

# Copyright and Intellectual Property at Macalester

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## Introduction to Copyright at Macalester

Most copyright conversations start with one of these two questions:

- [Can I use this?](#)
- [What do I own?](#)

This website is a first step to providing guidance to you in answering these questions.

In addition, your Librarians and Academic Information Associates offer one-on-one and small group consultation on topics related to rights and intellectual property issues in research and publishing. Librarians also offer workshops on request and can visit classes, labs, or research teams for training or discussion of copyright issues in-person, or via video with Macalester College faculty, staff, students, and other members of

our broader community. We can't give legal advice, but we can provide information to help you understand the legal landscape, and discuss common approaches to similar topics.

Common consultation topics:

- Basics of copyright law: copyrightability; rights and responsibilities; who owns what
- Project or research planning: what can be copied; what can be shared?
- Educational and classroom use questions: fair use and additional useful tools
- Publishing: negotiating author rights; permissions; fair use in published works
- Alternative models in publishing: open access; open educational resources
- Alternative options for promoting and protecting content: Creative Commons and open source licensing

As noted above, this guide presents information about copyright law. Macalester College makes every effort to assure the accuracy of this information but does not offer it as counsel or legal advice. Consult an attorney for advice concerning your specific situation.

## Can I use this?

### In the Classroom

#### Sharing Text-Based Course Materials

Instructors share course materials with students online, via Moodle or other password-protected course web sites, and by handing out materials in class. Most of the copyright issues involved are similar, whether you are working with online or physical copies of text-based materials.

#### **The EASIEST OPTION - Don't Make Any Copies!**

Copyright issues with course materials usually arise because you're *making copies*. Make life easy on yourself and your students by not making copies.

How can you share course materials without making copies?

- When the readings are publicly available online, linking to them is always ok.
- When the readings are available online via a college subscription, link to them. Look for a "Permanent Link" or "Permanent URL" (or PURL) to add them to your course site, or contact your AIA or Librarian for help. You can also share citations for the readings with the students and collaborate with your Research & Instruction Librarian to teach students to use the citations to find the readings using campus resources.
- It is sometimes possible for the library to purchase access to multi-user ebooks of items you wish to assign for your course. This is not usually available for straight-up textbooks, but can be an option for other books assigned as course readings. Check with your Librarian to find out what options are available.
- Have students access their own copies, or watch or listen to video or audio via personal accounts.
- Put books or journal issues containing the readings on reserve (physically) in the library.

## **Other Options**

If you have to make copies to share course materials with your students, you will have to think about whether such copies are already permitted by law, or whether you will need permission from (and usually payment to) the copyright holder.

## **Fair Use**

Fair use is a provision in the law that allows some copying without permission or payment. It is sometimes legal to make fair use copies of materials for students in a non-profit instructional environment; the text of the relevant statute mentions "multiple copies for classroom use." It is also true that not all non-profit instructional copying is a fair use.

At Macalester College, faculty and staff are trusted to make their own reasonable and informed choices about fair use which requires knowing something about how fair use works. Your Research & Instruction Librarians can help you sort through the various options for resource access, including fair use.

## **Permissions**

Sometimes, there is no way to get students to a reading without making copies, and fair use doesn't seem to apply to the copying. Then, you may need permission to make the copies or you may choose to find alternative course materials.

Library staff can help you obtain permissions for course materials for Macalester courses. There may be fees involved, so please reach out early to think through the best options.

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## **Sharing Student Works in the Classroom**

Student works that are created as part of course assignments at Macalester College are, as a general matter of law, the intellectual property of the students who create them. As part of the educational mission of the college, student works may also sometimes be used for confidential assessment purposes outside of the classroom.

Faculty may ask students to share their works within the class in a variety of ways including bringing copies to class, using Moodle, or private websites as a condition of participating in a particular course. This is best done by making all expectations for sharing clear in the course syllabus. Bear in mind that using publicly available websites and tools such as Facebook Live, YouTube, Twitter, Instagram, or Twitch may present [FERPA privacy concerns](#) in addition to requiring content contributors to give certain copyrights to the platforms. A student who prefers not to share their work in that way should discuss alternate options with the instructor.

There can be some special circumstances that involve student work that might require additional agreements. Some examples include research or projects conducted over a series of course offerings such as some digital projects or ongoing research, or civic engagement projects where the intellectual property transfers to the partner organization. Contact your Librarian or AIA for help planning these kinds of projects and agreements.

