



Applying Fair Use in Higher Education: Clearing Up the Confusion

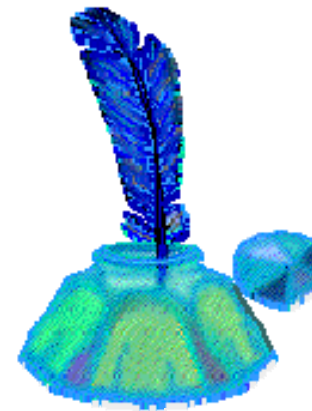
Lolly Gasaway
February 2008



- **Copyright basics**
- **Fair use**
 - Liability issues
 - Copyright compliance
- **The print environment for teachers**
 - Multiple copying for the classroom
 - Coursepacks
- **Use & creation of digital works**
 - The Internet & WWW
 - Distance education
- **Performances & displays in instruction**
 - Classroom exemption
 - TEACH Act

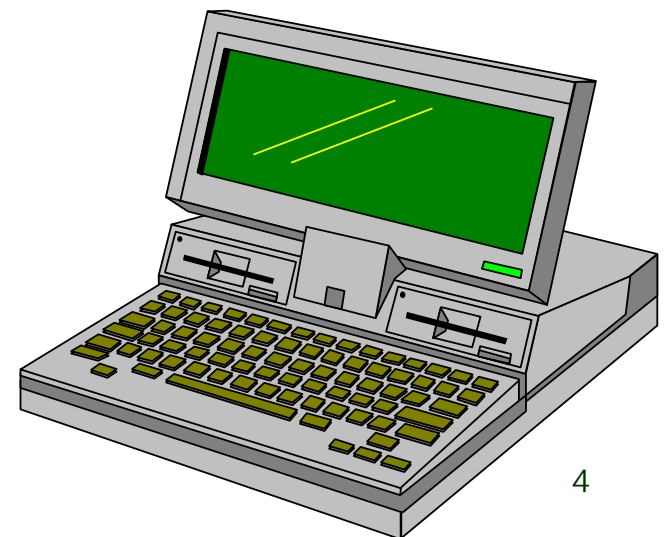
U.S. Constitution, Article I, § 8, clause 8

“The Congress shall have Power...To promote the Progress of Science and useful arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”



COPYRIGHT BASICS

- Form of expression not facts, ideas
- Originality & creativity - § 102(a)
- Fixation - § 102(a)
- Registration –fees (\$45)
- Deposit
- Notice of copyright





TERM OF COPYRIGHT

1909

28 years
+ 28 years
56 years

1976 Act Section 202
Personal Author

life
+ 50 years
?

1998 Amendment

life
+ 70 years
?



PROTECTABLE WORKS

§ 102(a)

1. **Literary works**
2. **Musical works**
3. **Dramatic works**
4. **Pantomimes & choreographic works**
5. **Pictorial, graphic & sculptural works**
6. **Motion picture & other audiovisual works**
7. **Sound recordings**
8. **Architectural works**

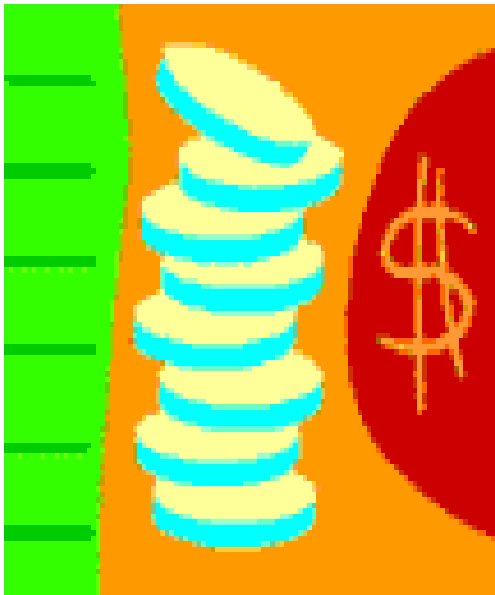


PUBLIC DOMAIN

- 1. Materials on which the copyright has expired.**
- 2. Materials in which the author never claimed copyright, i.e., “dedicated to the public.”**
- 3. Materials produced by the federal government (§ 105)**

RIGHTS OF THE COPYRIGHT HOLDER

§ 106



- **Reproduction**
- **Distribution**
- **Adaptation**
- **Performance**
- **Display**
- **Public performance of sound recordings by digital transmission**



FAIR USE

§ 107

...“the fair use of a copyrighted work, including such use by reproduction in copies ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”

