



Copyright Considerations for Higher Education

Minnesota State Colleges and Universities
April 7, 2004

Minnesota State Colleges and Universities: Policy Considerations

In June of 2002, the Board of Trustees of the Minnesota State Colleges and Universities adopted Board Policy 3.26, *Intellectual Property* and Board Policy 3.27, *Reproduction and Use of Copyrighted Materials*. The policies are the result of the combined efforts of representatives of the Minnesota Interfaculty Organization, the Office of the Chancellor, and several Minnesota State Colleges and Universities campuses. Members of the Task Force on Intellectual Property spent several months researching, developing and drafting policy language. The Board of Trustees was also active in refining the final versions of the policies, which became effective on January 1, 2003. The full text of the policies may be accessed at <http://www.mnscu.edu/Policies/326.html> and <http://www.mnscu.edu/Policies/327.html>.

In conjunction with these policies, the Chancellor's Office has developed print materials, including tip sheets on such topics as classroom use of copyrighted materials and drafting requests for permission. Intellectual Property Coordinators have been appointed for each campus and a number of face-to-face training sessions have been conducted. The Chancellor's Office has also developed an educational website for faculty, students and staff. The website covers intellectual property and copyright law as it applies to the Minnesota State Colleges and Universities. It offers a wealth of information and will continue to be built out as new issues arise. The intellectual property portion of the website can be accessed at www.intellectualproperty.mnscu.edu and the copyright portion of the website can be accessed at www.copyright.mnscu.edu.

Copyright Basics:

In 1790, Congress enacted the first copyright law. The law has been revised many times since. It is grounded in the Patent and Copyright clause of the United States Constitution.

Copyright law grants to copyright owners the exclusive right to control and reproduce their works in accordance with federal law, subject to certain permissible uses. The law attempts to balance the interest of authors in protecting their works from unauthorized reproduction and the interest of the public in having access to such creative works.



Rights Of All Copyright Holders

Copyright owners have five rights with regard to their work.

- ✂ The right to reproduce the work;**
- ✂ The right to distribute the work;**
- ✂ The right to publicly perform the work;**
- ✂ The right to publicly display the work; and**
- ✂ The right to modify the work (including the creation of derivative works).**

Infringement

Non-owners often infringe on these copyrights when they engage in common activities like photocopying, downloading files, posting works (for example, photographs, graphics, text and sound) to a website, showing films and performing dramatic works like plays and songs.

Section 504 of the 1976 Act sets forth the remedies available to a copyright owner whose copyright has been infringed. Copyright owners who feel their rights have been violated may pursue the following remedies:

- Actual damages (*e.g.*, lost profits);
- Statutory damages in a sum not less than \$500, nor more than \$20,000. (Statutory damages may be increased to a sum not more than \$100,000, if the court finds that the infringement was committed willfully. The court may also reduce statutory damages to a sum not less than \$200, if it determines that the infringer was not aware and had no reason to believe that he/she was violating a copyright); or
- An injunction against the infringing activities.

What is Eligible for Copyright?

Copyright law protects original works of authorship “fixed in a tangible medium of expression.” Copyright protection is automatic and works are protected from the moment they are created (whether they bear the © symbol or not). Included among such original works are the following:

- **Literary works**
- **Musical works, including any accompanying words**
- **Dramatic works, including any accompanying music**
- **Pantomimes and choreographic works**
- **Pictorial, graphic and sculptural works**
- **Motion pictures and other audiovisual works**

- **Sound recordings**
- **Architectural works**

What is not eligible for copyright?

By law, certain works are not eligible for copyright protection.

