

# *Beyond Bricks and Mortar Classroom Uses Consistent with Copyright Law*

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Prepared for CSUN Faculty

# Presentation Overview

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1. What is covered by Copyright Act
2. Tools and Tips
3. Scenarios
4. Copyright law and CSU Policy
5. Application of Exemptions

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“The primary, objective of copyright is not to reward the labor of authors, but [t]o promote the Progress of Science and Useful Arts. To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of sciences and art.”

- Justice Sandra Day O'Connor  
FEIST PUBLICATIONS, INC. v. RURAL TEL. SERVICE CO., 499  
U.S. 340, 349-50 (1991)

# What is Covered under Copyright?

## § 102(a) Subject matter of copyright:

- original works of authorship
- fixed in any tangible medium of expression,
- from which they can be perceived, reproduced, or communicated, either directly or with the aid of a machine or device.



# What is *Not* Covered

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## Section 102(b):

- any idea,
- procedure, process, system,
- method of operation,
- concept,
- principle, or discovery
- Works in the public domain

# What are the Exclusive Rights?

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## Bundle of Rights:

- Make copies of the work
- Make derivative works based on the original work
- Distribute the work
- Perform the work publicly
- Display the work in a commercial setting
- The owner of a copyright may license these rights to others.

# Exemptions

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- Fair Use (Section 107)
- Classroom Teaching (Section 110(1))
- TEACH Act (Section 110(2))
  - Distance Learning

# Tools and Tips

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- Copyright Term Duration Chart

- <http://copyright.cornell.edu/resources/docs/copyrightterm.pdf>

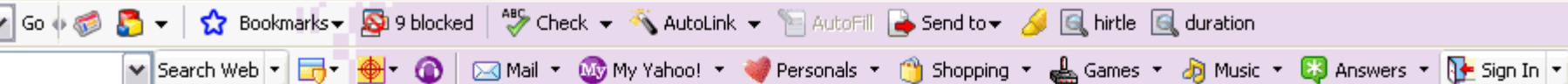
- Fair Use Checklist

- <http://copyright.columbia.edu/copyright/files/2009/10/fairusechecklist.pdf>

- How to Secure Permission of Copyrighted Work

- <http://www.utsystem.edu/ogc/intellectualproperty/permisn.htm>
  - Provides a list of resources for obtaining permissions





## Copyright Term and the Public Domain in the United States 1 January 2007

### UNPUBLISHED WORKS

<i>Type of Work</i>	<i>Copyright Term</i>	<i>What was in the public domain in the U.S. as of 1 January 2007<sup>2</sup></i>
Unpublished works	Life of the author + 70 years	Works from authors who died before 1937.
Unpublished anonymous and pseudonymous works, and works made for hire (corporate authorship)	120 years from date of creation	Works created before 1887.
Unpublished works created before 1978 that were published after 1977 but before 2003	Life of the author + 70 years or 31 December 2047, whichever is greater	Nothing. The soonest the works can enter the public domain is 1 January 2048
Unpublished works created before 1978 that were published after 31 December 2002	Life of the author + 70 years	Works of authors who died before 1937.
Unpublished works when the death date of the author is not known <sup>3</sup>	120 years from date of creation <sup>4</sup>	Works created before 1887. <sup>4</sup>

### WORKS PUBLISHED IN THE US

<i>Date of Publication<sup>5</sup></i>	<i>Conditions<sup>6</sup></i>	<i>Copyright Term<sup>2</sup></i>
Before 1923	None	In the public domain

**Fair Use Checklist**  
Copyright Advisory Office  
Columbia University Libraries  
Kenneth D. Crews, Director  
<http://copyright.columbia.edu>

Name: \_\_\_\_\_

Institution: \_\_\_\_\_

Project: \_\_\_\_\_

Date: \_\_\_\_\_

Prepared by: \_\_\_\_\_

**Purpose**

**Favoring Fair Use**

- Teaching (including multiple copies for classroom use)
- Research
- Scholarship
- Nonprofit educational institution
- Criticism
- Comment
- News reporting
- Transformative or productive use (changes the work for new utility)
- Restricted access (to students or other appropriate group)
- Parody