FAIR USE FACTORS

- Purpose and character of the use
- Nature of the copyrighted work
- Amount and substantiality used
- Market effect





LIABILITY FOR COPYRIGHT INFRINGEMENT

- **General**
 - Copyright = strict liability statute
- **Actual damages & profits**
- **Statutory damages**
 - \$750-\$30,000
 - Innocent \$200
 - Willful \$150,000
- **Institutional liability**
 - Liability for acts of E's
 - Agency law
 - Likelihood of suit
- **Personal liability**
 - Likelihood of suit



MULTIPLE COPYING FOR CLASSROOM USE

- **H.R. 94-1476**

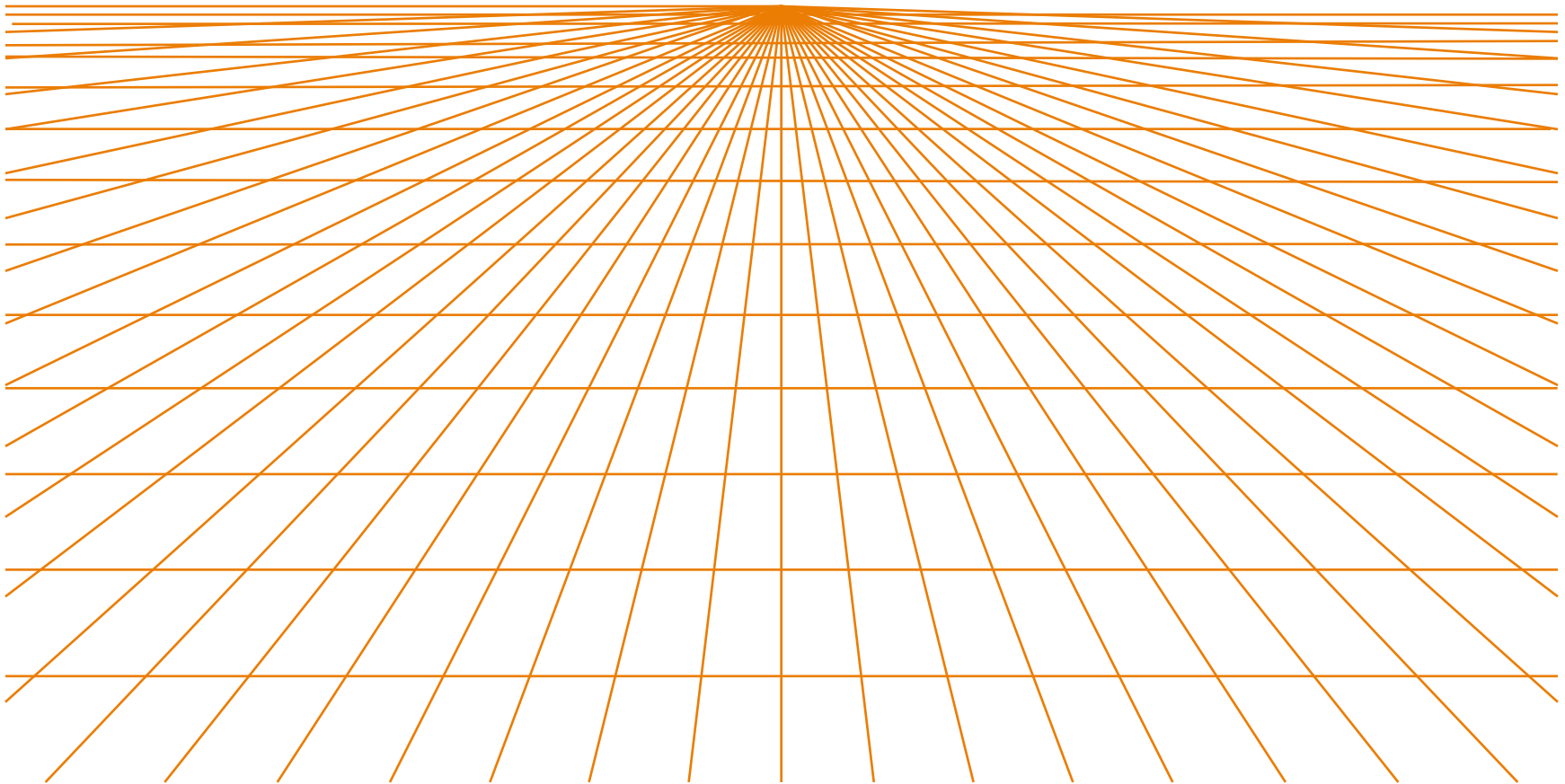
- **TESTS:**

- Brevity**
- Spontaneity**
- Cumulative effects**
- Notice of copyright**
- No charge beyond
cost of copying**






WHAT DOES THE INTERNET DO TO © ?