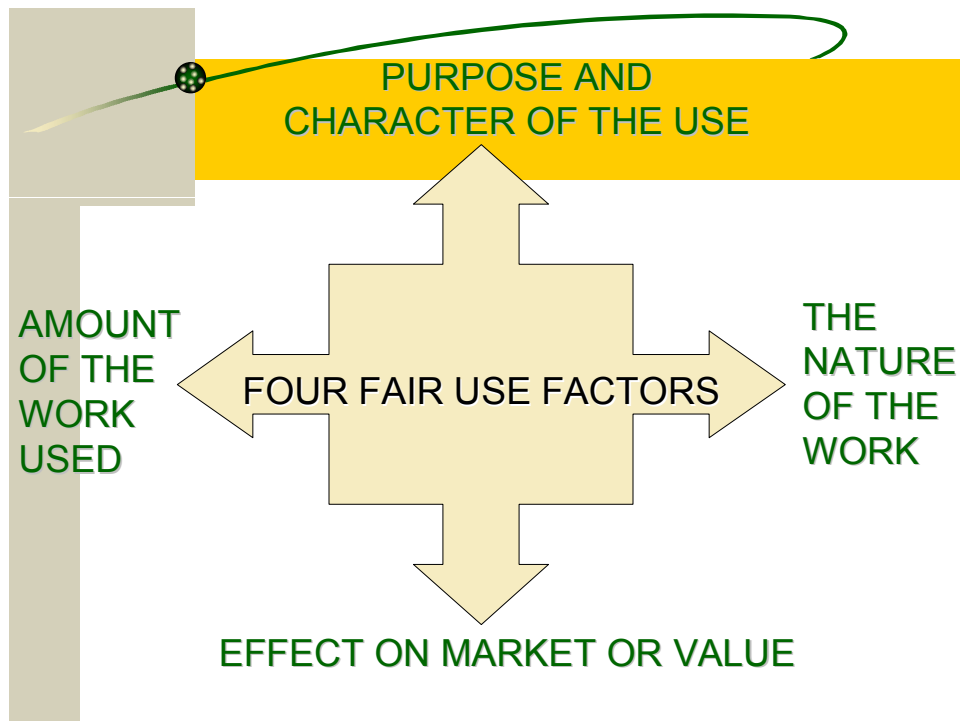
Accordingly, there are no restrictions on the use, photocopying, and reproduction of these works. Unprotected works fall into the following categories:

- **Works in the Public Domain:** These include works that never were copyrightable, as well as those for which the copyright has expired.
- **Government Publications:** Works prepared by an officer or an employee of the U.S. government *as a part of that person's official duty* are not copyrightable. Note that this “government publications” exception applies only to works of the U.S. government, however. Works of other governmental bodies, such as states, counties and cities, are copyrightable and can only be reproduced in accordance with law.
- **Non-copyrightable Works:** Works not fixed in a tangible medium of expression or that employ less than “minimal creativity” are not copyrightable. These include principles, ideas, processes, concepts, discoveries, procedures, systems, and methods of expression. Keep in mind, though, that some non-copyrightable concepts or ideas may be eligible for patent or trademark protection.
- **Statutory Exceptions:** In some instances, works that may otherwise be protected may be used without permission because the particular use being made of them falls within a statutory exception to the copyright law. Statutory exceptions include the exception for face-to-face teaching activities of non-profit groups and the exceptions for distance learning activities described in the TEACH Act.

Fair Use

Certain limited use of copyrighted materials for teaching, criticism, commentary, reporting, scholarship, and research is considered a “fair use” and does not constitute an infringement of copyright. The law sets forth the following four factors to be used in determining whether a particular use is a fair use:

- 1. The purpose and character of the use;**
- 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;**
- 4. The effect of the use upon the potential market for or value of the copyrighted work.**



Use, Copying, and Reproduction of Copyrighted Works with Permission

Unless a work falls within one of the previously listed exceptions, or the intended use of a work constitutes “fair use,” you should not use or make photocopies and other reproductions of copyrighted works without first obtaining specific permission from the copyright owner. When contacting an owner for permission to use a copyright protected work, it is important to clearly describe the manner in which you intend to use the work. The more information you provide for the owner’s consideration, the more likely you will be successful in your attempt to obtain permission. Once written permission has been obtained, you may make such copies and reproductions and use the work in any manner authorized by the copyright owner.



Requests for Permission

- ✎ Describe your audience
- ✎ Describe the work you want to use
- ✎ Describe when and how long you want to use it
- ✎ Describe why you want to use it
- ✎ Describe how and where you want to use it
- ✎ Agree to the owner’s limitations

Remember, too, that your college or university librarian can greatly assist you in your efforts to obtain copyrighted works. Librarians are well schooled in copyright issues and frequently use copyright clearinghouses.

TEACH Act

The most recent change to copyright law directly affects higher education. In the fall of 2002, Congress passed the Technology, Educational and Copyright Harmonization Act (TEACH Act). The TEACH Act revised the section of copyright law that deals with the performance and display of others' works in distance education settings and prescribes new rules for faculty members at institutions with students in remote classrooms, online courses, or other distance education settings.

What's Covered?

