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You're Suing Me? Best Fair Use & Copyright Practices

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You're Suing Me?

Best Fair Use & Copyright Practices

Do you teach? Do you publish?

Do you know how to exercise your fair use rights?


Green Library – Panel Discussion – 2/24/16

Libguides.fiu.edu/FairUse

Panel Members

- **Stephanie Brenenson**
Graduate Studies/Scholarly Communication Librarian
- **Sarah J. Hammill**
Business & Online Learning Librarian
- **Valerie Boulos**
Head, Collection Development and Resource Access
- **Jamie Rogers**
Assistant Director, Digital Collections Center
- **Tom Moore**
Head, Sound and Image Department
- **Brandie Thomas**
Electronic Thesis and Dissertation Coordinator, University Graduate School

Step by Step

- **Use unprotected works**
- **Use licensed materials to exercise Fair Use**
 - FIU Libraries
 - Creative Commons 
 - Web (implied license, unless otherwise stated)
- **Seek a license; ask for permission**
- **Back to Fair use**

17 USC = Copyright

Copyright* is a bundle of exclusive rights of the creator or copyright holder:

- **To Reproduce**

The Reproduction right is the right to make copies of a protected work (e.g. as photocopies or online)

- **To Distribute**

The Distribution right is the right to sell or distribute copies of the work to the public

- **Prepare Derivative Works or Adaptations**

The right to create adaptations (called derivative works, e.g. translations), the right to prepare new works based on the protected work

- **Display or Perform the Work Publicly**

The rights to perform a protected work (such as a stage play) or to display a work in public

- **Authorize Others to Exercise Any of These Rights**

This bundle of rights allows a copyright owner to be flexible when deciding how to realize commercial gain from the underlying work; the owner may sell or license any of the rights.

*Granted by the Copyright Act of 1976

Section 107. Limitation on exclusive rights: Fair Use

- Fair use is a legal doctrine that **promotes freedom of expression** by permitting the **unlicensed use of copyright-protected works in certain circumstances**.
- The fair use of a copyrighted work...for purposes such as:
 - **criticism,**
 - **comment,**
 - **news reporting,**
 - **teaching** (including multiple copies for classroom use),
 - **scholarship, or research,**is not an infringement of copyright.
- **Four factors** – are considered In determining whether the use made of a work in any particular case is a fair use.

Four Factors

- 1. Purpose and Character of the Use**
- 2. Nature of the Copyrighted Work**
- 3. Amount or Substantiality of the Portion Used**
- 4. Effect of the Use on the Potential Market for or Value of the Work**

Utilize a Four Factors Checklist – a tool, a roadmap

Fair Use Checklist

_____	_____	_____
Name	Campus	Date
_____	_____	_____
Project	Prepared by	

Favors Fair Use	Purpose	Opposes Fair Use
<input type="checkbox"/> Teaching (including multiple copies for classroom use)	<input type="checkbox"/> Commercial Activity	<input type="checkbox"/> Profiting from use
<input type="checkbox"/> Research	<input type="checkbox"/> Entertainment	<input type="checkbox"/> Bad-faith behavior
<input type="checkbox"/> Scholarship	<input type="checkbox"/> Denying credit to original author	
<input type="checkbox"/> Nonprofit educational institution		
<input type="checkbox"/> Criticism		
<input type="checkbox"/> Comment		
<input type="checkbox"/> News reporting		
<input type="checkbox"/> Parody		
<input type="checkbox"/> Transformative or productive use (changes the work for new utility)		
<input type="checkbox"/> Restricted access (to students or other appropriate group)		

Favors Fair Use	Nature	Opposes Fair Use
<input type="checkbox"/> Published work	<input type="checkbox"/> Unpublished work	
<input type="checkbox"/> Factual or nonfiction based	<input type="checkbox"/> Highly creative work (art, music, novel, film, play)	
<input type="checkbox"/> Important to favored educational objectives	<input type="checkbox"/> Fiction	