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## Using Images in Teaching (online and otherwise)

Images can be powerful teaching tools, as illustrations to support in-class lectures, or for studying concepts outside of the classroom. Some best practices and resources are noted on the [MacDigital web site](#) in addition to the more detailed information here.

### **In-class display from physical copies is usually okay!**

Most of the time, showing things to students in class is okay as there is [a specific provision](#) in the law that allows teachers to display copyrightable materials for students, without limitation, in non-profit, face-to-face, classroom settings. It's not a flexible exception like fair use as it only applies to teachers, and only in specific situations. But it also is not uncertain; you don't have to guess at market harm issues, or how much is an appropriately small amount. Learn more about the [Classroom Use Exemption](#).

Examples:

- Holding up illustrations from a book, or passing books, prints, maps, or other hard-copy images around a classroom
- Using a traditional overhead projector, slide projector, or a document projector to display images

Note: online and distance classes are not covered by the Classroom Use Exemption - it only applies when students and teachers are physically present in the same space. You may well be able to display things for your students, but you'll have to think about it in terms of fair use. The [TEACH Act \(17 U.S.C. §110\(2\)\)](#) does create some rights for teaching uses of copyrightable works in the online environment, but it's more technical with more restrictions.

### **Copying or scanning images for instructional use**

The Classroom Use Exemption, mentioned above, doesn't cover making copies at all; it says you can show a picture from a book, but it does not say that you can scan the picture out of the book in order to put it in a presentation file that you project from your computer. You may be able to copy the pictures from the book in order to use them in class, but if so, it will be because of fair use.

Fair use almost certainly allows some copying of images for instruction, especially in the non-profit context. It's also likely that not all image copying, even in non-profit instructional contexts, falls under fair use. Courts haven't done much to interpret how fair use might apply to instructional use of images, but they have allowed fair use copying of images in other contexts, sometimes even commercial ones, especially when accompanied by criticism or commentary. You can learn more about [general principles of fair use](#), or if you're already familiar with the principles, [think through your specific use](#). If making the copies is a legitimate fair use, then subsequently showing them in class is probably permitted under the Classroom Use Exemption. However, the Classroom Use Exemption does not apply to copies that are not legitimately obtained.

### **Posting images online for student use**

Sharing images online with students, whether embedded in a presentation file (if you distribute Powerpoint files, for example), or as stand-alone images in a learning management system such as Moodle or a password-protected course website, is also usually a question of [fair use](#). Consider if linking to a publicly available image or an image in a licensed online source is an option for your instructional needs.

## **Additional resources on academic image use**

The [Visual Resources Association](#) has produced a very useful "[Statement on the Fair Use of Images for Teaching, Research, and Study](#)". The statement articulates the organization's understanding of fair use principles, but it's not legal advice. It's a bit longer than this website, but very much worth the read for anyone whose teaching is image-heavy. It is also of great value for anyone working with images as the subject of their research, or who wants to include images in published scholarly materials.

The [College Art Association](#) has drawn up a "[Code of Best Practices in Fair Use for the Visual Arts](#)". This has been welcomed by many in the visual arts teaching and research community. It articulates accepted community practices around writing and teaching about art, and goes beyond to fair use issues in making new art, and in archival and museum uses.

The [Association of Art Museum Directors](#) have "[Guidelines for the Use of Copyrighted Materials and Works of Art by Art Museums](#)", which is a welcome document in succession to their groundbreaking earlier principled documentation of fair use issues in visual arts.

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## Using Video and Audio in Teaching (online and otherwise)

Video and audio are increasingly present in our classrooms, and as out-of-class review, learning, and study materials. Some best practices and resources are noted on the [MacDigital web site](#) in addition to the more detailed information here.

### **In-class performances or display from physical media are usually okay!**

Most of the time, showing things to students in class, or performing things with or for students in class at Macalester College is totally okay - there is a [Classroom Use Exemption](#) in the law that allows teachers to perform or display things, without limitation, in non-profit, face-to-face, classroom settings. If not for this exception, classroom activities could be public performances or displays that might require payment and/or permission.

- Examples:
  - Singing a song that all the students already know
  - Playing or singing from sheet music (legitimate copies, i.e., fair use/purchased/rented, only)
  - Watching a video (in whole or in part) from a DVD or VHS tape
  - Listening to music from a CD, tape, or record

The Classroom Use Exemption is not a flexible exception, like fair use. It only applies to teachers, and only in specific teaching situations, but it is also not at all uncertain - you don't have to make a judgement of market harm issues, or how much is an appropriately small amount.