- ✎ TEACH Act covers materials that a teacher would show or play during class.
- ✎ TEACH Act does not cover materials for students to study, read, listen to or watch on their own time or outside class time.
- ✎ Intended to create rules for distance learning environments.
- ✎ Fair Use remains available and is not supplanted by TEACH Act.

Transmission of Copyrighted Works (Distance Education)

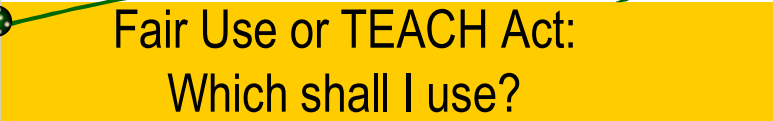
In accordance with the TEACH Act, educators at the Minnesota State Colleges and Universities' accredited non-profit colleges and universities may also show, display or perform others' work in distance education settings, just not to the same extent as in face-to-face classroom settings. The amount and type of work that may be broadcast or otherwise transmitted in a distance education setting are dictated by the act.

1. **Amount and Type of Work.** Pursuant to the TEACH Act, the following types of work may be broadcast or otherwise transmitted:
 - a) the performance of a non-dramatic literary work;
 - b) the performance of a non-dramatic musical work;
 - c) reasonable and limited portions of other works (such as films, videos or dramatic musical works like opera, musicals and music videos); and
 - d) other copyrighted works (such as still images) as long as the display of such works is in an amount comparable to that which is typically displayed in the course of a live classroom session.

2. **Conditions Governing the Broadcast or Transmission of Copyrighted Works.** Broadcasting or otherwise transmitting the above described works is subject to the following conditions, all of which must be complied with in order to stay within the boundaries of the TEACH Act:
 - a) The performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of the college or university. "Systematic mediated instructional activities" refers to the activities educators would engage in during the course of actual class time instruction, as opposed to

activities educators might assign as part of the students' work outside of class;

- b) The performance or display is directly related and of material assistance to the teaching content of the transmission;
- c) The transmission is made solely for students officially enrolled in the course and, to the extent technologically feasible, is limited to such students; and
- d) The transmitted material is not material specifically marketed for classroom use for digital distance education; has been lawfully made or acquired; and is not the type of material typically purchased by students (such as textbooks or coursepacks) for their review outside the classroom or class session.



Fair Use or TEACH Act: Which shall I use?

- ✂ Use Fair Use if it applies and permits the intended use.
- ✂ Use TEACH Act if the work will be used in a distance learning environment and Fair Use does not permit the intended use.
- ✂ Fair Use is often more liberal in terms of sources and amounts that may be used.



Appendix

Tip Sheets:

- ✂ Public domain
- ✂ Classroom use and copying
- ✂ Multimedia/website use
- ✂ Music
- ✂ Performance of copyrighted works
- ✂ Software

TEACH Act checklist

Tip Sheet:

Copyright and the public domain

The Minnesota State Colleges and Universities Office of the Chancellor has established guidelines for the copying, distribution and use of copyrighted materials. Copyright protection does not extend to works in the public domain, however. This tip sheet provides a summary of the types of works in the public domain that may, thus, be used freely.

Public domain

By law, certain works are not eligible for copyright protection. These works are considered to be in the “public domain.”

Because they are not protected, there are no copyright restrictions on the use, photocopying, and reproduction of these works. Works in the public domain include works that never were copyrightable, as well as works for which the copyright has expired. Unprotected works fall into the following categories:

- **Government publications.** Works prepared by an officer or an employee of the U.S. government as a part of that person’s official duty are not copyrightable. Works of other governmental bodies, such as states, counties and cities, are copyrightable, however, and can only be reproduced in accordance with law.
- **Non-copyrightable works.** Works not fixed in a tangible medium of expression or that employ less than “minimal creativity” are not copyrightable. For instance, copyright protection does not apply to slogans. Non-copyrightable works include principles, ideas, processes, concepts, discoveries, procedures, systems and methods of expression.
- **Works excluded from protection by statute.** In some instances, works that may otherwise be protected may be used without permission because the particular use being made of them falls within a statutory exception to the copyright law. For instance, there are statutory exceptions for distance learning activities described in the TEACH Act.
- **Works for which copyright protection has expired.** Trying to determine whether and when copyright protection expires is tricky. The laws have changed many times over the years. As the following chart illustrates, the duration of copyright protection for any particular work depends on the law in effect at the time of the work’s creation. The only sure rule of thumb is that all works published before 1923 are in the public domain.