Favors Fair Use	Amount	Opposes Fair Use
<input type="checkbox"/> Small quantity	<input type="checkbox"/> Large portion or whole work used	
<input type="checkbox"/> Portion used is not central or significant to entire work	<input type="checkbox"/> Portion used is central to or "heart of" the work	
<input type="checkbox"/> Amount is appropriate for favored educational purpose		

Favors Fair Use	Effect	Opposes Fair Use
<input type="checkbox"/> User owns lawfully purchased/acquired copy of original work	<input type="checkbox"/> Could replace sale of copyrighted work	
<input type="checkbox"/> One or few copies made	<input type="checkbox"/> Significantly impairs market or potential market for copyrighted work or derivative	
<input type="checkbox"/> No significant effect on the market or potential market for copyrighted work	<input type="checkbox"/> Reasonably available licensing mechanism for use of the copyrighted work	
<input type="checkbox"/> No similar product marketed by the copyright holder	<input type="checkbox"/> Affordable permission available for using work	
<input type="checkbox"/> Lack of licensing mechanism	<input type="checkbox"/> Numerous copies made	
	<input type="checkbox"/> You made it accessible on the Web or in other public forum	
	<input type="checkbox"/> Repeated or long-term use	

Best Practices Statements

Center for Social Media and Washington School of Law at American University

- **Is the use you want to make of another's work transformative?**
 - Does it add value to and repurpose the work for a new audience?
- **Is the amount of material you want to use appropriate to achieve your transformative purpose?**

Transformative uses that repurpose no more of a work than is needed to make the point, or achieve the purpose, are generally fair use.

Sarah J. Hammill

Business & Online Learning Librarian

TEACH Act

- Technology, Education And Copyright Harmonization (TEACH) Act
- Expands the scope of educators' rights to perform and display works and to make the copies integral to such performances and displays for distance education.
- Doesn't completely eliminate the gap between f-2-f and distance learning
- Allows:
 - Performance of non-dramatic literary or musical work
 - Performance of any other work (dramatic & audiovisual) in **“reasonable and limited portions”**
 - Display in an amount comparable to f-2-f (i.e. images)
- Extension of Copyright / Not a replacement for Fair Use