Note: online and distance classes are not covered by the Classroom Use Exemption - it only applies when students and teachers are physically present in the same space. The [TEACH Act \(17 U.S.C. §110\(2\)\)](#) does create some rights for teaching with of copyrightable works in the online environment, but it's more technical with more restrictions.

## **What about streaming media?**

Unfortunately, a lot of the media we use in real life today present some legal wrinkles that "old school" physical media don't.

### **Online media**

Sites like YouTube and Vimeo have Terms of Service that say they are for personal use only. Some even specifically say they are for personal, non-commercial use. Subscription services like Netflix, Amazon Prime, and others also have Terms of Service, almost all of which also limit use to personal and/or non-commercial use. Some have even more specific limitations than that. It's unclear whether the terms of service on a free site, where you never clicked "I Agree", are legally enforceable, but with subscription services, you usually did actively agree to the terms of service at some point.

Is your teaching a personal use? No one really knows. Is your teaching non-commercial use? Also unclear. Most of the folks who run these services have not directly addressed such issues. Certainly it's common practice to play public online content, such as YouTube videos, in many different public settings, though not all such users may be aware that the terms of use present questions about such uses.

It's important to note that limitations that you agreed to in a service contract or at the time you purchased digital content are not copyright issues. They are contract issues, and so present risks related to your contractual relationship with the provider of the content, such as account termination.

Many faculty do play YouTube videos in class, or play music they downloaded from iTunes or stream from Spotify. They may or may not be aware of the contract law issues that those uses present.

### **Media files like MP3s or movie files**

Purchased copies of media files often come with their own terms of use, which you usually agreed to at the time of purchase, and which also usually say the files are for personal and/or non-commercial use only. Again, whether instructional use is permitted under those terms is an issue of contract law more than copyright. If the files were not purchased, you may not have to worry about contractual limitations on your use, but do still have to decide the copyright-law question of whether playing questionably legitimate copies in class is fair use.

Note: ripping or otherwise digitizing audio or video from source media is quite likely fair use sometimes. But this proposition is contested by media companies, and some media like DVDs and Blu-Rays present additional legal issues related to "anticircumvention" provisions of the DMCA.

### **Instructional/educational display outside of the classroom**

Outside of the classroom environment, neither the Classroom Use Exemption nor the [Teach Act](#) apply, so non-classroom use of audio and video such as in some online instruction, publicly available class projects, at conferences, in school meetings, etc., may be allowed, but you have to think about it through the lens of [fair use](#).

### **Digitizing video or audio for instructional use**

The Classroom Exemption, and the TEACH Act, both mentioned previously, don't cover making copies at all; they say you can show a movie in class or online under specific circumstances, but they do not say that you can digitize the movie so your students have access to it outside of the class session. You may be able to digitize portions of a film or song in order to use them in class, but if so, it will be because of fair use.

Fair use almost certainly covers some copying of audio or video for instruction, especially in the non-profit context. It's also likely that not all audio and video copying, even in non-profit instructional contexts, falls under fair use. Courts haven't done much to interpret how fair use might apply to instructional use of media, but they have allowed fair use copying of images in other contexts, sometimes even commercial ones, especially when accompanied by criticism or commentary. You can learn more about [general principles of fair use](#), or if you're already familiar with the principles, [think through your specific use](#).

If making the copies is a legitimate fair use, then subsequently showing them in class is probably permitted where the Classroom Use Exemption applies, and may be fair use in other circumstances.

### **Posting media online for student use**

Sharing media online with students, when you upload copies of the media yourself, is also usually a question of [fair use](#). Linking to copies of videos online is another option for sharing videos with students, but it's always worth considering whether those videos are themselves legal copies.

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## **Fair Use Judgment Calls in Classroom Teaching**

A few types of teaching uses are [clearly permitted](#) by United States laws, including linking to existing public content, and some kinds of in-class use of video or audio. Beyond that, faculty will have to make some judgment calls about what they share with students. Many factors come into play, and instructors, even in similar situations, may make different choices about their uses.

