

EDUCATIONAL FAIR USE:

“I’LL KNOW IT WHEN I SEE IT.”

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On your way to work one morning you get a brilliant idea for a way to teach a complex idea to your students. For the activity to work, you’ll need to hand out a copy of a story you found online. You know the story might be subject to copyright laws, and you want to make sure you do the right thing. After all, you lecture your students every semester about the dishonesty of illegally copying CDs and downloading music. The website the story is on doesn’t have any copyright notices and you’re not sure if you can use it. You think about it, ask a colleague, look at the “fair use” factors, and finally throw up your hands and decide to lecture on the topic like you did last semester. Or, you figure, it’s for classroom use; even if it’s a violation of the law, who will know and who will really care, so you do it hoping you’re not breaking the law. Sound familiar?

Justice Stewart, formerly of the U.S. Supreme Court, made a statement in an anti-obscenity case that has become a famous illustration of the difficulty judges sometimes have in creating hard and fast principles that can be applied in all cases: “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”¹

In many areas of law, Congress and judges have intentionally created a flexible set of standards that allow for a determination based on the facts of each case, resulting in an approach that sometimes seems a lot like the “I’ll know it when I see it” guideline. This is especially true in certain areas of copyright law. Copyrighted works by definition are unique and original, making any sweeping rules or classifications ineffective. So the law gives broad guidelines to be applied to specific facts. A House Report on the fair use copyright laws stated, “Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged.”² And an opinion by a New York judge said, “The doctrine is entirely equitable and is so flexible as virtually to defy definition. [The Second Circuit] Court of Appeals... some years ago described the issue of fair use as ‘the most troublesome in the whole law of copyright.’”³

So you were right to throw up your hands. In the words of a contract drafted by my students attempting to invoke arbitration, the issue will “be resolved by arbitrary means,” so what’s the use? It’s true that if you want a definitive answer as to whether what you are doing constitutes “fair

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use,” you’ll have to go to court to get it. But it is possible to understand copyright principles sufficiently to avoid lying awake at night wondering how you would adapt to a prison environment. I’ll attempt to walk through a few of the basic principles of copyright law that we probably ought to understand as educators. But please remember that every situation is different, and reading this article does not in any way substitute for obtaining legal advice.

WHAT’S COPYRIGHTED?

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The first question to ask when you want to use someone’s material is whether the material is copyrighted at all. It’s a surprise to many (probably because this has not always been the case) that modern U.S. copyright law does not turn on registration, publication, or the presence of a copyright notice. Original material first gains copyright protection when it is fixed in a medium by the creator.⁴ So when a person jots down a poem on a napkin in a café, the poem immediately receives copyrighted status with its author as the copyright holder. Notice and registration are still helpful steps for a creator who wants to protect her intellectual property. The presence of a notice prevents an infringer from claiming an “innocent infringement” defense,⁵ and registration constitutes evidence of the copyright⁶ and is required before the creator can bring a lawsuit for infringement.⁷ The best policy is to assume that any “original work of authorship” must have been created by someone and must therefore be protected by federal copyright law. Copyright protection extends to “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”⁸

Some material is not protected by copyright law. Protection does not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”⁹ This would exclude works that have not been fixed in a tangible form of expression (e.g. a speech that has not been recorded); titles, names, short phrases, lettering, mere listings of ingredients; ideas, methods, processes, discoveries, concepts, and works consisting entirely of information that is common property containing no original authorship (like standard calendars and rulers).¹⁰

If the material you want to use is clearly not protected, your analysis is complete. If you decide the material might be subject to protection, then the next question is whether the material is part of the public domain. The public domain includes works created by the U.S. federal government

(e.g. a State of the Union speech), laws and cases, works published in the U.S. before January 1, 1923 (copyright protection has expired), many works published in the U.S. between 1922 and 1964 (copyright holder failed to renew), and a few works that have been specifically dedicated by copyright holders to the public domain.¹¹ Public domain works are not subject to copyright protection, but a collection of public domain works is likely to be copyrighted. For some teachers, the public domain provides a wide range of useful materials. For example, an American History course might be based almost solely on U.S. materials published before 1923. In a law class, the ability to use and copy cases is invaluable. But some of our disciplines didn't even exist prior to 1923, and case law won't include the latest theories on quantum physics.

IF THE MATERIAL IS COPYRIGHTED, WHAT EXACTLY DOES THAT MEAN?