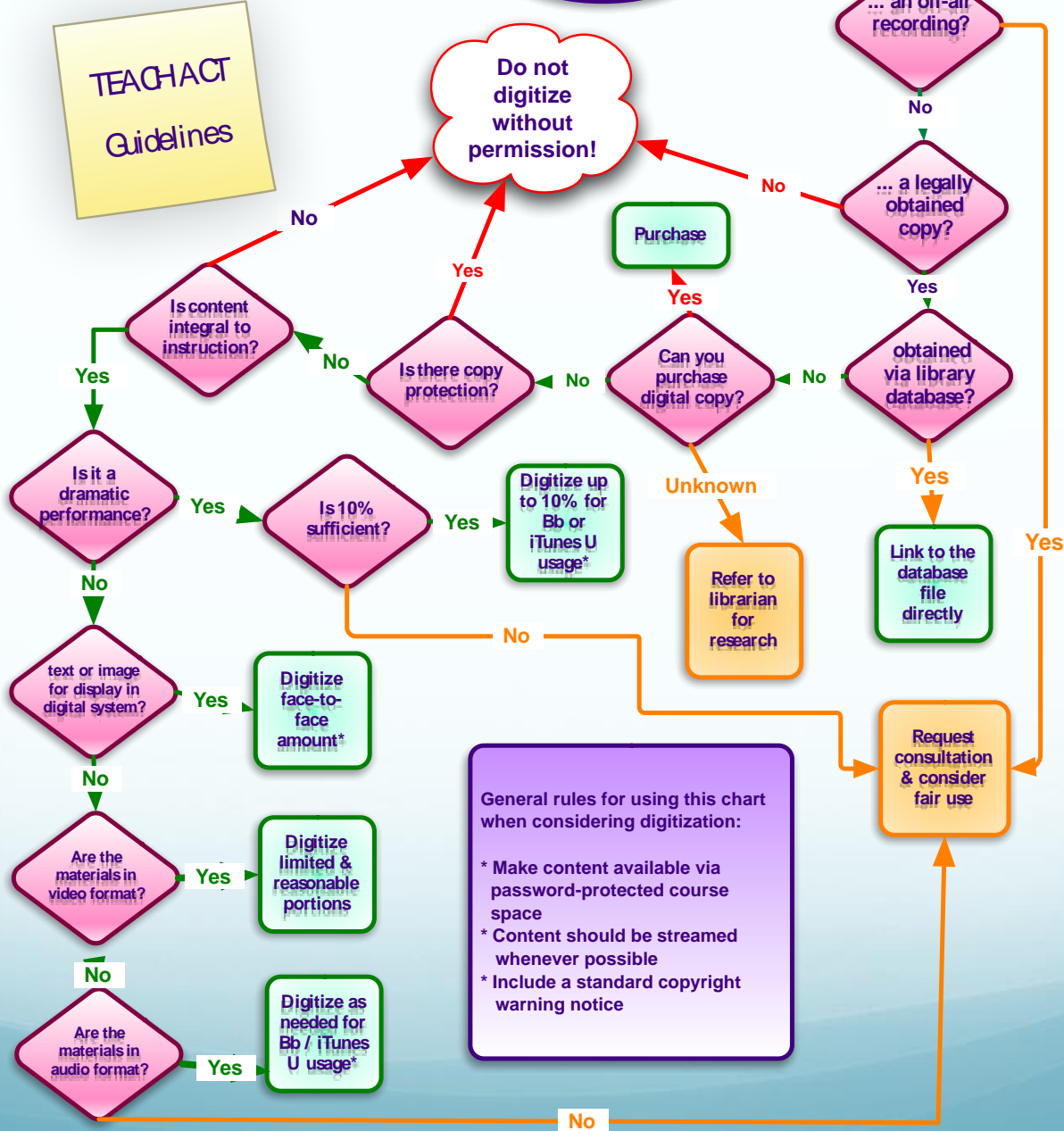
Blackboard Ethics

- Link Not Copy
- Performance & Displays / Part of mediated instruction
- Limit access / Time limits
- Prevent copying of copyrighted works / No tampering
- When needed, get copyright permission – include documentation
- Take the rights of other's seriously
 - Show a reasonable, logical effort to comply with Fair Use and/or the TEACH Act
- If in doubt, contact your library subject specialist!

Can this material be digitized?

START HERE!

TEACHACT Guidelines



General rules for using this chart when considering digitization:

- * Make content available via password-protected course space
- * Content should be streamed whenever possible
- * Include a standard copyright warning notice

No

References

- Copyright Guide:
<http://libguides.fiu.edu/copyright>
- TEACH Act Flowchart:
<http://libguides.fiu.edu/copyright/TEACHAct>
- TEACH Act Checklist:
<http://libguides.fiu.edu/copyright/TEACHAct>

Valerie Boulos

Collection Development and
Resource Access, Head

Fair Use and Licensing

- Most electronic resources have a license
 - Software = shrinkwrap license (non-negotiable)
 - Electronic devices (Kindle, iPad) = shrinkwrap license
 - Most library resources = contract and usage terms

License terms may
restrict or expand
certain uses,
including Fair Use
and Copyright