### **Making copies for students**

It's not all that common anymore for instructors to make paper copies of reading materials for students, although some still do. More commonly, instructors may make materials such as articles, book chapters, audio clips and video available in a course management system like Moodle or a password-protected course website. [Linking to materials](#) from a course website usually doesn't present any copyright issues, but uploading files is almost always a copyright issue in much the same way as making paper copies. Instructors can sometimes upload materials to a course website without seeking copyright permissions when this copying falls within the bounds of [fair use](#), as provided by US copyright law.

Fair use allows some copying without permission in support of socially beneficial things like criticism and commentary, news reporting, scholarship, and education. In fact, the statutory definition of fair use highlights classroom copying, stating that it includes "multiple copies for classroom use." ([17 USC § 107](#).) The same basic elements of fair use apply to all kinds of uses by teachers, artists, researchers, reporters, and so on. If you are not already familiar with the [basic four factors of fair use, you should probably start there!](#)

### **Some fair use highlights for instructional use**

- *Less is more*

Fair use is most likely to apply to the use of relatively small portions of works, and when the portion used is key to a specific pedagogical purpose. So while it may be acceptable to upload a film clip for students to watch in preparation for a class discussion of that clip, uploading longer portions of a film

would be less likely to be fair use. Similarly, sharing a small portion of a book as a PDF might be acceptable, but it would rarely be fair use to upload an entire book.

- *Online isn't special*

Putting materials for students online is not fundamentally different from making paper copies for them; online copies are no more or less likely to be fair use than offline ones. Sometimes, information about copying suggests you might be responsible for what people do with digital files you give them, but that's not how the law usually works.

- *Passwords aren't magic, but they're useful*

Posting things to a password-protected course website or course management system such as Moodle is not really relevant to whether the copying is a fair use or not. However, it may be relevant if you are thinking about the "market harm" factor. When you limit access to enrolled students, you know exactly how many people would have access to your copies, and thus the extent of some types of potential market harm.

- *Sometimes you're supposed to pay!*

Fair use does not cover all copying, and in particular it may not cover copying when a paid alternative exists. If you want students to have their own copies of a book, they may need to buy the book. If you want them to watch a movie, they may need to pay to view it via an online streaming service. Library staff can help you explore options to reduce costs such as purchasing institutional copies of ebooks or streaming video, but this isn't always an option.

At Macalester College, it is the instructor's right and responsibility to make determinations about fair use in course contexts, and your Research & Instruction Librarians and AIAs can help with that.

If it does not seem like a fair use to copy something as a course reading, such as if you need students to read several chapters of a book or watch an entire movie outside of class sessions, you may need to seek permission. Library staff can help with obtaining appropriate permissions. Alternatively, you could request original copies of the book or movie to be placed on course reserve at the library for students to check out and use on their own. It's less convenient than an online copy, but it doesn't raise copyright problems.

### **Case law about fair use in courses**

Until quite recently, we didn't have much information about whether providing online copies for students fell within fair use. Many folks pointed to the 1990's "coursepack cases" (Basic Books Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D. N.Y. 1991); Princeton Univ. v. Michigan Document Servs., 99 F.3d 1381 (6th Cir. 1996)) as establishing the principle that all copies of course readings required permission and payment. However, those cases involved paper copies made by for-profit copy shops, and as it became more common for individual instructors to post readings online, some different interpretations arose.

In 2008, [several academic publishers sued administrators at Georgia State University](#) over files shared with students online. This case is ongoing, but the District Court opinion affirmed that some educational copying is okay as a fair use.

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# Outside of the Classroom in an Educational Setting

## Sharing Readings

While Macalester College is a non-profit educational institution, once use of materials moves outside of the physical or online classroom into college-sponsored programs, conference presentations, meetings, etc., the provisions allowed by the [Classroom Use Exemption](#) and the [TEACH Act](#) no longer apply. Use of shared readings or other materials may be allowed, but you have to think about it through the lens of [fair use](#).

### **The EASIEST OPTION - Don't Make Any Copies!**

Copyright issues with shared materials usually arise because you're *making copies*. So, make life easy on yourself by not making copies.

How can you share materials without making copies?

