

# Fair Use and the Digital Age

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*"The primary objective of copyright is not to reward the labor of authors, but 'to promote the progress of science and useful arts.' To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work...This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art."*

Justice Sandra Day O'Connor

## INTRODUCTION

### Copyright

Copyright is a form of protection provided by the laws of the United States (title 17, U.S. Code) to the authors of "original works of authorship" including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works. For example, a copyright protects original works of authorship giving the holder exclusive rights to reproduce or copy, produce derivative works based on the copyrighted work, distribute copies of the work, perform the work freely, and display the work publicly.

Some works are copyrightable, others are not. Literary works are in the first category and include novels, nonfiction prose, poetry, newspaper articles and newspapers, magazine articles and magazines, software manuals, training manuals, manuals, catalogs, brochures, text ads, and compilations such as directories and indices. Musical works are also copyrightable; songs, advertising jingles, and instrumentals are covered by this code—as are dramatic works; pictorial, graphic and sculptural works; motion pictures; and, other audiovisual compositions including, but not limited to sound recordings, computer software, and even electronic mail.

Works that are *not* copyrightable are often less tangible. They include ideas or concepts; lists with little, if any, originality; factual information readily available in

public records, court transcripts, or statistical reports, for example; and titles or short phrases (not to be confused with trademarks which are protected).

### Fair Use

As more and more material fell subject to the pitfalls of copyright infringement, particular categories of users sought relief from the burdensome demands of seeking release to use. Enter the "fair use" laws and an additional set of complications associated with the reproduction of privileged materials. Fair use is defined as the "manipulation of copyrighted works, including such use by reproduction in copies or recordings, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" (Wikipedia, 2006). Invoking the stipulations of fair use opens the door for the incorporation of materials under specific circumstances, without infringement of copyright restrictions and without formal requests for copyright release. In determining whether the use made of a work in any particular case is a fair use involves the following factors:

- Purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- Nature of the copyrighted work;
- Amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- Effect of the use upon the potential market for or value of the copyrighted work.

For educators, a few additional factors have been advanced by the community of scholars and must be considered when determining fair use of text, audio, and visual materials. In the 1970s, a committee of publishers and librarians worked out guidelines to expand copyright laws pertaining to educational and library situations. These guidelines encompass four specific areas: (a) classroom use of copied materials,

Table 1. Applications of fair use laws in education

Content	Examples	Limitations
Text	Self-explanatory	Up to 10% or 1,000 words of a work
Visuals	Illustrations and Photographs	No more than five images from one artist or photographer. No more than 10% or 15 images, whichever is less, from a collection
Multimedia	Moving Images and Music	No more than 10% or 3 minutes from any video or animation. No more than 10% or 30 seconds from any musical work.
Multimedia Projects	Portfolios	No more than two copies may be made of a project.
Numerical Data Sets	Spreadsheets and databases	Up to 10% or 2,500 fields or cell entries, whichever is less, from a copyrighted database or data table.

(b) replication of music for educational purposes, (c) interlibrary loan, and (d) videotaping of broadcasted programming for educational purposes. From these initial beginnings came a plethora of generalities and specifics that would swell to redirect the attention of faculty, students, and administrators as they attempt to walk the fine line between academic freedom and aversion of plagiarism. Table 1 illustrates the common limitations for educational and library applications under fair use laws.

### Use: Getting a Handle on Fair or Unfair

Educators have historically been among the first to embrace innovations in the form of sound, video, slides, photographs and art, and text. By combining different media, new technologies have expanded even further the possibilities of instructional media for enhancing the quality of their teaching. But with the truly cross-platform tools provided by 21<sup>st</sup> century technology, educators are now free to compose, consolidate, integrate, and infuse sounds, images, and text as heretofore nonexistent entities. Doing so often impedes on the boundaries of copyright as teachers trample fair use parameters without obtaining permissions from the component copyright holders. Further

confounding the issue are the gigabyte iPods, thumb-sized jump drives, writable CDROMs, inexpensive DVDs, transferable e-books, and who-knows-what-will-be-available-next-month media readily applied to the digital classroom. A generation of students (and soon teachers) will have grown up in the gray abyss of disk-copying software, downloading music, taping movies, and sharing ringtones.

### We Better Get a Handle on What's Fair Game and What's Not Before It's Too Late

Under Section 106 of the Copyright Act, the owner of a copyright has exclusive rights to his/her works along with all privileges to by-products from the works. At the same time, the fair use provision of Section 107 may or may not protect would-be (intentional or unintentional) plagiarists from lawsuits asserting infringement. Fair use allows for the educational use of resources without obtaining permission from the copyright holder, governed by four criteria:

1. **Limited Access to the Resources:** Given the susceptible nature of digital media, limiting access to the resources downloaded from the Internet or

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