License Example 1

- Authorized Uses. Licensee and its Authorized Users **may** access and use the Licensed Products only for scholarly and research purposes and only as follows: (1) access, search, browse and view the Licensed Products; (2) **download and print individual Articles and make a reasonable number of photocopies of a printed Article**; (3) print a reasonable number of pages from an eBook and make a reasonable number of photocopies of those printed pages; (4) forward links to individual Articles and eBooks to Authorized Users and others; (5) **post up to twenty-five (25) Articles or eBooks per semester, per course in PDF or HTML format for the purposes of electronic course reserves** on Licensee's internal, secured computer network accessible only to Authorized Users
- (c) Restrictions. Except as expressly permitted in this Agreement, Licensee and its Authorized Users **may not**: (1) **download, reproduce, retain or redistribute the Licensed Products or any journal or issue of a journal in the Licensed Products in its entirety or in any substantial or systematic manner**, including, but not limited to, accessing the Licensed Products using a robot, spider, crawler or similar technological device; (2) **electronically distribute, via e-mail or otherwise, any Article or eBook**; ... (6) remove, obscure or modify in any way copyright notices, other notices or disclaimers that appear on Articles or eBooks or in the Licensed Products.

License Example 2

- 3. USAGE RIGHTS
- (a) **You**, subject to clause 4 below, **may**:
 - (i) Allow Authorised Users to have access to the Online Product(s) from the Server via the Secure Network;
 - (ii) Access, search and view the Online Product(s) for the purpose of internal marketing or testing or for training Authorised Users or groups of Authorised Users;
 - (iv) **incorporate parts of the Online Product(s) in Course Packs and/or Electronic Reserves to be used by Authorised Users in the course of instruction** (but not for Commercial Use) at Your institution and hosted on a Secure Network. Each such item shall be subject to any limits detailed in clause 3(b) below, and shall carry appropriate acknowledgement of the source, listing title and author of the extract, title and author of the work, copyright notice, and the Publisher. **Copies of such items shall be deleted by You when they are no longer used for such purpose.** Course packs in non-electronic non-print perceptible form, such as audio or Braille, may also be offered to Authorised Users who, in Your reasonable opinion, are visually impaired;

Electronic Books – License Variety at Its Best

E-book Platform Differences

- Format differences
 - Pdf, epub, reader application
- Some download by chapter, others the entire book
- Limits to number of pages you can print
- Limits to number of simultaneous users

The E-Book User Scale

- 1-user: only 1 user can access or download at a time
 - Cheapest
 - Typically fine for research level material, definitely not for course-required readings!
- 3-user: up to 3 users can access or have downloaded at a time
- “non-linear lending”: can be used simultaneous, up to a certain amount of uses per year
- Unlimited access
 - Most expensive
 - Needed for course required readings

How can I tell the number of users?

- 3 E's
 - **EBSCO** and **Ebrary** typically have a limited number of users
 - **EBL** is usually non-linear lending (sufficient for class)
- Others are typically unlimited users
 - Oxford University Press may or may not be unlimited (depends on the resource)
- Check with your liaison

Video Rights are
even messier

Rights can vary from film to film...

- Educational Use
 - Typically allows use of a film for classroom instruction
 - May or may not include non-classroom use (i.e., organizations or clubs)
 - Often exclude the ability to stream in an online course
- Public Performance Rights
 - Needed for most organization showings
 - Definitely needed for showings which include non-FIU members (public)

Streaming Videos

- Whereas a DVD is bought once and can be used for many years, streaming video licenses are typically 1-3 year subscriptions
- Rights may vary based on where we purchase the film and what rights were requested at the time of purchase
 - i.e., class use versus generally added to the collection

Jamie Rogers

Digital Collections Center,
Assistant Director

Digitized & Born Digital

What are “digital collections” and how do they differ from electronic resources (subscription based journals/databases) ?

- Digitized special collections and archives of published and unpublished materials
 - Photographs, rare books, ephemera, oral histories, maps, letters, etc.
- Open access institutionally created content
 - Journals, white papers, conferences, theses and dissertations
- Generally free and open to university community or worldwide

