

June 2021

FAQs for Teaching Artists

Prepared for the New York State Council on the Arts

Teaching artists and their employers encounter numerous issues related to the creation and use of artistic content in the classroom. The following questions are intended to provide guidance to people working in a community arts classroom setting.

- **Can parts of video content created for one organization be used for another organization (or organizations)?**
 - *Not without permission from the copyright owner. An assignment or license from a copyright owner may transfer the right to reproduce the work, create derivative works, distribute copies of the work or perform or publicly display the work to someone else. A license must be negotiated with the copyright owner.*
- **How to talk about copyright with your employer: what questions should I ask before signing my contract?**
 - *By default, content that is created by an employee within the scope of their employment is considered a “work for hire” and belongs to the employer. If you want ownership of content you create, that would need to be negotiated with your employer.*
- **What's the difference between copyright and fair use?**
 - *Copyright protects original works of authorship (works such as written works, audiovisual works, artworks, musical works) from unauthorized reproduction and use. Fair use is a doctrine that enables certain kinds of uses of works, but typically only limited portions of works, to be made without becoming liable for copyright infringement. It is a fact-specific determination, made by a court (fair use is a defense, not a bar to being sued) as to whether a particular use of a particular material falls under the fair use doctrine, so a copyright attorney should be consulted before relying on fair use. More information about fair use can be found at <https://www.copyright.gov/fair-use/more-info.html>*
- **How does copyright impact the resources that I show or use in my class? (i.e. source material, music used in a class or for a sharing, etc.)**
 - *The Copyright statute permits teachers of non-profit accredited institutions to display or perform copyrighted works (excluding copies of audio-visual works that the school knows or should know were not lawfully made) as part of in-person (classroom) teaching. The statute uses “display” to mean “to show a copy of it, either directly or*

through a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images non-sequentially.” The statute uses “perform” to mean “to recite, render, play, dance, or act it, either directly or through any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”

- *It is important to note that these permissions do not include making copies (except as strictly necessary to be able to display or perform a work by a teacher in the classroom), either physical or electronic (including for later review on a website or portal) for distribution to or later review by students, and also does not extend to textbooks, course packs or other such materials “typically purchased or acquired for elementary and secondary students for their possession and independent use.”.*
- *For remote-learning settings analogous to a typical classroom, where a work is to be displayed or performed as part of “mediated instructional activities” (those lead and supervised by a teacher in real time), works may be uploaded as long as a set of technical measures and restrictions on access set forth in the statute are met, which include that: access to the display and performance is limited to students in the class; delivery is made only to those enrolled in the course and review or retention beyond the classroom session or further dissemination of the work is prevented; the institution does not engage in any conduct that would interfere with the efforts of the copyright holder to limit such retention or dissemination; and, the institution has policies in place regarding copyright with informational materials promoting compliance.*
- *Absent the circumstances in the forgoing points, teachers will need to license materials or to rely on the fair use doctrine (see answer above).*
- **How does the process and context of creating these educational resources impact copyright? For example, a teaching artist creating and editing a video on their own looks different than administrative staff collaborating with teaching artists on a curriculum.**
 - *When people work together to create and use each other’s materials, under United States copyright law, this may result in the creation of joint works, collective works, or derivative works. The distinction between joint works, collective works, and derivative works can be difficult to discern. Indeed, various aspects within a single work could fall within all three of the categories. The analysis to determine what type of work has been created is fact-specific, and nonprofits should consult with an attorney in order to understand what intellectual property rights may exist with respect to the work, as each classification has its own consequences under copyright law.*

Generally speaking, however: A joint work is created by two or more “authors” who intend for their contributions to be merged into inseparable or interdependent parts. Certain types of work are more commonly made jointly, such as songs, movies, and operas, but ultimately, any copyrightable material can be a joint work. A collective work is created when two or more authors’ works are joined together into one work; however, the primary intent of the authors in creating their own contributions was to have them be separate works. Typical examples of collective works include poetry anthologies and

collections of short stories. A derivative work is a work that is based in whole or substantially upon one or more preexisting works (e.g., a translation, fictionalization, motion picture version, etc.).

- **If we record a class for students to watch, do we need to update our media release regarding recording? This recording would be for internal use only, for absent students or students who need to watch the class a second time. Are there any practical workarounds for this?**

- *New York is a one-party consent state, meaning that a conversation can be recorded so long as one party has consented. This means that an organization may record an online session without consent of the other party. However, organizations should notify participants and their parents or guardians if the organization plans to record its programming and how the recording will be used. For example, a nonprofit may wish to record a session for security purposes to ensure no improper behavior by staff, or to be made available later to participants who were not available to participate in the live session. If you plan to make the recordings available to anyone outside of those participating in the session, then you should have a media release signed by anyone in the recorded session giving permission to share the recording of the participant. Recordings should not be used for marketing and publicity.*

- **Does adding language to the videos as shown in quotes below provide any legal protection?**
- ***“This video in its entirety is the intellectual property of ORGANIZATION and cannot be reproduced without their permission. Video Content has been made available for informational and educational purposes only. Fair use is permitted by copyright statute that might otherwise be infringing.”***

It is never a bad idea to include language or a disclaimer that puts the audience on notice regarding the ownership of the materials to which they’ve been given access. You should consult with an intellectual property attorney to review any specific language used. Reliance on such language to avoid liability for copyright infringement, however, is unlikely to succeed.

- **What language should we have in our contracts with the schools to make sure we maintain the rights to our own videos? Can expiration dates/ usage amounts/terms get worked into that language? (See below.)**

Who “owns” a lesson plan? Can I use a lesson plan or curriculum across multiple organizations? (See below.)

Who owns a video-recording lesson plan? In a contract for something like this, what needs to be included and for how long are the terms? How much and in what context can it be reproduced?

- *In response to the questions above, the general rule is that the person who creates the work owns the copyright. The exception is a “work made for hire,” where an employee creates a work (e.g., a video-recording lesson plan) within the scope of their employment. In that case, the work is owned by the employer. Anything outside of this*

default must be negotiated in a contract. Terms of a license agreement can vary widely depending on facts and circumstances.

- **Are we legally allowed to use other artist's work (a popular song for example) in our videos if they are for educational purposes? How does being a non-profit affect this?**
 - *See the answers above regarding fair use doctrine and use of materials in a classroom setting. Educational and non-profit (non-commercial) purposes for a use of a work are helpful in a fair-use analysis, but are not the only considerations a court must use to determine whether a use falls under the doctrine.*

This alert is meant to provide general information only, not legal advice. If you have any questions about this alert please contact Ciarra Chavarria at Cchavarria@lawyersalliance.org or visit our website at www.lawyersalliance.org for further information. To become a client, visit www.lawyersalliance.org/becoming-a-client.

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations and social enterprises that are improving the quality of life in New York City neighborhoods. Our network of pro bono lawyers from law firms and corporations and staff of experienced attorneys collaborate to deliver expert corporate, tax, real estate, employment, intellectual property, and other legal services to community organizations. By connecting lawyers, nonprofits, and communities, Lawyers Alliance for New York helps nonprofits to provide housing, stimulate economic opportunity, improve urban health and education, promote community arts, and operate and advocate for vital programs that benefit low-income New Yorkers of all ages.