When works pass into the public domain

DATE OF WORK	PROTECTED FROM	TERM
Published before 1923	In public domain	None
Published from 1923 through 1963	When published with notice	28 years + could be renewed for 47 years, now extended by 20 years for a total of 67 years. If not so renewed, in the public domain.
Published from 1964 through 1977	When published with notice	28 years for first term; now automatic extension of 67 years for second term.
Created before 1/1/1978, but not published	1/1/1978, the effective date of the 1976 Act that eliminated common law copyright	Life + 70 years or 12/31/2002, whichever is later.
Created before 1/1/1978, but published between then and 12/31/2002	1/1/1978, the effective date of the 1976 Act that eliminated common law copyright	Life + 70 years or 12/31/2047, whichever is later.
Created 1/1/1978 or after	When work is fixed in tangible medium of expression	Life + 70 years (or if corporate authorship, the shorter of 95 years from publication or 120 years from creation).

Based on a chart by Lolly Gasaway, University of North Carolina at www.unc.edu/~uncclng/public-d.htm

Tip Sheet:

Classroom use and copying of books and periodicals

The Minnesota State Colleges and Universities Office of the Chancellor has established guidelines for classroom use and copying of books and periodicals where faculty members do not first obtain permission to use the copyrighted works. This tip sheet provides a summary of those guidelines.

Single copies for research and teaching

A single copy of any of the following may be made by faculty members for research or for teaching or preparing to teach a class:

- a chapter from a book;
- an article from a periodical or newspaper;
- a short story, short essay, or short poem; or
- a chart, diagram, drawing, cartoon or picture from a book, periodical or newspaper.

Copies for classroom distribution

Multiple copies (not to exceed more than one copy per pupil in a course) may be made by faculty members for classroom use or discussion provided that 1) the copying meets the tests of brevity and spontaneity; 2) the copying meets the cumulative effect test; and 3) each copy includes a notice of copyright.

Brevity and spontaneity

Brevity refers to how much of the work is copied. A short, complete work (such as a poem, article, or essay) may be copied; a single chart, diagram, cartoon or picture may be copied; and a portion of a “poetic prose” work (e.g. a children’s book) may be copied, as long as the portion copied does not exceed two published pages or 10% of the work.

Spontaneity refers to the timing of the decision to use the work. In order to be “spontaneous,” the faculty member’s inspiration to use a work and the copying/distribution of the work must be so close in time that attempting to obtain permission first would be unreasonable. **If a faculty member makes the decision to use a work in a class while engaged in course preparation, the use is planned (not “spontaneous”). The faculty member should seek permission from the copyright owner in that instance, before copying and using the work in class.**

Cumulative effect

Evaluating cumulative effect requires a “big picture” view of how much and how often works are being copied for classroom use. For instance, copying may only be for one course for one semester. Copying of multiple works by the same author or from the same collective work is not allowed. In addition, no faculty member may engage in more than nine instances of multiple copying during one class term.

Copying restrictions

In no instance may faculty members engage in the following:

- copying of “consumable works,” including workbooks, standardized tests, test booklets, answer sheets, etc.;
- copying of works to replace or substitute for anthologies, compilations or collective works;
- copying of works to substitute for the purchase of books, publishers’ reprints or periodicals;
- charging students for copies beyond the actual cost of the copying.

Tip Sheet:

Use of copyrighted materials in web pages and multimedia works

The Minnesota State Colleges and Universities Office of the Chancellor has established guidelines for the copying, distribution and use of copyrighted materials. This tip sheet provides a summary of those guidelines with respect to their use in web pages and multimedia works.

What is a “multi-media” work?

“Multi-media” works are works that combine different content and media, (such as music, text, graphics, illustrations, photographs or software) into a single work, and which frequently are presented in an electronic format, either online or on CD-ROM. The unique thing about multi-media works is that they often combine the work of many different creators, all of whom have rights in the works they have created. For this reason, it is important when designing multi-media works to consider the use being made of others’ works and to obtain permission to use such works when appropriate.

Copyright protection

Copyright protection is automatic and works are protected from the moment they are created. By law, copyright owners have certain exclusive rights. These include the right to reproduce their work; to distribute their work; to create derivative works; to publicly display their work; and to publicly perform their work. Non-owners may infringe on these rights when they engage in common activities like photocopying, scanning, and downloading works. It is important to keep in mind that even though we have the technology available to capture, copy and use others’ protected literary, graphic or musical works, it is not always legal to do so.