A copyright holder has the exclusive rights to reproduce the work, prepare derivative works based on the work, distribute the work to the public, perform the work publicly, and display the work publicly.¹² If your proposed use includes any of these, you need to get permission or qualify for an exemption.

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CLASSROOM USE: EXEMPTIONS FOR CERTAIN PERFORMANCES AND DISPLAYS

Usually when we hear about copyright exceptions for educators, we hear about "fair use." Some of us probably aren't even aware of the exemption for performances or displays in the course of "face-to-face teaching activities." This exemption is a little easier to nail down than the fair use exemption, and it applies to many of the activities we might need to use copyrighted materials for. Section 110 of Title 17, Chapter 1 of the U.S. Code states that the following is not an infringement of copyright: "(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made." Basically, this section covers use of copyrighted materials in the classroom that are related to a learning goal. If you want to use a video in materials in class—a short clip or the whole movie—you can do it without even worrying about the fair use analysis, as long as it has an instructional purpose and as long as your copy is legal. What you could

not do under this section is show a movie for entertainment at a class party. You would also be in trouble if you went to China and picked up a black-market copy of a recently-released film to show in class (or produced your own unauthorized copy). But as long as you go to the local video store, rent a legal copy, and relate it (legitimately) to your course material, you're fine. This also goes for sound recordings, copies of maps, diagrams, plays, songs, etc.

TEACHING AN ONLINE COURSE: DOES THE SAME EXEMPTION APPLY?

The exemption for performances in a face-to-face classroom session does not apply directly to distance learning, but the next part of the same section of the Code does.¹³ This provision on distance education law was revised by Congress in 2001 to reflect the way distance learning now takes place in an online setting.¹⁴ If you teach an online course, the revised section answers many of your questions about what you can include in Blackboard materials, but that discussion really needs its own article.¹⁵

ONLINE MATERIALS: CAN'T I JUST LINK TO IT DIRECTLY AND AVOID ANY COPYRIGHT ISSUES?

When I find material online that I'd like my students to view or read, I've always figured I'm outside the scope of copyright concerns if I just provide a link to the relevant page. I might create a hyperlink from my online syllabus or create an external link from Blackboard. I was surprised to discover that what's known as "deep-linking" (when you link directly to the material on someone's web page you want students to visit, circumventing the page's homepage and advertising), has been somewhat controversial and has even been challenged as copyright infringement.¹⁶ Most of these challenges have not been successful, but the courts have ruled that linking to illegal software or other material might be prohibited.¹⁷ One California court specifically ruled that hyperlinking itself is not copyright infringement.¹⁸ This probably isn't an area to worry too much about. Still, because the law on this subject isn't necessarily settled, and more to the point, because many website providers don't like deep links, I plan to exercise caution in this area. First, if I'm unsure whether the material meets an exemption and especially if I want to link to my webpage, I will probably provide a hyperlink to the main webpage I want students to visit, then I'll provide them with instructions to access the relevant content. Otherwise, if the material meets the fair use exception, I'd consider linking directly to the content through Blackboard where only students enrolled in my course have access.

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OTHER MATERIALS NEEDS: THE FAIR USE ANALYSIS

So far, we've avoided fair use analysis, and that's probably something you want to do whenever you can. What makes fair use analysis difficult is that you have to balance factors. The "balancing test" is a common way for judges and legislators to avoid imposing bright-line rules that may not prove workable in specific situations. Instead, the law provides a set of factors that should be considered in each case, and then balanced against each other to determine the final outcome. The bad news is that you have to think analytically through each of the factors (something I'm constantly trying to get my students to do, but I'm not sure I want to do it myself). The good news is that if someone sues you for infringement after you have carefully considered each of the fair use factors and you "believed and had reasonable grounds for believing that [your] use of the copyrighted work was a fair use" as an employee of BYU-Idaho, the amount of damages you have to pay will be reduced.¹⁹ If this news doesn't sound all that good to you, then remember to always err on the side of permission so you don't ever have to worry about getting sued. Remember that just because you're right doesn't mean an angry copyright holder couldn't try to sue you. One important question to ask yourself might be, "Is my proposed use likely to make a copyright holder angry?" If yes, you probably should get permission even if you think you are within your legal rights.