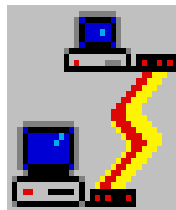
- **Nothing!**
- **Nothing changes the underlying copyright concepts**
- **New method to infringe (copy) copyrighted works**



- 
- **Result = mass reproduction**
 - **A copy is made when the work is scanned, input or copied to send**
 - **Copies in computer RAM are copies that count**
 - **Arguably, copy is made by every person who even reads or views the work on the screen**
 - **U.S. courts now have so said; also the Register of Copyrights**

INTERNET PARTICULARS

- Copyright still belongs to authors / publishers
- No notice requirement
- Listserv submissions copyrighted (if original)

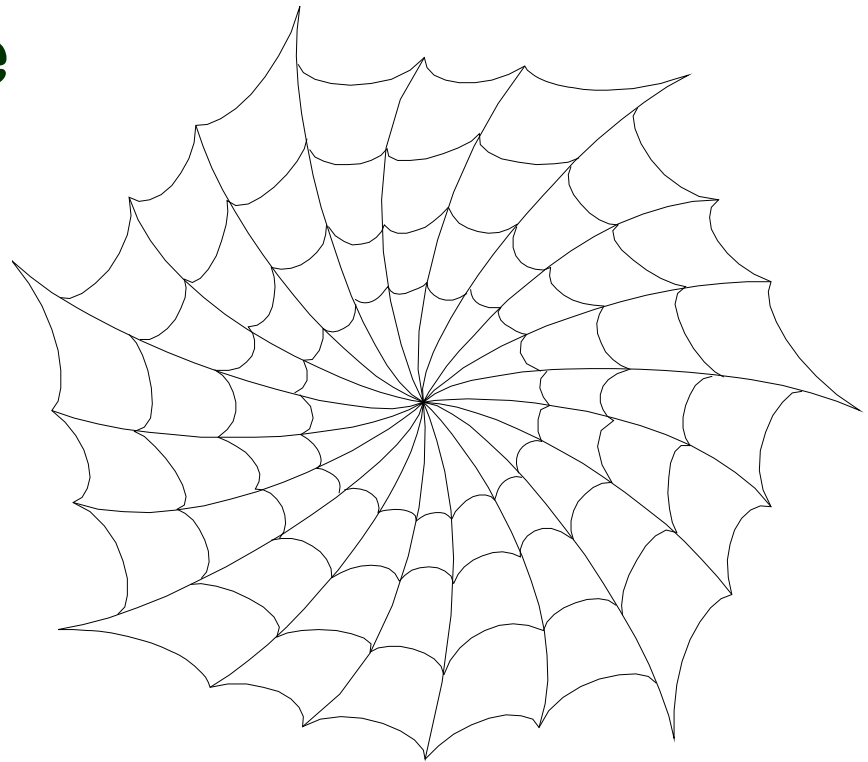




- **Just because something is on the Internet does not mean it is there by permission**
 - **Articles on which you hold copyright**
 - **Someone else's article**
- **HINT: Specify how item was put there plus any restrictions on use**

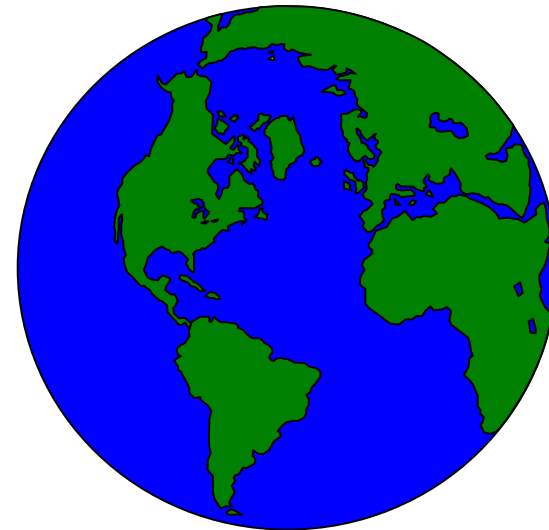
WORLD WIDE WEB

- **Yes, webpages are copyrighted**
 - **No notice requirement, but is a good idea**
 - **Use of original works is no problem!**



- **Original work =no problem**
- **Does inclusion of ©'d works require permission?**
 - **Text**
 - **Photographs, graphics, etc.**