- If the resources are publicly available online, linking to them is always ok.
- If the readings are available online via a college subscription, and your audience is current students, faculty, and staff, link to them. Look for a "Permanent Link" or "Permanent URL" (or PURL) to add them to your course site, or contact your AIA or Librarian for help. You can also share citations for the readings with participants and collaborate with your Research & Instruction Librarian to let participants know how to use the citations to find the readings using resources available through campus resources.
- For events open to community members residing in Minnesota, you can use [eLibraryMN.org](http://eLibraryMN.org) resources to share links to readings or other materials. Your Research & Instruction Librarians can help you with this.
- It is sometimes possible for the library to purchase access for multi-user ebooks of items you wish to incorporate into your program. This is not usually available for straight-up textbooks, but can be an option for other books, when your audience is current Macalester staff, students, and faculty.
- You can have participants purchase their own copies, or watch or listen to video or audio via personal accounts.
- You can put books or journal issues containing the readings on reserve (physically) in the Library when your audience is current faculty, students, or staff.

### **Other Options**

If you have to make copies to share materials with program participants, you will have to think about whether such copies are already permitted by law, or whether you will need permission from (and usually payment to) the copyright holder.

### **Fair Use**

Fair use is a provision in the law that allows some copying without permission or payment. It is sometimes legal to make fair use copies of materials for participants in a non-profit instructional environment; the text of the relevant statute mentions "multiple copies for classroom use." It is also true that not all non-profit instructional copying is a fair use, particularly outside of the literal classroom and the College's formal curriculum.

At Macalester College, program leaders are trusted to make their own reasonable and informed choices about fair use which requires knowing something about how fair use works. Your Research & Instruction Librarians can help you sort through the various options for resource access, including fair use.

## Permissions

Sometimes, there is no way to share materials without making copies, and fair use doesn't seem to apply to the copying. Then, you may need permission to make the copies or you may choose to find alternative course materials. Library staff can help you obtain permissions for Macalester programs. There may be fees involved.

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## Using Images

Images can be powerful teaching tools, as illustrations to lectures, or for studying concepts outside of the classroom. While Macalester College is a non-profit educational institution, once the use of images moves outside of the physical or online classroom into college-sponsored programs, conference presentations, meetings, etc., the provisions allowed by the [Classroom Use Exemption](#) and the [TEACH Act](#) no longer apply. Use of images may be allowed, but you have to think about it through the lens of [fair use](#).

### Display from physical copies is probably okay?

Sometimes uses that feel very similar to the user are treated differently by the law. For example, showing an image in a non-profit face-to-face classroom may be permitted by the Classroom Use Exemption, but showing the same image, in a very similar instructional setting that is not technically a physical classroom is not so clearly allowed. Display of images in online instruction, at conferences, in meetings, etc. may be allowed, but under [fair use](#). Most of the time, showing things to participants in an educational program is okay as the social benefits likely outweigh the economic interests of the rights holder, and the scope of the use is limited.

Examples:

- Holding up illustrations from a book, or passing books, prints, maps, or other hard-copy images around a room
- Using a traditional overhead projector, slide projector, or a document projector to display images

Because we are working with fair use and not the Classroom Use Exemption and the TEACH Act, the delivery method is less relevant in that fair use is technology-neutral. The same considerations apply when the program content is delivered online. However the extent of potential market harm may be less clear and online delivery or presentation on the open web may change one's fair use assessment.

### Copying or scanning images

Fair use allows some copying of images for teaching, commentary, and criticism, especially in the non-profit context. It's also likely that not all image copying, even in educational contexts, falls under fair use. Courts haven't done much to interpret how fair use might apply to instructional use of images, but they have allowed fair use copying of images in other contexts, sometimes even commercial ones, especially when accompanied by criticism or commentary. You can learn more about [general principles of fair use](#), or if you're already familiar with the principles, [think through your specific use](#).

### Posting images online

Sharing images online is also usually a question of [fair use](#). Consider if linking to a legitimate, publicly available image is an option for your needs.

### **Additional resources on academic image use**

The [Visual Resources Association](#) has produced a very useful "[Statement on the Fair Use of Images for Teaching, Research, and Study](#)". The statement articulates the organization's understanding of fair use principles, but it's not legal advice. It's a bit longer than this website, but very much worth the read for anyone whose instruction is image-heavy. It is also of great value for anyone working with images as the subject of their research, or who wants to include images in published materials.

The [College Art Association](#) has drawn up a "[Code of Best Practices in Fair Use for the Visual Arts](#)". This has been welcomed by many in the visual arts teaching and research community. It articulates accepted community practices around writing and teaching about art, and goes beyond to fair use issues in making new art, and in archival and museum uses.