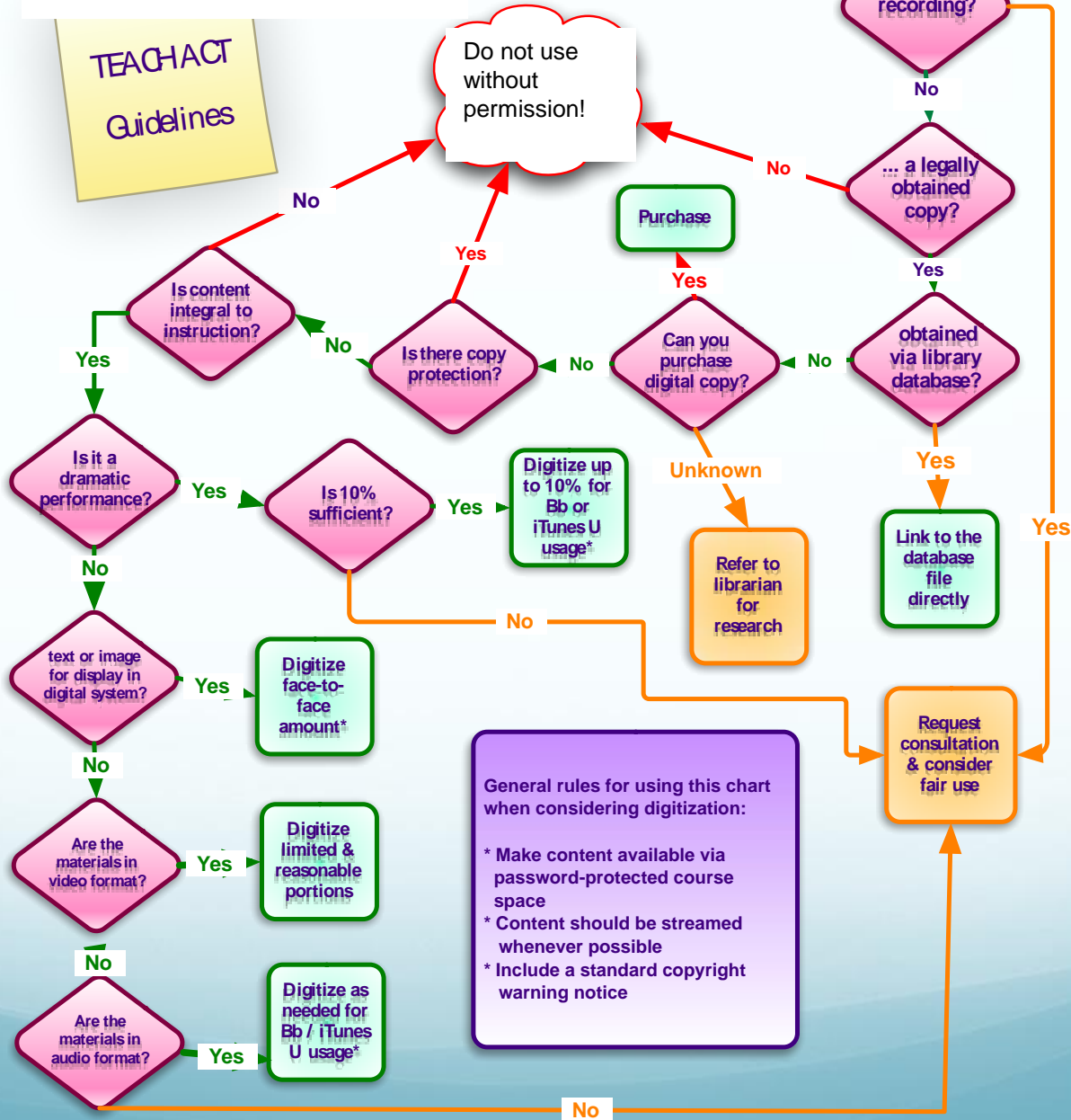
Already online = free to use?

- The rules of fair use apply to digital collections in the same way they apply to all other types of materials.
- Just because an item is made available online through fair use does not mean that fair use will apply to your use.

Can this material be used?

START HERE!

