

## Copyright & Fair Use

### Nonprofit/For Profit Educational Institution Statutory Comparison for the Use of Traditional Copyright Protected Works

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#### Exclusive Rights of Copyright Owners 17 U.S.C. §106

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1. Reproduce copyright protected work.
2. Create derivative works.
3. Distribute the work.
4. Publicly perform the work.
5. Publicly display the work.

Copyright owners possess exclusive not absolute rights. Users' rights are highlighted below. Users' rights vary depending on a variety of factors including their nonprofit or for profit status.

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#### Rights of Nonprofit Educational Institutions in Face-to-Face Classrooms 17 U.S.C. §110(1)

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As long as the copies used were lawfully obtained, and are being used for educational (not entertainment ) purposes, faculty members may:

1. Show videos and films.
2. Perform and listen to musical or other recordings.
3. Perform or show a play.
4. Show slides, photographs, charts, tables, graphs or other images.

**For profit institution solution:** Because these rules apply only to nonprofit educational institutions, faculty members at for profit educational institutions must get permission to use such materials and pay any required royalties or licensing fees. If the materials are in the library at a for profit educational institution, the library may already hold a license permitting this type of use.

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## Rights of Accredited Nonprofit Educational Institutions in Distance Education TEACH Act – 17 U.S.C. §110(2) & §112

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As long as the copies used were lawfully obtained, are being used for educational purposes and are comparable to that used in-class in an on-campus course (i.e. the TEACH Act does not apply to homework or other out of class assignments), faculty members may:

1. Transmit up to entire performances of non-dramatic literary and musical works (e.g. everything but operas, musicals and music videos).
2. Transmit any other performance as long as the portions transmitted are limited and reasonably tailored to the educational purpose.
3. Transmit the display of any other work as long as it is comparable to that typically used in face-to-face instruction.

**Unaccredited institution solution:** Because these rules apply only to accredited nonprofit educational institutions, faculty members at unaccredited educational institutions must get permission to use such materials and pay any required royalties or licensing fees. If the materials are in the library at an unaccredited educational institution, the library may already hold a license permitting this type of use.

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## Fair Use Rights of Both Nonprofit & For Profit Educational Institutions 17 U.S.C. §107

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The fair use rules apply to both nonprofit and for profit educational institutions. When a use qualifies as a fair use, a faculty member does not need to obtain permission or pay any royalties or licensing fees to use the copyright protected work (as long as the copy being used was lawfully acquired or accessed).

For a use to qualify as a permitted fair use, the use must be *both* for a fair use purpose *and* satisfy the fair use factors. As specified in the language of the statute, fair use purposes include: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” The teaching, scholarly and research activities of faculty members at both nonprofit and for profit educational institutions meet this requirement. Evaluating the fair use factors is less straightforward. The four factors are:

1. The purpose and character of the use.
2. The nature of the work used.
3. The amount and substantiality of the portion used.
4. The impact of the use on the market for and value of the work used.

Without going into a detailed analysis of the four factors, for the purposes of comparing nonprofit and for profit educational institutions, factor one is where the difference lies. Both nonprofit and for profit institutions provide students with an education, so from that perspective, the purpose or character of the use is educational which weighs in favor of fair use. For nonprofit institutions, their status as non-commercial entities further weighs in favor of fair use. Obviously, the same is not true of for profit educational institutions. For profit educational institutions are both educational and commercial entities. Consequently, the purpose and character of the use is mixed which means it does not as clearly and neatly weigh in favor of fair use. As a result, while fair use is available to for profit educational institutions, most experts agree that greater care is in order when utilizing it in such environments.

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### Remitting Damages for “Innocent” Infringements in Nonprofit Settings 17 U.S.C. §504©(2)

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Judges can remit certain damage awards (i.e. reduce them) when a copyright infringement occurs **if** the infringement was based on the reasonable though mistaken belief that the use qualified as a fair use. Judges have this authority **only** when the infringer is an employee of a “nonprofit educational institution, library, or archives.”

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### Practical & Pragmatic Alternatives

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This comparison of the application of the rules of copyright and fair use law in nonprofit and for profit educational institutions applies to the use of copyright protected materials that are available for purchase or licensing. However, there are other options.

1. Make your own. Copyright law protects the expression of an idea, not the idea itself. So create your own version of the materials and you can use that as you wish. Just make sure you properly cite your sources to avoid plagiarism problems.
2. Use public domain resources. By definition, public domain resources are not protected by copyright law and can be used by anyone.
3. Use open access materials. Open access materials are available at no cost to anyone. Do remember that open access materials are copyright protected but the owner choose to distribute them via an open access network. So, make sure you properly cite your sources.
4. Use the library. Your librarians can help you figure out what is and is not permitted. This will be in part due to the licenses under which your library acquired its collection and in part a function of institutional policies and procedures.