**Opposing Fair Use**

- Commercial activity
- Profiting from the use
- Entertainment
- Bad-faith behavior
- Denying credit to original author

Fair Use Checklist p. 2

**Nature**

**Favoring Fair Use**

- Published work
- Factual or nonfiction based
- Important to favored educational objectives

**Opposing Fair Use**

- Unpublished work
- Highly creative work (art, music, novels, films, plays)
- Fiction

**Amount**

**Favoring Fair Use**

- Small quantity
- Portion used is not central or significant to entire work
- Amount is appropriate for favored educational purpose

**Opposing Fair Use**

- Large portion or whole work used
- Portion used is central to or “heart of the work”

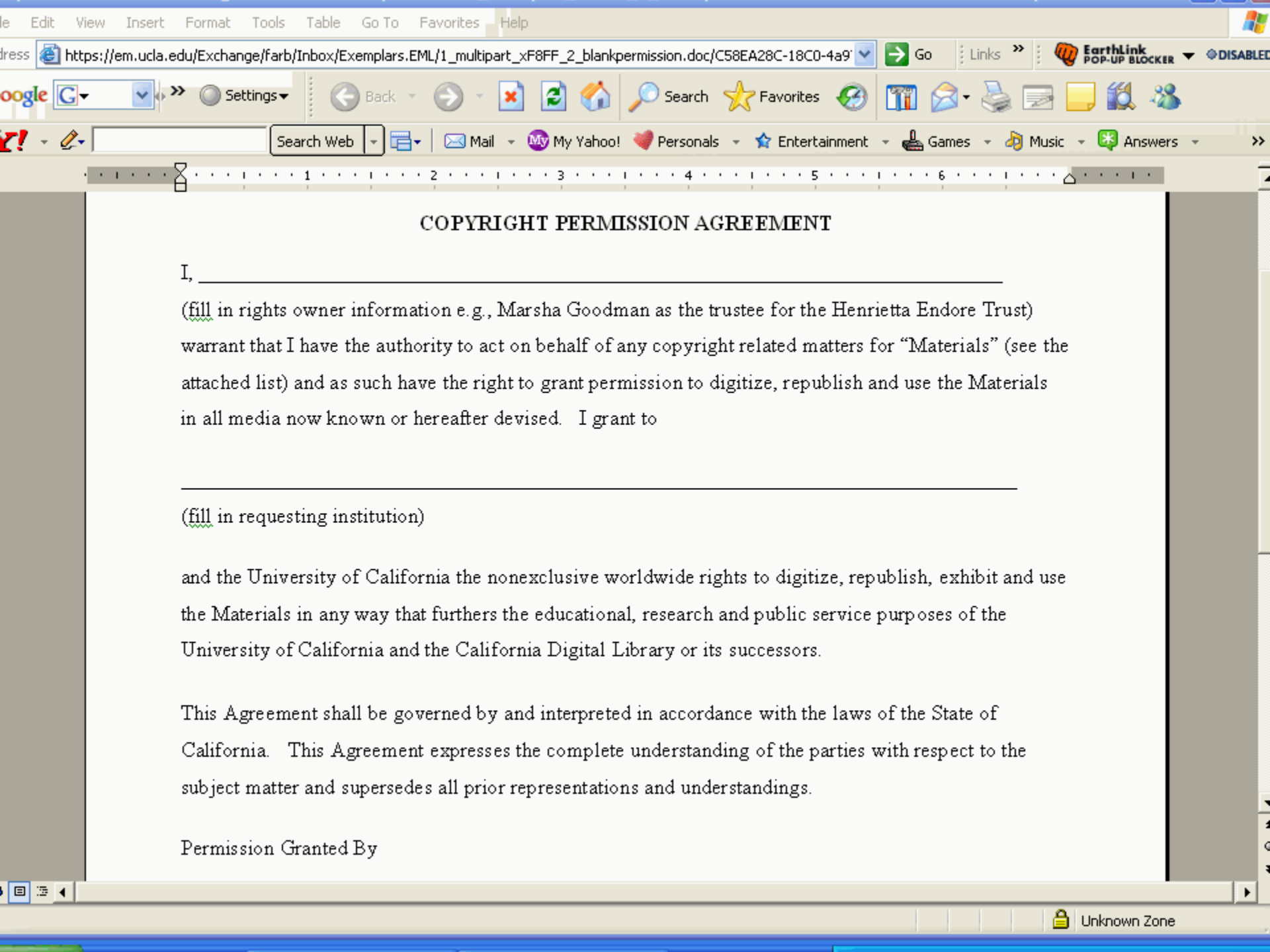
**Effect**

**Favoring Fair Use**

- User owns lawfully purchased or acquired copy of original work
- One or few copies made
- No significant effect on the market or potential market for copyrighted work
- No similar product marketed by the copyright holder
- Lack of licensing mechanism

**Opposing Fair Use**

- Could replace sale of copyrighted work
- Significantly impairs market or potential market for copyrighted work or derivative
- Reasonably available licensing mechanism for use of the copyrighted work
- Affordable permission available for using work
- Numerous copies made
- You made it accessible on the Web or in other public forum
- Repeated or long-term use



## COPYRIGHT PERMISSION AGREEMENT

I, \_\_\_\_\_

(fill in rights owner information e.g., Marsha Goodman as the trustee for the Henrietta Endore Trust)  
warrant that I have the authority to act on behalf of any copyright related matters for "Materials" (see the attached list) and as such have the right to grant permission to digitize, republish and use the Materials in all media now known or hereafter devised. I grant to

\_\_\_\_\_  
(fill in requesting institution)

and the University of California the nonexclusive worldwide rights to digitize, republish, exhibit and use the Materials in any way that furthers the educational, research and public service purposes of the University of California and the California Digital Library or its successors.