- **Motion media**
- **Music**



LINKING = CROSS REFERENCE

- No problem = equivalent to cross references

- Unless site is infringing

- “Clean links”





COURSE MANAGEMENT SOFTWARE

- **Blackboard, etc.**
 - Built in features help
 - Password protection
- **Cannot create an online coursepack without paying royalties**
- **Make materials available similar to analog world**
 - Follow classroom guidelines
 - One semester use without permission
 - Linking to electronic resources better than scanning

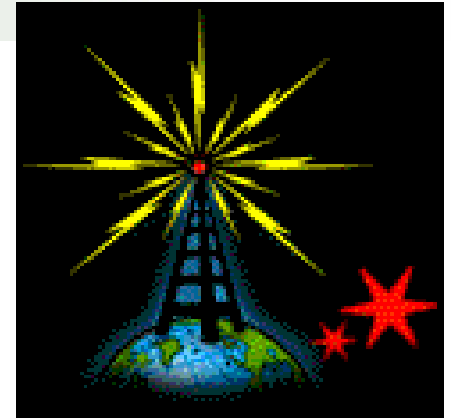


CLASSROOM PERFORMANCES & DISPLAYS

§ 110(1)

- **Face-to-face teaching**
- **Nonprofit educational institution**
- **In a classroom**
- **All works covered**
- **Not for entertainment**

TEACH ACT



- **Technology in Education & Copyright Harmonization Act**
 - True negotiated act
 - Based on Register's 1999 report
 - Covers:
 - Performances & displays only
 - Transmissions & online portions of courses
 - Almost all types of works



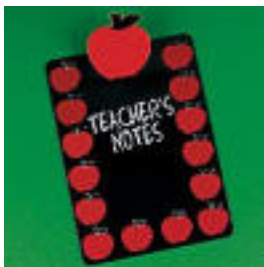
INSTITUTIONAL RESPONSIBILITIES FOR DIGITAL TRANSMISSIONS & IT

- **Have policies, provide information about, and give notice that the materials used may be protected by copyright;**
- **Educate the community about copyright;**
- **Apply technological measures that reasonably prevent retention of the works beyond the class session and further distributing them in accessible form; and**
- **Not interfere with technological measures taken by copyright owners that prevent retention and distribution**

TEACH ACT CONDITIONS

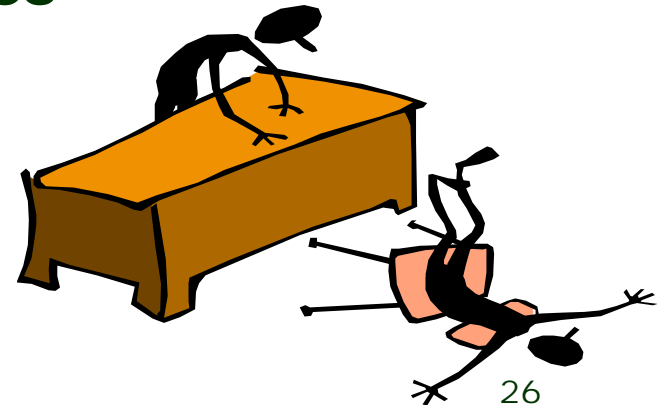
Performance or display must be:

- Regular part of systematic mediated instructional activity,
- Directly related & of material assistance to teaching content, and
- For and technologically limited to students enrolled in class



TEACH ACT DEFINITIONS

- **Mediated instruction = Performances & displays made at direction of or under supervision of instructor**
 - **Integral part of class session**
- **Accreditation = regional or national accrediting agencies for higher education.**
- **For K-12, recognized by applicable state certification or licensing procedures**





ELIGIBILITY, COVERAGE & AMOUNTS

- Accredited nonprofit educational institutions & government bodies
- Covers transmissions of performances & performances over digital networks
- For performance, all works are covered with one exception:
 - Performance of full works limited to nondramatic literary & musical works
 - Reasonable & limited portions of other works
 - No use of works produced for marketed primarily or use in mediated instructional activity via digital networks
- For display, all works in amount comparable to that typically displayed in live classroom



LIMITATIONS

- **Systematic mediated instructional activity**
 - At direction of or under supervision of instructor
 - Integral part of class session

- **For all works, copy must have been lawfully made**

- **Reception or receipt anywhere if technological conditions met**

- **Solely for students officially enrolled in the course & government employees as part of official duties**