“Fair use” and permission

Unless your inclusion of another’s copyrighted work in your multimedia work falls within the “fair use” exception to copyright law, you must obtain permission from the copyright owner of the work before including it in your multi-media work. Some copyright owners may grant permission readily. Others may require you to pay a fee in exchange for an assignment or license to use the work. Regardless, permission must be obtained or the work may not be used.

What to keep in mind

- Much of the information found on the internet is protected by copyright so you must obtain permission before using it.
- Works may be protected by copyright, even if they do not bear the copyright symbol (use of the symbol is optional for works created after 3/1/1989).
- Even if you use only a portion of a copyrighted work, you may still violate the owner's copyright, especially if the portion you use is vital to the work as a whole.
- Use of another's work in an educational setting does not automatically constitute "fair use."
- Some works are protected by more than one copyright. For example, if you want to include a photograph of a piece of sculpture in your multi-media production, you must obtain permission from the sculptor as well as the photographer who produced the image of the sculpture. Using music also can be tricky, as separate copyrights can be held by composers, lyricists, and performers.

For more information regarding "fair use" and obtaining permission to use copyrighted works, please consult the Minnesota State Colleges and Universities' available print and online resources.

Tip Sheet:

Use and copying of music materials

The Minnesota State Colleges and Universities Office of the Chancellor has established guidelines for use and copying of music materials where faculty members do not first obtain permission to use the copyrighted works. This tip sheet provides a summary of those guidelines.

Copying and use of music materials in the classroom

Copyrighted music material may be copied and used by a faculty member in the classroom under the following circumstances:

- to replace purchased copies in an emergency when, for any reason, the copies are not available for an imminent performance, provided purchased replacement copies are substituted in due course;
- for academic purposes other than performance, provided that excerpts do not comprise a part of the whole that would constitute a performable unit such as a section, movement, or aria and, provided further that no more than 10% of the whole work is copied and no more than one copy per student is made;
- to provide edited or simplified versions of printed works, provided that the fundamental character of the work is not distorted or the lyrics altered or new lyrics added;
- a single copy of recordings or performances by students may be made for evaluation or rehearsal purposes and may be retained by the college or university or individual faculty member;
- a single copy of a sound recording of copyrighted music may be made from a sound recording owned by the college or university or individual faculty member for the purpose of constructing aural exercises or examinations and may be retained by the college or university or faculty member. (This pertains only to the copyright of music itself and not to any copyright that may exist in the sound recording.)

Copying restrictions

In no instance may faculty members engage in the following:

- copying of “consumable works,” including workbooks, standardized tests, test booklets, answer sheets, etc.;
- copying of works to replace or substitute for anthologies, compilations or collective works;
- copying for the purpose of performances, except as permitted above;
- copying of works to substitute for the purchase of music, except as permitted above;
- copying without inclusion of the copyright notice that appears on the printed copy.

Tip Sheet:

Performance of copyrighted works in the classroom, distance education and public settings

The Minnesota State Colleges and Universities Office of the Chancellor has established guidelines relating to the performance of copyrighted works for educational purposes. This tip sheet provides a summary of those guidelines.

Classroom performances for teaching purposes

Faculty members may show, display or perform others' work in the classroom

(e.g. videos, motion pictures, music materials, dramatic works) under the following conditions:

- the work is shown/displayed in the classroom or a similar place devoted to instruction;
- the faculty member and the students are in the same location;
- the audience is composed of members of one class only;
- the work is shown/displayed as part of systematic instruction, which does not include recreational or cultural programs;
- the work is shown/displayed at the direction of the faculty member, a student or a guest lecturer.
- the work is lawfully obtained.

Distance education

Faculty members may also show, display or perform others' work in distance education settings, just not to the same extent as in face-to-face classroom settings. The amount and type of work that may be broadcast or otherwise transmitted in a distance education setting are dictated by a recent revision to copyright law called the TEACH Act.

What may faculty members broadcast under the TEACH Act?

- the performance of a non-dramatic literary work;
- the performance of a non-dramatic musical work;
- reasonable and limited portions of other works (such as films, videos, operas, music videos); and
- works such as still images, as long as the display of such works is in an amount comparable to that which typically is displayed in the course of a live classroom session.

What conditions govern the broadcast of these works?