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## Using Video and Audio in Educational Programming

Showing or "performing" a motion picture or playing pieces of music at Macalester can be important for teaching and other educational activities outside of the classroom. The performance of a copyrighted film must be made with permission from the copyright owner, often obtained through a licensing agreement such as those provided through institutional streaming services and contracts, or obtaining individual public performance rights, or consistent with one of the exceptions or limitations in the copyright law. Music is a little bit different, but many similar concerns apply.

The law provides many opportunities for showing films or playing music at Macalester, but one usually must begin with the following assumptions:

- Most audiovisual works used in programs at Macalester are protected by copyright. Copyright protection lasts for many decades, and usually only some of the earliest motion pictures and early 20th century music are in the public domain;
- Many performances of copyrighted works outside of the classroom are considered to be a public performance. A performance can be "public" if it is held in a place open to the public or at any place where a substantial number of persons outside of a normal circle of "family and friends." As a result, a "public performance" can take place in a classroom, a dormitory lounge, or a campus theater or auditorium.

Nevertheless, copyright law includes several possibilities for properly performing copyrighted audiovisual works.

Please note that this discussion is only about the "performance" of the work. Making a copy of all or part of the work must be addressed separately.

### **Perform a work privately, and not publicly**

A performance may not be “public” if the location is closed to the public, and the audience is not a “substantial” number of persons. Therefore:

- The smaller the viewing or listening group, the less likely it would be considered a public performance.
- Gathering a large group of friends or using a common room in a residence hall can make the performance “public.”
- Open invitations and announcements to the broader campus community can make a performance “public.”

How big of a group is "large?" How public is a dorm lounge? These questions are not answered in the law, and are part of the judgement call one needs to make based on each individual situation. Reach out to a Research & Instruction Librarian for guidance and help obtaining permissions if needed.

### **You can obtain permission**

The creator of the work is typically the copyright owner or other rightsholder. In the case of motion pictures, movie studios usually hold rights in the works they create or distribute. Smaller scale documentary films often include information on public performances and screening rights on the film's website, and may be willing to offer low cost performance rights for college screenings. In the case of music, playing and performing music is often covered by blanket licenses purchased by the college from [ASCAP](#), [BMI](#), and [SESAC](#), the major music performance rights management companies.

- You may be able to secure permission directly from the rightsholder. Library staff can help you obtain permission as needed.
- Some suppliers of audiovisual works offer a limited public performance license for a fee, or they sell the work to colleges with a performance license. Often the library has already purchased such licenses; consult with library staff about whether our ownership includes performance rights.
- Limited public performance licenses may be available through institutional streaming services such as Alexander Street Press' [Music Online](#), [Swank Motion Pictures](#), [Films on Demand](#), or [Kanopy](#) or through blanket licenses with ASCAP, BMI, or SESAC that are managed through the campus' Business Services.
- Some films and music may be copyrighted, but licensed for broad uses through [Creative Commons](#).

### **Perform a work that is in the public domain**

Copyright protection does not last forever, and when the copyright has expired, the work may be used without copyright restriction. For example, any work published in the U.S. before 1925 is in the [public domain](#) and may be used freely.

[The Internet Archive](#) and other organizations facilitate finding and using many films and other works that are in the public domain. Additional sources of films that are in the public domain include: [Festival Films](#); [Desert Island Films](#); [Reel Media International](#); [BuyOut Footage](#); and [OpenFlix](#).

Works created by the federal government are not protected by copyright and are in the public domain. However, works commissioned by the federal government may have copyright protection. Also, works produced by state, local, or foreign governments may have copyright protection. Federal government works in the public domain could include many [military films](#) and [NASA space exploration footage](#).

## Use fair use

Fair use is a provision in the law that allows some performances without permission or payment. It is sometimes legal to make fair use of music performances or showing films in a non-profit instructional environment. It is also true that not all non-profit instructional display or performance is a fair use, particularly outside of the literal classroom.

At Macalester College, program leaders are trusted to make their own reasonable and informed choices about fair use which requires knowing something about how fair use works. Your Research & Instruction Librarians can help you sort through the various options for resource access, including fair use.

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## Getting Comfortable with Ambiguity, or, Fair Use

Fair use is an important part of copyright law that provides some flexibility for users and new creators. At its core, fair use ensures that there are some kinds of uses that do not require permission or payment. But there are no easy rules for fair use - if you want to take advantage of its flexibility, you have to understand its complexities!

