty are strongly encouraged to use images in their teaching materials that are either their own, or within the public domain. While use of a single copyrighted image in a presentation may constitute Fair Use, making the slides available to the public (i.e., individuals not enrolled in the class) may increase the likelihood of an infringement claim.

   Public domain materials may be found at a variety of sites, including: Project Gutenberg (gutenberg.org); Project Bartleby (bartleby.com); The Universal Digital Library (ulib.isri.cmu.edu); Federal Government Materials (gpo.gov); Free Music Archive (freemusicarchive.org); Mutopia Project (mutopiaproject.org); Open Music Archive (openmusicarchive.org); Musopen (musopen.org); Flickr Commons (flickr.com/commons); Pixabay (pixabay.com); and Pixelrockstar (pixelrockstar.com).

7. I am concerned that if I upload course materials to a virtual learning platform that others may copy the materials and post them to other websites. Are there any steps I can take to help prevent this?

   We strongly encourage faculty posting course materials in a virtual classroom to notify students that the materials are subject to copyright protection and may not be copied, posted or otherwise distributed to third parties without consent. Faculty should tell

students that they are authorized to take notes and make copies of course materials for their own use, or to share with another student who is registered and enrolled in the course. To discourage copyright infringement and to help third party websites to filter out content belonging to third parties, faculty may also include the following notation on their materials before posting them: "This content is protected by copyright and may not be shared, uploaded or distributed without authorization." If you find that your material has been uploaded without your authorization to internet websites, like Course Hero, you can assert your copyright by sending a takedown notice to the website owner.

8. Can I use short clips of audio or visual materials in my virtual lecture?

   Yes, using short clips of audio or visual materials in a lecture (including in a virtual classroom) is typically considered fair use. Entire works, such as books, movies or articles, should typically not be included as part of the lecture materials without an appropriate license.

9. Can I link to materials in my virtual course materials for students to access on their own?

   Yes, linking to third-party websites that are authorized to host the copyrighted materials is one of the best ways to encourage students to access materials outside of class without infringing the rights of others. Copies of copyrighted materials downloaded from these third-party sites, however, should not be uploaded onto the University server or website for the students to access.

10. Are there any other steps I can take to help limit the risk that I will infringe the copyrights of others?

    Yes. While teaching in a virtual format is different from in-person teaching, many of the rules are the same. When in doubt, please contact your campus resources (e.g., Chief Research Officers, Librarians and Campus Counsel) to determine whether a particular use or activity is permissible. It is also a good idea to limit any virtual classroom sessions to only those enrolled in the class to help avoid infringing the copyrights of third parties. This is because some uses of third-party materials are allowed under the TEACH Act (Distance Learning exception) that would not fall under Fair Use, provided that the course is limited to only enrolled students.

11. Does COVID-19 and the resulting need to furnish education in virtual formats change the way the Fair Use doctrine should be applied?

    Copyright law does not contain different rules for use in exigent circumstances like the COVID-19 pandemic. The Fair Use exception has not changed due to COVID-19, and there is no clear-cut legal authority to apply it differently now. In other words, the handful of organizations and websites that have asserted that the Fair Use exception, in times of emergency, arguably may allow for the copying and distribution of entire copyrighted textbooks to facilitate online education are making assertions that have not been validated or authorized by law or the courts. While we hope that many copyright holders will be flexible and understanding during these difficult times, there is still a significant risk that extending principles of Fair Use beyond those traditionally accepted may result in copyright infringement claims.