In order to have permission to add audio or video content to an Architeck page, every Architeck user is required to attend a class. One reason for this requirement is to ensure that every Architeck user is provided with background instruction on copyright law and how copyright impacts what we make available online.

The purpose of copyright law is to provide legal protection for the authors of original works. One of the primary goals of copyright law is to provide the authors of original works with an opportunity to profit from their works. The protection offered by copyright law ensures that the authors of original works have a legal recourse in the event that someone tries to exert ownership or disseminate unauthorized copies, a process that has become easier over time as technology has made it easier to copy and distribute copyrighted works. Original works can be broadly interpreted to include any artistic and most intellectual works, be they literary, dramatic, visual, or audio. In the United States, copyright protection is provided from the moment of creation, which means that an author or creator does not need to register with the Copyright Office to be protected, though registration is an option.

Copyright law and the restrictions it places on unauthorized copying and distribution apply to everyone, including teachers. However, as copyright has evolved, special protections and exceptions have been carved out for certain professions and classes of consumers. Teachers are one group that have a bit more latitude to use copyrighted materials, under certain circumstances. Of the limitations placed on copyright, the most important for teachers is the doctrine of “fair use”.

Generally speaking, copyright accords the owner of a copyright the right to reproduce their work or to authorize others to reproduce their work, usually under a license specifying the scope and purpose of the copying. Fair use provides a means by which copyrighted material can be used without first asking for permission from the copyright holder. The doctrine got its start in common law, which means that it initially did not exist in the statutes, but rather was defined by court decisions. It was codified into the Copyright Act of 1976, specifically applying to the use of copyrighted work for criticism, news reporting, teaching, scholarship, or research purposes. Unfortunately,
that is about as specific as the law gets on the subject of fair use. The tricky part about fair use is that there are no specific rules about what constitutes fair use and what does not. In 1976, while crafting the fair use exemption, Congress met with representatives of the publishing and recording industries to draw up some guidelines about how much of a copyrighted work could be used under fair use before the industries would call their lawyers. These guidelines are not written into the law and are not necessarily binding. Instead, they serve as examples of what fair use might look like for the judges who actually decide whether a specific use is fair use. In codifying the doctrine of fair use, Congress put forth four criteria that judges should consider when determining fair use. These criteria were not new. They were essentially the same criteria the courts were already using, plainly restated for universal application.

The first criteria that a judge will consider is the purpose and character of the use. Basically, does the use support the enrichment of the general public or does it serve only to generate personal profit? In considering the purpose and character of the use, non-profit, educational, and personal uses are favored over commercial purposes. Using a clip of a song in an educational podcast to demonstrate rhythm would be more likely to be considered fair use than using a clip of a song in a commercial. Notice that I used the phrase “more likely”. Remember that there are no hard and fast rules about what might be considered fair use. Every claim of fair use is judged independently. Judge A might decide that it was fair use; judge B might disagree.

The other thing judges weigh when evaluating the purpose and character of the use is whether the alleged infringement was transformative. A transformative work is a work that uses copyrighted material in such a manner that it transforms the material into a new work. Transformative works might contain recognizable elements of a copyrighted work, but so change the original work that the average person would not mistake the new work for the original or consider it a substitute for the original. A prime example of a transformative work is the Fair(y) Use Tale Video. It is a 10 minute video made by Eric Faden of Bucknell University, comprised entirely of clips from Disney animated films. Now Disney is one of the world’s largest copyright IP holders and one
of the most aggressive defenders of copyright, so under normal circumstances the creator of a 10 minute video using Disney animated movies would seem like an obvious target for a copyright infringement lawsuit. However, in this case, Eric Faden chopped the Disney movies into tiny little bits, arranging the clips so that the characters presented in the video provide an overview of the doctrine of fair use. The video clips are unmistakably Disney, but the end product is unmistakably a new and original creation.

The second criteria that a judge uses to determine fair use is the nature of the work. Factual, published, and scientific works are favored over creative, unpublished, or artistic works. For instance, imagine I was teaching 5th grade and I had a lesson to teach about meteors and the effect of a meteor impacting the Earth. If I were to use a video clip from a Nova special with a computer animation of what happens when a small meteor enters the atmosphere and hits the Earth, this would be more likely to be considered fair use than if I used a clip from the Hollywood movie “Deep Impact”. Yes, both videos use computer animation to detail what occurs when a meteor strikes the Earth, but one was created for educational purposes and one was created for entertainment purposes. And again, note the use of the phrase “more likely”. Choosing to take a clip from an educational video is not a guarantee that every judge will agree that your use was fair use.

The third criteria that a judge considers is the amount and sustainability of the portion used. When determining fair use, the use of a small portion of a work is favored over the use of the whole work. There is no set amount of a given type of work that one can use before crossing the line between fair use and copyright infringement. The appropriate length is guided by the purpose to be accomplished. Generally speaking, the goal should be to use the smallest portion of the work necessary to illustrate the point being presented. Returning to our hypothetical 5th grade classroom, imagine I am teaching a chemistry unit and for the first lesson we are going to look at the phases of matter. Now I happen to have a 30 minute Bill Nye video about chemistry. In the course of the video, Bill Nye spends about a minute specifically demonstrating the phases of matter. Using the entire video in my lesson
about phases of matter would be a copyright infringement, but using just that minute long clip in which Bill Nye is demonstrating the phases of matter might be considered fair use.

When a judge has worked through the first three criteria and is still having difficulty deciding if a use constitutes fair use, then the fourth criteria becomes the deciding factor. For the fourth criteria, the judge weighs the effect of the use on the potential market of the work. Remember I said before one of the primary goals of copyright law is to provide authors with an opportunity to profit from their work, to create a financial incentive that encourages the development and dissemination of new ideas for the enrichment of society. When considering the effect on the potential market, the judge is deciding if the usage of the work negatively impacted the value of the work or reduced the author’s potential for financial gain. Consider the Bill Nye video we were talking about a minute ago. If I were put the entire 30 minute video into my video podcast and then post my podcast on the Internet for the entire world to download, I would have impacted Bill Nye’s opportunity to profit from his video. After all, why go to the store and buy a copy of the video when you can get the whole thing for free in my podcast.

The best way to ensure that our podcasts do not land us in legal hot water is to focus on creating original content. The doctrine of fair use does provide teachers with a bit more leeway to use copyrighted material without permission, but there are limits and those limits can be very fuzzy. Understand that these limits are fuzzy on purpose. Fair use is purposely ill-defined to allow for changes in time, technology, and circumstances. As I pointed out earlier, if you are forced to claim fair use in a copyright infringement lawsuit, there is no guarantee that a judge will agree with you, or even that two different judges will agree. Again, judge A might think your use was fair use, judge B might disagree. Indeed, Judge A may not even be consistent. Judge A might rule the use of a work as fair use today, but Judge A might not find the same way for an identical use a year later. Focus on creating original content, and there will not be an issue with copyright at all.
And also remember that placing a podcast on an Architeck page marked “Intranet Only” is not a workaround for posting copyrighted content. If your podcast includes copyrighted content, placing it on an “intranet” page may restrict the rest of the Internet world from accessing it, but it does not prevent your podcast from being indexed by a search engine like Google and it still makes the content available to the approximately 70000 people who do have access to our intranet pages from within the network, 70000 people you should not be providing with an unauthorized reproduction of a copyrighted work. One more reason to focus on creating original content.