This Agreement shall be governed by and interpreted in accordance with the laws of the State of California. This Agreement expresses the complete understanding of the parties with respect to the subject matter and supersedes all prior representations and understandings.

Permission Granted By

# CSU Resources

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- Fundamentals of Copyright and Fair Use (2007)  
[http://www.calstate.edu/gc/Docs/Fair\\_Use.doc](http://www.calstate.edu/gc/Docs/Fair_Use.doc)
- Policy on Ownership of Intellectual Creations (1984)  
<http://scholarworks.csun.edu/xmlui/handle/10211.2/354>
  - Pursuant to CSU policy, Faculty own their creations

# Scenario A

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- Professor's website for history of Spain course is password protected. The course syllabus includes hyperlinks to reading materials for each assignment. Clicking on the hyperlink connects with a scanned copy of various reading materials for the assignment.
- Professor estimates that he copies 5% or less of any book (approximately one chapter out of 20).
- Electronic copies are provided to the students free of charge.
- Some materials are older works that are no longer in print.

# Scenario A Cont.

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- Some materials are in publications that are currently in print.
- Often the material is part of a larger topic. For example, his course is focusing on Spain, the chapters in the book on other countries are irrelevant, and it does not make sense for the students to purchase the entire treatise.
- Materials used for any particular course change with each year. He may add materials, delete materials or change the focus of the coursework. He does keep some of the materials in use from year-to-year.

# Scenario A Cont.

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- Is this Face to Face Teaching?
- Is this Distance Learning?
- Is this Fair Use?