Although there are other [exceptions](#) to the far-reaching [rights of copyright holders](#), most of those exceptions only apply in very limited circumstances. Fair use is much more flexible, but also much harder to understand and apply. To understand fair use, you need to be familiar with the four statutory factors, and the idea of "transformativeness". To [think through whether a particular use is a fair use](#), you have to look at these details and other associated issues as a whole. Even then, fair use is unpredictable enough that the best anyone can do is make a well-informed, reasonable guess.

## Four Statutory Factors

Each possible use of an existing work must be looked at in detail and the law [spells out several factors](#) that determine whether a use is fair. No one factor is decisive - you always have to consider all of them, and some additional questions. Even after considering all relevant issues, the result is usually an impression that a particular use is "likely to be fair" or "not likely to be fair." There are rarely definitive answers outside of courts.

### 1. *Purpose and Character of the Use*

This is the only factor that deals with the proposed use - all the others deal with the work being used, the source work. Purposes that favor fair use include education, scholarship, research, and news reporting, as well as criticism and commentary more generally. Non-profit purposes also favor fair use (especially when coupled with one of the other favored purposes.) Commercial or for-profit purposes weigh against fair use - which leaves for-profit educational users in a confusing spot!

### 2. *Nature of the Original Work*

One element of this factor is whether the work is published or not. It is less likely to be fair to use elements of an unpublished work - which makes sense, basically: making someone else's work public when they chose not to is not very fair, even in the schoolyard sense. Nevertheless, it is possible for

use of unpublished materials to be legally fair.

Another element of this factor is whether the work is more "factual" or more "creative": borrowing from a factual work is more likely to be fair than borrowing from a creative work. This is related to the fact that copyright does [not protect facts and data](#). With some types of works, this factor is relatively easy to assess: a textbook is usually more factual than a novel. For other works, it can be quite confusing: is a documentary film "factual", or "creative" - or both?

### 3. *Amount and Substantiality of the Portion Used*

- a. Using proportionately smaller amounts is usually more likely to be fair

Amount: this is an element that many [guidelines](#) give bad advice about. A use is usually more in favor of fair use if it uses a smaller amount of the source work, and usually more likely to weigh against fair use if it uses a larger amount. But the amount is proportional! So a quote of 250 words from a 300-word poem might be less fair than a quote of 250 words from a many-thousand-word article. Because the other factors also all come into play, sometimes you can legitimately use almost all (or even all) of a source work, and still be making a fair use. But less is always more likely to be fair.

- b. Substantiality: this element asks, fundamentally, whether you are using something from the "heart" of the work (less fair), or whether what you are borrowing is more peripheral (and more fair). It's fairly easily understood in some contexts: borrowing the melodic "hook" of a song is borrowing the "heart" - even if it's a small part of the song. In many contexts, however, it can be much less clear.

### 4. *Effect of the Use on the Potential Market For or Value Of the Source Work*

This factor is truly challenging - it asks users to become amateur economists, analyzing existing and potential future markets for a work, and predicting the effect a proposed use will have on those markets. But it can be thought of more simply: is the use in question substituting for a sale the source's owner would otherwise make - either to the person making the proposed use, or to others? Generally speaking, where markets exist or are actually developing, courts tend to favor them quite a bit. Nevertheless, it is possible for a use to be fair even when it causes market harm.

## **The "Fifth Factor" - Transformative Use**

Transformative use is a relatively new addition to fair use law, having been first raised in a Supreme Court decision in 1994. ([Campbell v. Acuff-Rose Music, 510 U.S. 569 \(1994\)](#).) A derivative work is transformative if it uses a source work in completely new or unexpected ways. Importantly, a work may be transformative, and thus a fair use, even when all four of the statutory factors would traditionally weigh against fair use.

Parody: Parody is one of the most clearly identified transformative uses, but any use of a source work that criticizes or comments on the source may be transformative in similar ways. Legal analysis about this kind of transformative use often engages with free speech issues.

New Technologies: Courts have sometimes found copies made as part of the production of new technologies to be transformative uses. One very concrete example has to do with image search engines: search companies make copies of images to make them searchable, and show those copies to people as part of the search results. Courts found that those thumbnail images were a transformative use because the copies were being made for the transformative purpose of search indexing, rather than simple viewing.

Other Transformative Uses: Because transformative use is a relatively new part of copyright law, it is still developing. Many commentators suggest that [audio and video mixes and remixes](#) are examples of transformative works, as well as other kinds of works that use existing content to do unexpected and new things.