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The text of section 107 of the Copyright Act of 1976 reads as follows:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (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; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.²⁰

To decide whether reproduction or copies for teaching is fair use, you have to weigh each of the factors to determine whether your proposed use seems more like fair use or more like unfair use.

FACTOR ONE: PURPOSE AND CHARACTER OF THE WORK

Most of the time, an educational use will be nonprofit rather than commercial, which weighs in favor of fair use.

Most of the time, an educational use will be nonprofit rather than commercial, which weighs in favor of fair use. Some people assume this is the only factor that affects fair use. Even a judge has opined that the “multiple copies for classroom use” language means that any and all copies made for classroom use are automatically exempt.²¹

Way back in 1914, a Massachusetts court put that idea to rest. A private tutor at Harvard got sued by a professor for preparing a typewritten outline for economics students based on the professor’s textbook. The outlines were never sold and the outlines did not increase the price of a tutoring session. However, the court found that outlines infringed on the professor’s copyright. The court stated: “I am unable to believe that the defendant’s use of the outlines is any the less infringement of the copyright because he is a teacher, because he uses them in teaching the contents of the book, because he might lecture upon the contents of the book without infringing, or because his pupils might have taken their own notes of his lectures without infringing.”²²

This factor also includes an analysis of the “transformative nature” of the work. If you are critiquing, parodying, commenting on, or adding substantially to the portion of work you are using, this will weigh in favor of fair use. In some cases this element is considered to be the most important. A good example is a case where a photographer sued a search engine for showing thumbnail images of copyrighted works on its site when a search for images was performed. The use was found to fall within fair use based primarily on the transformative nature of the use. The court noted that the transformative nature of the works makes it less likely that there will be a negative effect on the potential market for the work (the fourth factor).²³ The U.S. Supreme Court has stated: “The central purpose... is to see... whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character altering the first with new expression, meaning, or message.”²⁴ So, if you wanted to copy an excerpt from a story and include critical analysis, you’d be more likely to meet the fair use test than if you simply copy the story without changing or adding to it (a merely “mechanical transformation” weighs against fair use²⁵).

FACTOR TWO: THE NATURE OF THE COPYRIGHTED WORK

Is the material factual in its nature, or is it creative? Works that are more factual weigh in favor of fair use, while works that are creative in nature (plays, stories, paintings, etc.) weigh in against fair use. If there are very few ways to express the underlying information, the case for fair use is much stronger. Remember that you can always use the underlying facts or information presented in a work. What's copyrighted is the original expression that has been fixed in a work. If you wanted to write an article, poem, or musical about copyright law, you could use all the facts and information about copyright provided in this article without my permission. But you would be infringing if you reproduced the way I put the facts together in an original way in this article. You'd need my permission (to decide the balance of all the factors favors fair use) to copy the article.

FACTOR THREE: THE AMOUNT AND SUBSTANTIALITY OF THE PORTION USED

It would be comforting to have specific guidelines here: two lines from a poem, 1000 words from an essay, that sort of thing. But every work is so different, you really have to look at the work as a whole to decide. The more you use, the more the scales tip against fair use. The substantiality part of the definition makes sure you consider quality as well as quantity. If you reproduce a very small portion of a work, but that small portion is the essence of that work, you're weighing against fair use rather than for it. For example, a television news program infringed when it used one minute and 15 seconds of a 72-minute Charlie Chaplin film in a news report. The court held that the portions used were the "heart" of the film.²⁶

In a case brought by a group of publishers against a copy shop for creating course packets without license from the publisher copyright holders, the court found that this factor weighed heavily against fair use where the material used from each author was not less than five percent and as much as 30 percent. The court also said that as to substantiality, "The fact that the professors thought the excerpts sufficiently important to make them required reading strikes us as fairly convincing 'evidence of the qualitative value of the copied material.'"²⁷ Based on this reasoning, any time you require students to read, view, or listen to the portion of the work in question, you are creating evidence that the portion used is "substantial" and should weigh against fair use.

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FACTOR FOUR: THE EFFECT OF THE USE UPON THE POTENTIAL MARKET

Just ask whether your use is likely to have a negative effect on the market for the original work.