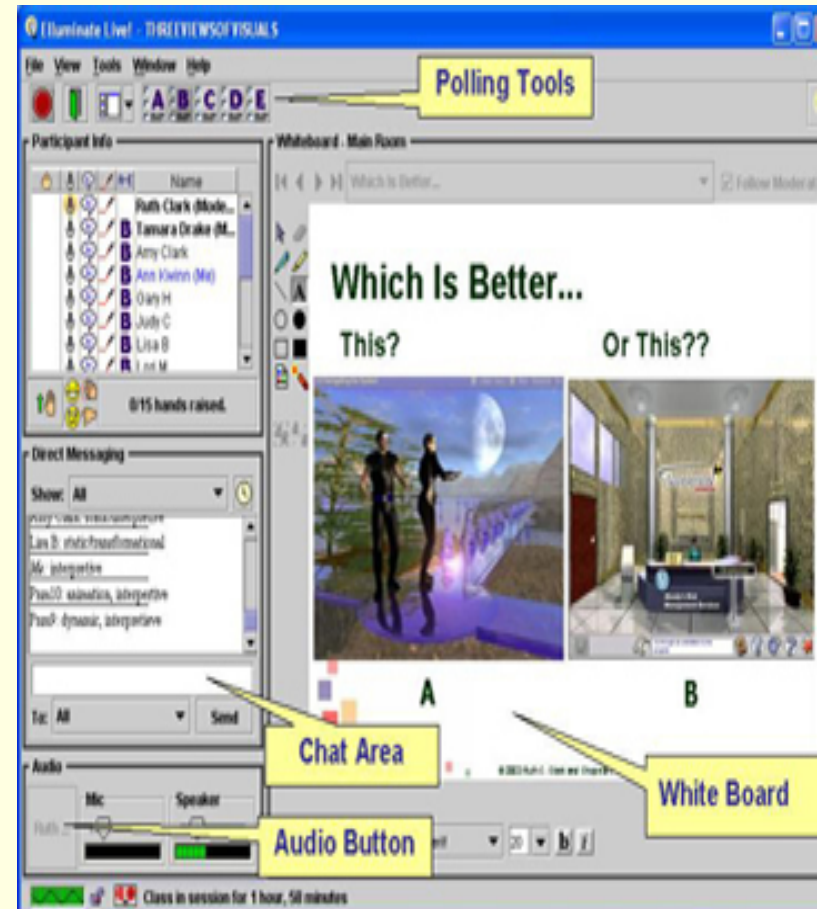
# Classroom Teaching Exemption

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- The performance or display of a work in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction.

# Physical v. Virtual Classroom as Face to Face Teaching

- Course Websites
- Course Management Systems
- Are these virtual classrooms now deemed a “similar place devoted to instruction”?



# Similar Place Devoted to Instruction

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- The House Report cites as qualifying locales “a studio, a work-shop, a gymnasium, a training field, a library, the stage of an auditorium, or the auditorium itself if it is actually used as a classroom for systematic instructional activities.” (H. Rep. at p. 82.)

# UCLA's Recent Position

Campus to restart streaming of instructional video content / UCLA Newsroom

March 04, 2010 UCLA Home Campus  
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## Campus to restart streaming of instructional video content

By Phil Hampton March 03, 2010

UCLA is taking steps to restore the streaming of previously purchased instructional content behind password-protected course websites, a practice the campus believes is permitted under various provisions in the federal Copyright Act.

Campus officials temporarily suspended the practice in January as a good-faith gesture while UCLA attempted to resolve a copyright claim with a trade association. After carefully reviewing options and implications, UCLA has notified the Association for Information Media and Equipment (AIME) that it intends to restore the service.

"Course instruction long ago ceased to be bound by the walls of the classroom, and we are obligated to provide students with appropriate instructional content in whatever medium helps to foster an effective learning environment," said Jim Davis, UCLA vice provost for information technology and chief academic technology officer. "We're well aware the outcome of this dispute could affect other educational institutions, and it's important that UCLA take a leadership role and demonstrate just how critical the appropriate use of technology is to our educational mission."

Campus officials say the instructional uses in which UCLA engages are permitted under the fair-use limitation on the exclusive rights of a copyright owner. For example, UCLA's practices are consistent with landmark court rulings that allowed video recording of television programs for viewing at a later date (so-called "time-shifting") and the transfer of musical content from one device to another ("space-shifting").

The safe harbor of the TEACH Act, which permits transmissions of content for educational purposes, and the face-to-face exemption of the Copyright Act also support UCLA's uses.