### Analyzing Specific Uses

It can be difficult to apply basic ideas about fair use to specific situations. One good way to develop your general understanding of fair use is to discuss examples with others - you'll be surprised how easily reasonable people can disagree!

Since even experts usually only make a "best guess" as to whether a use is fair or not, it's not an easy task to think through whether a use you want to make is a fair use. The University of Minnesota Libraries have developed a [tool](#) that may help you organize your thoughts. Talking through your use with a librarian or an academic information associate can also be an option.

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## What Do I Own?

Let's start with the basics:

- A copyright comes into existence the moment a copyrightable work is created - no registration is necessary for a copyright to exist;
- The copyright usually automatically belongs to the creator (or creators) of the work;
- Status as an employee for an organization, working on commission, and collaborative creation with others can change and affect copyright ownership.

Scholars may be surprised to learn that in addition to copyright law, College policy (or employer policy, more broadly) may affect ownership in works that are created as part of someone's job duties. The default rule of law is that the employer owns those kinds of works, called "[works made for hire](#)" in the law, but Macalester College has a policy stating faculty own their academic works, staff own their faculty-like creative work, and works of employees (including student employees) that fall outside of that category are owned by the College. Macalester encourages collaboration among faculty, students, and staff. However, all of the individuals who contribute to a collective effort may own copyrights in all or a part of the resulting works. Faculty and staff are encouraged to address copyright ownership in writing in a manner consistent with College policy before embarking on collaborative efforts, particularly if the intent is to publish the resulting work. [This policy](#) is part of the Employee Handbook used by all faculty and staff.

Members of the Macalester community need to know about the rights they have in the works they create, and how to manage those rights in order to distribute those works via publishers or other means, while also retaining the rights that they themselves may need in order to make full use of their own works throughout their career.

The library has two resources that give more information about the changing nature of scholarly and educational publishing, and how you can contribute. Our [Open Access](#) site provides information about

negotiating author rights, publishing in open journals and monographs, and funding programs to support these initiatives. Our [Open Educational Resources Toolkit](#) gives information on how to create, remix, and reuse open education resources for teaching and learning, in and outside of the classroom. Consult with a Research & Instruction Librarian for more information about your options as a copyright holder.

In addition, the library also provides [Digital Commons](#) as publishing service to the Macalester community. DigitalCommons@Macalester includes all types of scholarship including student Honors projects, award-winning scholarship, working papers, and college-produced journals. Digital Commons is a permanent online archive that preserves and organizes materials. Any materials included in Digital Commons have a dedicated permanent URL that can be used in articles, books, and papers to refer back to the scholarship.

Students and anyone else placing their materials in Digital Commons, retain the copyright for their works. Faculty and staff retain the copyright for works in accordance with the Macalester policy on [Ownership of Copyrights in Works](#).

## Relevant Campus Policies and Guiding Principles

The Provost is the Copyright Officer for Macalester College and is the final authority for ensuring that the College adopts and implements policies regarding intellectual property. These policies both protect the intellectual property rights of members of the Macalester community and ensure that the Macalester community respects the intellectual property rights of others.

The Library and Information Technology Services staff at Macalester College base our decision-making and recommendations regarding copyright on two major principles:

- We respect the intellectual property of others, and therefore the rights afforded to the creator through copyright.
- We utilize and defend the exceptions carved out in copyright law, particularly fair use.

### Macalester Community

[Digital Copyright Violations Policy](#)  
[Classroom Recording Policy](#)

### Faculty and Staff

- [Copying Code of Ethics](#)
- [Ownership of Copyright in Works](#)


### Students

- [Academic Integrity](#)
- [Copying Code of Ethics](#)
- [Copyright Films, Video Tapes, and Music](#)
- [Movies/Video Presentations](#)



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## Acknowledgements

This guide to copyright issues is based on material created by the [University of Minnesota](#) and [Kenyon College](#) and was developed by Ginny Moran in consultation with Aisling Quigley, Brooke Schmolke, Ellen Holt-Werle, Louann Terveer, Chris Schommer, Katy Gabrio, and Angi Faiks. Unless otherwise noted, all content in the *Copyright and Intellectual Property at Macalester* section of this site is licensed under a  [Creative Commons Attribution-NonCommercial License](#).

This guide presents information about copyright law. Macalester College makes every effort to assure the accuracy of this information but does not offer it as counsel or legal advice. Consult an attorney for advice concerning your specific situation.

*Last reviewed April 7, 2021*

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