

**"Can I do that?"**  
**Copyright, Fair Use, and NJIT faculty and staff**

The **Fair Use** provision of the copyright law allows you – an **NJIT faculty or staff member** -- to use copyrighted works in your digital courses (e.g., courseware, course modules, web sites, and so forth for e-Learning or face-to-face "augmented" courses).

**Fair Use** evaluates:

- (1) the **purpose and character** of the use, including whether such use is of a commercial nature or is for nonprofit;
  - (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.
- Fair Use is **purposefully vague** (it essentially says "the amount must be considered" **without** spelling out "10% is OK" or "five minutes is safe" or "20 pages is allowed")
  - Fair Use calls for a **case-by-case analysis** (all four tenants must be explored and **weighed together** in light of the **total argument** and in the context of the use; **no one tenant** automatically "sinks the ship")

**Generally,**

- IF . . . your use is for an **NJIT course** . . . you have an argument in favor of the **purpose and character** tenant
- IF . . . your use is **password protected or encrypted** . . . you have an argument in favor of the **effect** tenant
- IF . . . your use **cites** the work and **states** your use is covered by Fair Use . . . you have an argument in favor of the **effect** tenant
- IF . . . your use is a **low-resolution** copy . . . you have an argument in favor of the **amount and substantiality** tenant
- IF . . . your use is limited to **portions** of works (e.g., a chapter from a book, instead of the whole book; video clips, instead of the whole film; selected journal articles, instead of every article from a journal or every article by the principal author) . . . you have an argument in favor of of the **amount and substantiality** tenant

Of course, in our modern world, anyone may file a lawsuit against anyone at any time. And reasonable people can look at the same facts and still come to **reasonably different interpretations and opinions**.

You are encouraged to seek **university counsel** if you have doubts about creating or teaching your courses.

Nonetheless, higher education has **not yet** seen a case in which a university professor was taken to court by a publisher over digital documents or files provided to students in that professors course. And, Section 504(c)(2) of the Copyright Act protects univesity and faculty from being liable for damages when they use Fair Use.

**TEACH ACT** (Nov 2002) -- The TEACH Act specifically addresses copyright in **Distance Learning** environments. The TEACH ACT replaces Section 110 (1) and (2) of the 1976 Copyright Act that previously addressed Distance Learning only in the very narrow context of cable television.

The TEACH ACT **explicitly allows** many activities essential for distance learning, but also **places limits** on those allowances and **explicitly requires** certain other concessions from the university:

- digital copies may be made of analog works, but only where no digital work is already available (e.g. from a publisher)
- delivery of distance learning is no longer limited to classrooms, but may now be delivered to home and offices (indeed, anywhere)
- universities must establish university-wide copyright policies and distribute university-wide copyright information
- universities must take technological steps to limit and protect digitized works

In these early days after the adoption of the TEACH ACT, it is too early to see how potentially **conflicting elements** of the Fair Use provision and the TEACH ACT will shake out.