Campus officials estimate that streamed content will return to course websites during the 2010 spring quarter. Faculty are first being asked to specify the educational purpose of making videos available as part of their instruction.

"While we believe our previous protocols were consistent with applicable laws, this modification provides an extra layer of assurance and transparency so that we can resume streaming videos as soon as possible rather than prolonging the impact on students and faculty through additional negotiations," Davis said.

UCLA's decision to restart the streaming of instructional content was informed in part by principles developed jointly by the Academic Senate and the UCLA Information Technology Planning Board (ITPB), the faculty-administration committee charged with IT policy.



RSS Alerts



Facebook



Twitter



Youtube

### Media Contacts

Phil Hampton,  
310-206-1460  
phampton@support.ucla.edu

# TEACH Act

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- Technology, Education and Copyright Harmonization Act (17 U.S.C. §110(2)).
  - Safe harbor that protects the transmission of a work from copyright infringement claims provided the transmission meets 11 specific requirements.

# TEACH Act Cont.

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- The work must “not be produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks.
- The performance of the work must be based on a copy that was “lawfully made and acquired.”
- The *performance* of a dramatic work must be a “reasonable and limited portion” of the work.
- The performance must be made “at the direction of, or under the actual supervision of an instructor.”
- The performance must be “an integral part of a class session offered as a regular part of the systematic mediated instructional activities.”
- Other factors, including technological protections.




# Fair Use



## Four Factor Test:

- Character of Use (commercial versus non-profit educational; transformative)
- Nature of Copyrighted Work (fact versus imaginative and published versus unpublished)
- Amount and Substantiality of Portion Used
- Market Effect



# *Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with respect to Books and Periodicals*

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- Copyright Office Circular 21 includes the Guidelines
  - <http://www.copyright.gov/circs/circ21.pdf>

## **Exemplars:**

- Single Copying for Teachers
  - Book chapter, article, short story, one chart
- Multiple Copies for Classroom Use
  - Never more than one copy per student in the class
- Copy to Create a Multimedia Work
  - Limited to creation of the work, cannot make multiple copies for class assignments, remote instruction, etc.



# IMPORTANT CAUTION

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- The Agreement on Guidelines represent the *minimum* of what is permissible and adherence to the “Safe Harbor” avoids litigation
- The rights of the University and its faculty and student body to copy are broader under the fair use doctrine

# Applying Fair Use Factors

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- The Professor uses the materials only for teaching in connection with specified courses. No charge for the materials, so there is no “profit” inuring to the University.
- Nature of the works posted varies. Some of the works are in the public domain, or are licensed, and thus, their use is expressly permitted. Other works are portions of materials not available on the commercial market because they are out of print. Still other works are portions of scholarly works used solely for the advancement of education. None of the postings contain unpublished materials.
- Transformative use: Links to syllabus package work with original education content

# Fair Use Factors Cont.

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- Amount and substantiality of the works used also varies. While neither the Copyright Act nor case law establishes percentage parameters, 5-10% of a work is a modest amount that should comply with fair use contours.
- Effect of the Professor's use upon the potential market for or value of the copyrighted material is likely insignificant. In no case do the scanned portions represent significant amounts of the copyrighted work, and the rest of the work was not relevant to the topic, suggesting that the Professor would not assign such a work as a required text (i.e., one to be purchased) for a course.



# Fair Use Cont.

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- Copyright holder could argue it is denied potential licensing fees for the portions used, and, thus, the value of or market for the work is diminished where those fees are not paid. There are no cases, however, holding that a centralized licensing entity must be used and fees paid where the use otherwise qualifies as fair use.
- On balance – this use likely qualifies as fair use.

# Scenario B

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- A professor provides copies of an entire Shakespearian play on her password protected course website.
- **QUESTION:** Is this a fair use?
- **Answer:** The copyright in the individual play would have expired, and is therefore, in the public domain. No fair use analysis is required.
- What if the faculty copies the play from an illustrated book that is copyrighted?
- **Answer:** The transformed version, with illustrations is copyrighted and fair use analysis would be required.

# Questions?

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