TEACHACT Guidelines



General rules for using this chart when considering digitization:

- * Make content available via password-protected course space
- * Content should be streamed whenever possible
- * Include a standard copyright warning notice

No

Digital Content is...special

- You may have a difficult time establishing copyright due to lack of date and/or creator information.
- The work may be considered “orphaned.”
 - Orphan Works and Mass Digitization - a report of the register of copyrights, June 2015: <http://copyright.gov/orphan/reports/orphan-works2015.pdf>
- Something may be out of copyright, but the owning institution may want to license the use of the digitized material.
- It is best practice to cite the owning institution, in addition to the actual copyright holder (if one is identified).

Tom Moore

Sound and Image Department,
Head

Copyright, fair use, and media, 1

- Terms
- Formats
- Best practices/Fair use
- Specific cases

Terms

History of copyright terms in the USA

- 1790 14 years, renewable for 14 years
- 1831 28 years, renewable for 14
- 1909 28 years, renewable for 28
- 1978 life of author, plus 50
- 1989 US adheres to Berne Convention
- 1998 Sonny Bono Extension = life plus 70

Formats

- 1831 Music protected against unauthorized printing
- 1856 Dramatic compositions protected
- 1865 Photographs and negatives protected
- 1870 Works of art protected
- 1870 Some derivative works protected, including translations and dramatizations
- 1897 Public performance of music protected
- 1912 Motion pictures protected
- 1953 Recording/performing rights for non-dramatic literary works
- 1972 Copyright protection for sound recordings (!)

ARL Best Practices in Fair Use, 2012

Was NOT negotiated with rights holders. (Sec1:3)

No group of institutions, no matter how important their cultural function, is immune from the operation of copyright law....they get no “free pass” simply because their function is to support education. (Sec1:5)

...specific exceptions contained in Sections 108, 110, and 121 of the Copyright Act and the special protections granted by Section 504(c)(2).

Two questions:

Is the use “transformative”?

Is “the material taken appropriate in kind and amount”?

Specific examples analyzed:

- 1. Making course content available via digital networks*
- 2. Using selections for publicity, or for physical/virtual exhibitions*
- 3. Digitizing for preservation of at-risk items*
- 4. Digital collections of archival/spec. coll. Materials*
- 5. material for use by differently-abled users*
- 6. plus three more*

Brandie Thomas

Electronic Thesis and Dissertation
Coordinator,
University Graduate School

Fair Use, Images, and ETDs

- You must determine if the image is licensed. If the image is licensed, you must determine if the license allows you to include the image in your manuscript. If you can obtain a license to use the images you need, you should do so. If you cannot obtain a license, or if the image is unlicensed, then use the fair use guidelines to perform a fair use analysis:
 - Four Factors:
 - Purpose (Commercial vs. **Non-Profit**)
 - Nature (Unpublished vs. **Published**)
 - Amount (Whole Work vs. **Portion**)
 - Effect on the Original Work (Market Harm vs. **Undisturbed Market**)
- Courts look at the intent behind the use—they look at whether the user acted in good faith when using copyrighted work.
- Reproduction of images in theses and dissertations is generally considered fair use.

Fair Use, Images, and ETDs

If...	Then...
4 factors favor fair use	Fair use
3 factors favor fair use	More than likely fair use
2 to 2 tie. You have to assess the risk	May be fair use
1 factor favors fair use	Not fair use

Fair Use, Images, and ETDs

- If you perform a fair use analysis, and you don't have a strong case for fair use, you could seek permission from the image owner or find an alternate image that is public domain or has an open license.
- Attribute all images that you will be using, regardless of whether the images appear courtesy of a license or via fair use.
- List any copyright permissions that you have obtained on the copyright page in your manuscript.
- It is the duty of the student, the advisor, and the committee to ensure that no content within the manuscript violates copyright law. The University Graduate School does not check manuscripts for this.

References

<http://libguides.fiu.edu/FairUse>

These direct links are in the above guide, too.

- Copyright Guide:
<http://libguides.fiu.edu/copyright>
- TEACH Act Flowchart:
<http://libguides.fiu.edu/copyright/TEACHAct>
- TEACH Act Checklist:
<http://libguides.fiu.edu/copyright/TEACHAct>