The TEACH Act lists a number of conditions that govern the transmission or broadcast of materials in distance education settings. Among these are the requirements that the performance or display of material be done at the direction of a faculty member and as an integral

part of a class session; that the performance or display be directly related to teaching content; that the transmission be solely for students officially enrolled in the course; and that the transmitted material not be material specifically marketed for classroom use for distance education and not be used as a substitute for the purchase of books or course packs.

Public performances

The public performance of videos, motion pictures, or other similar audiovisual works without permission of the copyright holder is prohibited. The public performance of non-dramatic works and musical works without permission of the copyright holder is also prohibited, unless the performance is not broadcast to the public and is not a profit making venture, the performers and promoters are not paid, and there is no admission charge (or, if admission is charged, all profits are used exclusively for educational, religious, or charitable purposes). Even then, if the copyright owner objects, the performance may not be held.

Tip Sheet:

Use and copying of computer software and other electronic works

The Minnesota State Colleges and Universities Office of the Chancellor has established guidelines for the copying, distribution and use of computer software and other electronic works that are protected by contract or copyright law. This tip sheet provides a summary of those guidelines.

Computer software

The improper copying, distribution, or use of contractually protected or copyrighted computer software is prohibited. "Copying" includes either duplicating floppy disks or transferring a program from a floppy onto a hard disk and then sending the copied program over a local area network or telecommunicating it over long distance lines.

Copying of software

The following requirements apply to the use of computer software:

- Computer software shall not be duplicated unless properly authorized by the copyright owner. Unless explicit statements identify the software as "shareware," users should assume that it may not be duplicated;
- Users should consult with the college's or university's Intellectual Property Coordinator or a department manager to ensure that software may be copied before any copies are made;
- Copies or adaptations of computer programs may be made when the new copy or adaptation 1) is created as an essential step in the use of the computer program with a particular machine and is used in no other manner, or 2) is for archival purposes only and all archival copies are destroyed when continued possession of the program ceases to be rightful.

Licensing

The following requirements apply to licensing of computer software:

- Each college or university shall ensure that it holds proper licenses for computer software in use on college or university equipment;
- Faculty or staff members who acquire software for their personal use must obtain any necessary licenses and may not make copies of the software for colleagues;
- Computer software shall be used only on computers for which the college or university has a license or other authorization to use the software;
- If the college or university supplies licensed software to students for use in a classroom setting, sufficient licenses must be held for all

computers in the classroom. If the software is supplied in other than a face-to-face classroom setting, sufficient licenses must be held for all students in the class and for the faculty member.

- If more than one class is using licensed software during the same term, sufficient licenses must be held for all such classes.

Other electronic works

Works on the internet, such as software, distance learning materials, telecourses, web pages and other such material are entitled to the same copyright protection as printed work. Faculty and staff members who desire to copy works on the internet must be aware of and comply with copyright restrictions.

TEACH Act Checklist

- My institution is a nonprofit accredited educational institution or a governmental agency**
- It has a policy on the use of copyrighted materials**
- It provides accurate information to faculty, students and staff about copyright**
- Its systems will not interfere with technological controls within the materials I want to use**
- The materials I want to use are specifically for students in my class**
- Only those students will have access to the materials**
- The materials will be provided at my direction during the relevant lesson**
- The materials are directly related and of material assistance to my teaching content**
- My class is part of the regular offerings of my institution**
- I will include a notice that the materials are protected by copyright**
- I will use technology that reasonably limits the students' ability to retain or further distribute the materials**
- I will make the materials available to the students only for a period of time that is relevant to the context of a class session**
- I will store the materials on a secure server and transmit them only as permitted by this law**
- I will not make any copies other than the one I need to make the transmission**
- The materials are of the proper type and amount the law authorizes:**
 - Entire performances of non-dramatic literary and musical works**
 - Reasonable and limited parts of a dramatic literary, musical, or audiovisual works**

- **Displays of other works, such as images, in amounts similar to typical displays in face-to-face teaching**
- **The materials are not among those the law specifically excludes from its coverage:**
 - **Materials specifically marketed for classroom use for digital distance education**
 - **Copies I know or should know are illegal**
 - **Textbooks, coursepacks, electronic reserves and similar materials typically purchased individually by the students for independent review outside the classroom or class session**
- **If I am using an analog original, I checked before digitizing it to be sure:**
 - **I copied only the amount that I am authorized to transmit**
 - **There is no digital copy of the work available except with technological protections that prevent my using it for the class other than in the way the statute authorizes**