TECHNOLOGICAL CONDITIONS FOR DIGITAL TRANSMISSIONS

- **Apply technological measures that reasonably prevent recipients from**
 - **Retaining works beyond the class session and**
 - **Unauthorized further distribution.**
- **Not interfere with owner's technological protections that prevent retention & distribution**

DIGITIZING WORKS FOR USE IN TRANSMISSION

- Permitted for portion of work or amount permitted under § 110(2) if:
 - No digital version available or
 - Available digital version subject to technological measures that prevent its use in distance education



TEACH ACT BENEFITS

- Perform longer portions than before
- Applies to all types of work
- No classroom requirements
- No one semester limit
- Fair use still applies



TEACH DOES NOT:

- **Permit posting full text materials on course webpages**
- **Eliminate the need for coursepacks & paying royalties**
- **Deal with library electronic reserves**
- **Permit performing full works except nondramatic literary & musical works**



HIGHER ED HERO
384 TECHNOLOGY DRIVE • MALVERN, PA 19355
PHONE 800.964.6033 • FAX 215.689.3435

Audio Conference Evaluation: (#1243)
“Applying Fair Use in Higher Education: Clearing Up the Confusion”
February 7, 2008 – 1:00 PM ET

Please take a moment to fill out this evaluation form and return it to Higher Ed Hero via fax (215-689-3435) or mail. Your comments will help us make future audio conferences even more valuable. If you would like your comments to remain anonymous, do not fill out the contact information below.

Contact Information:

Name: _____ Title: _____ Company _____
Phone: _____ Fax: _____ E-mail _____

1. Why did you attend this Audio Conference?

Topic of Interest Invited/Instructed to Attend Save Time vs. Physical Conference
 Speaker Educational/Training Value of Topic Participate with Colleagues
 Accreditation Price/Value

1. Did the conference cover topics that you are interested in or currently faced with?

Comments: _____

2. Were recommendations presented during the conference that you found useful in your current situation?

Comments: _____

3. How valuable was the live question and answer session to you on a scale of 1-5 (1 poor, 5 excellent)

Comments: _____

4. Did you face any technical difficulties prior to or during the conference? If yes, please explain:

5. Please rate **Laura Gasaway**, the conference presenter, on a scale of 1-5 (1 poor, 5 excellent)?

Preparation Verbal Presentation Question-and-Answer Session
 Expertise Conference Materials

Comments: _____

6. How many people listened in on the conference from the phone line you dialed in from? _____

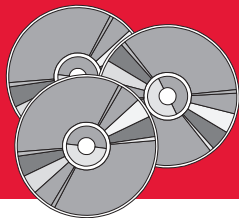
7. Do you have any suggestions for improvement? _____

8. Based on your experience with this conference, would you consider attending a future conference offered by our company?

If no, please explain: _____

9. Are there topics you would like to see covered in future conferences? _____

Thank you for your evaluation and feedback!



Audio Conference CDs

Reduced Price for Paid Attendees

**Supply limited
order today!**

Yes! I want to reserve my copy of the "Applying Fair Use in Higher Education: Clearing Up the Confusion" audio conference at the special discounted price of only \$99 (regularly \$199). This reduced price is for conference attendees only.

Payment information:

- Check enclosed for \$_____ (payable to Progressive Business Conferences)
- Please charge my credit card \$_____
- Visa Mastercard
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Account # _____

Exp. date _____

Signature _____

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IMPORTANT AUDIO CONFERENCE INFORMATION

Dear Audio Conference Attendee:

We have received a number of inquiries about audio conferences and the permissibility of copying and distributing materials, recording the conference as well as conferencing of calls to other sites by our listeners. Here are the main questions we receive.

Q: How many people may listen for the \$199 conference fee?

A: The \$199 registration charge is a “per phone line” charge. You may have as many people as feasible gather around one phone and listen to the conference.

Q: May I photocopy, fax or email a copy of my attendee packet to one or more colleagues for the purpose of calling from another location?

A: No. Only one phone line per registration is permitted. The first party to use your unique confirmation code will be the only phone line connected to the audio conference.

Q: May we tape the conference during the call.

A: No. Taping the conference and not purchasing the recording is an infringement on our copyright. However you may purchase the Audio Conference Tape or CD at the special paid attendee discounted price of only \$99 (regularly \$199). This price is reduced for conference attendees only.

We trust that our audience of professionals such as you will respect our legal copyright “on the honor system.” But if we learn of willful violations, we may have to seek legal remedies. If you have questions about the legal use and distribution of our conference materials not answered here, please contact us at 800-964-6033.

Sincerely,



Sara Mesiano
Conference Manager
Higher Ed Hero