This factor is often weighed most heavily by the courts. In the case by the publishers against the copy shop, the Sixth Circuit Court noted that while the U.S. Supreme Court may no longer consider the fourth factor to be the most important, “it at least *primus inter pares*”²⁸ (first among equals). Even though it may be the most important factor, it doesn’t take a lot of explanation and usually isn’t hard to determine. Just ask whether your use is likely to have a negative effect on the market for the original work. If it is, you might be in dangerous territory. Note that this factor is probably the most likely factor to make copyright holders angry. And even though we want to find out what the law of fair use is, we’re even more interested in avoiding any accusation of copyright infringement. Exercise extra caution when it comes to any use that might rob a copyright holder of potential markets.

IT MIGHT NOT BE FAIR USE. WHAT NOW?

If you don’t meet an exception, or if you aren’t certain, get permission from the copyright owner. Remember that you need permission from the copyright holder, not necessarily the author. If your pal wrote a text you’d like to use but sold the rights to a publisher, permission from your friend to copy the text at will doesn’t do you any good. You’ll need the publisher’s permission. The Internet can make finding the right person and asking permission a simpler process. You can start with the Copyright Clearance Center, a national clearinghouse, at www.copyright.com or visit BYU-Idaho’s copyright website at <http://www.byui.edu/copyright/default.htm> to get more help on seeking permission. ☺

NOTES:

- 1 *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
- 2 H.R. Rep. No. 94-1476, at 65 (1976).
- 3 *Time Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968) referencing *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (2 Cir. 1939).
- 4 17 U.S.C. 102. See also, United States Copyright Office, “Copyright Basics: What is Not Protected by Copyright?” (September 2000) [govt. document online]; available from <http://www.copyright.gov/circs/circ1.html>.
- 5 17 U.S.C. 401 (The defense allows an innocent infringer to pay a smaller amount of damages).
- 6 17 U.S.C. 410(c).
- 7 17 U.S.C. 411(a).
- 8 17 U.S.C. 102(a).
- 9 17 U.S.C. 102(b).

- 10 United States Copyright Office, “Copyright Basics: What is Not Protected by Copyright?” (September 2000) [govt. document online]; available from <http://www.copyright.gov/circs/circ1.html>
- 11 Stanford University Libraries and Academic Information Resources[website]Copyright and Fair Use Overview, “The Public Domain.” (2003 Nolo); available from http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter8/index.html.
- 12 Section 106.
- 13 See Section 110(2).
- 14 Technology, Education, and Copyright Harmonization Act of 2002, Pub. L. No. 107-273, 116 Stat. 1758, Title III, Subtitle C, 13301, creating new U.S.C. 110(2).
- 15 For an in-depth discussion of the laws relating to distance education, see Thomas A. Lipinski, “Legal Reform in an Electronic Age: Analysis and Critique of the construction and Operation of S. 487, The Technology, Education and Copyright Harmonization (TEACH) Act of 2001”, 2003 BYU Education & Law Journal 95 and Raquel Xalabarder, “Copyright and Digital Distance Education: The Use of Pre-Existing Works in Distance Education Through the Internet,” 26 *Columbia – VLA Journal of the Law & Arts* 101 (2000).
- 16 For a complete discussion and review of linking and framing cases, see Eugene R. Quinn, Jr., “Web Surfing 101: The Evolving Law of Hyperlinking,” 2 *Barry Law Review* 37 (2001).
- 17 *Universal City Studios, Inc. v. Shawn C. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).
- 18 *Ticketmaster Corp. v. Tickets.Com, Inc.*, 54 U.S.P.Q. 2d 1344 (C.D. Cal., 2000).
- 19 Section 504(c)(2).
- 20 17 U.S.C. 107.
- 21 *Princeton University Press v. Michigan Document Services, Inc.*, 99 F. 3d 1381, 1394 (6th Cir. 1996), (*Merritt, J., dissenting*).
- 22 *MacMillan v. King*, 223 F. 862, 867 (D. Mass. 1914).
- 23 *Kelly v. Arriba Soft. Corp.* 336 F.3d 811 (2003).
- 24 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).
- 25 *University Press v. Michigan Document Services, Inc.*, 99 F. 3d 1381, 1389 (6th Cir. 1996).
- 26 *Roy Export Co. Estab. Of Vaduz v. Columbia Broadcasting Sys., Inc.*, 672 F.2d 1095, 1100 (2d Cir. 1982).
- 27 *Princeton University Press v. Michigan Document Services, Inc.* 99 F.3d 1381, 1389 (1996). Cert Denied.
- 28 *Princeton University Press* at 1385.