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**CURRICULUM ARTICLE**

**Is Fair Use a License to Steal? Part 2 of an Education World series on copyright and fair use**



Many educators interpret *fair use* as freedom to use copyrighted materials as long as their use is restricted to instructional purposes. Are they correct in that belief? **Not exactly!** Learn how the law really works. **Included: Fair use guidelines for educators!**

[Copyrights and Copying Wrongs](#), the first part in the Education World series on copyright and fair use, set out a good rule of thumb for using copyrighted material -- when in doubt, ask permission.

There are, as always, exceptions to the rule. For example, if your use of the materials falls under the fair use doctrine, you don't have to get permission to use copyrighted materials. Be careful, though. The fair use doctrine is not a license to steal!

The fair use doctrine was created to allow the use of copyrighted works for criticism and commentary, parody, news reporting, research and scholarship, and classroom instruction.

Many educators, however, interpret the fair use doctrine as freedom to use any copyrighted materials as long as their use is restricted to instructional purposes.

"They are not correct in that belief," said former copyright attorney Nancy Willard, project director at the University of Oregon Center for Advanced Technology in Education.

"The fair use doctrine, established in a long line of court cases, provides a limited basis by which people can use a copyrighted work without getting

**Is It Fair Use?**

According to the Copyright Act of 1976, "In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include

- \* the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.
- \* the nature of the copyrighted work.
- \* the amount and substantiality of the portion used in relation to the copyrighted work as a whole.
- \* the effect of the use upon the potential market for or value of the copyrighted work.

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permission from the creator," Willard told Education World. "The essence of the fair use doctrine is that a person is not using the work in such a manner that is, or has the potential of, diverting income from the creator."



**IS IT FAIR USE?**

"To determine whether a use is fair requires consideration of four factors," Willard added. "The first factor is the purpose of the copying, and copying to support an educational use certainly meets this standard. There are three other factors, though: how much has been copied, what kind of material has been copied, and the potential financial loss to the creator. So, although your heart and intentions may be pure, the other factors must still be considered."

Those factors, codified in [Section 107 of the Copyright Act of 1976](#), are

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.
4. the effect of the use upon the potential market for or value of the copyrighted work.

When evaluating a particular use of copyrighted materials in relation to those four factors, you should ask yourself the following questions regarding

1. the purpose and character of the use:
  - Does the new work transform the original work or offer something beyond the original? Copyrighted works that are altered significantly are more likely to be considered fair use.
  - Is the use for nonprofit or educational purposes? Copyrighted works used for nonprofit or educational purposes are more likely to be considered fair use.
2. the nature of the copyrighted work:
  - Is the copyrighted work published or unpublished? Published works are more likely to be considered fair use.
  - Is the original work out of print? Out of print works are more likely to be considered fair use.
  - Is the copyrighted work factual or creative? Factual works are more likely to be considered fair use.
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole:
  - Is the amount of the original work used reasonable? The smaller the percentage of the work used, the more likely it is to qualify as fair use.
  - Is the section of the original work used the most important part of the work? The less significant the portion of the work used, the more likely it is to be considered fair use.
4. the effect of the use upon the potential market for or value of the copyrighted work:
  - Does the new work appeal to the same audience as the original work? Copyrighted works that are used for another purpose or designed to appeal to a different audience are more likely to be considered fair use.

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"Over the years, librarians, educators, and publishers have developed voluntary guidelines to address fair use," Willard told Education World. "Although these guidelines are not statutory, they are contained in the legislative history of the Copyright Act."

Those guidelines allow educators, under most circumstances, to copy

- a single chapter from a book
- an excerpt from a work that combines language and illustrations, such as a children's book, not exceeding two pages or 10 percent of the work, whichever is less
- a poem of 250 words or less or up to 250 words of a longer poem
- an article, short story, or essay of 2,500 words or less, or excerpts of up to 1,000 words or 10 percent of a longer work, whichever is less; or
- a single chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper.

The guidelines do not allow users to

- make multiple copies of different works as a substitute for the purchase of books or periodicals
- copy the same works for more than one semester, class, or course
- copy the same work more than nine times in a single semester
- use copyrighted work for commercial purposes
- use copyrighted work without attributing the author.

## MUSIC, TV, AND VIDEOTAPES

Educational technology existed, of course, -- in the form of audio and video -- long before the Internet, software, digital images, and multimedia productions invaded our classrooms. Guidelines for the use of such "primitive" technologies were developed.

The guidelines developed in 1976 for the educational use of music include the following:

- Multiple copies of sheet music may be copied in an emergency (for an imminent performance) to replace purchased copies that are not available, provided purchased replacement copies are substituted as soon as possible.
- For academic purposes other than performance, multiple copies of excerpts of works may be made, provided the excerpts don't include more than 10 percent of the whole work or make up a part of the whole that would constitute a performable unit, such as a section, a movement, or an aria. The number of copies may not exceed one copy per student.
- For academic purposes other than performance, a single copy of an entire performable unit (section, movement, aria, etc.) may be made if the unit is out of print or available only in a larger work.
- Sheet music that has been purchased may be edited or simplified if the fundamental character of the work is not distorted and that lyrics are not altered or added.
- A single copy of a sound recording of a student performance may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.
- A single copy of a sound recording of copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher.
- Copying to create, replace, or substitute for anthologies, compilations, or collective works; copying works intended to be consumable, such as workbooks, exercises, or standardized tests; copying for the purpose of

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performance (except in an emergency); copying as a substitute for purchase; and copying without the inclusion of the copyright notice are not permitted.

In 1981, a congressional subcommittee developed guidelines for off-air taping of television and radio broadcasts for educational use. Those guidelines allow educators to tape a radio or television broadcast for instructional (not entertainment) use if

- the program is recorded simultaneously with the broadcast.
- the program is being broadcast without charge.
- the program is recorded only in response to a specific request.
- the program is recorded (but not necessarily used) in its entirety.
- the program is not altered.
- the tape is retained by the educational institution for no longer than 45 days after the date of the recording.
- the tape is used only once with each class during the first ten consecutive school days of the 45-day retention period.
- the tape is used from the tenth to the 45th day of the retention period for teacher-evaluation purposes only.

In addition, guidelines established in 1976 allow educators who have bought or rented videocassettes designated for home use only to use those videocassettes for face-to-face student instruction -- but not for student entertainment.

## IS PRISON IN YOUR FUTURE?

Obviously, copyright law is complicated and easily misinterpreted. Even those with the best intentions -- and the best lawyers -- are liable to make mistakes.

[The Copyright Website](#) provides some fascinating examples of some big names who made costly copyright errors.

So what are the chances you'll find yourself in court? Pretty slim -- although they increase dramatically if your use of a work interferes with the owner's potential income. Most copyright owners don't want to take teachers or school systems to court. They just want to stop the copyright infringement. If you make a mistake in good faith and you're asked to stop using a particular work, do so immediately.

In addition, Nancy Willard offers the following recommendations to help teachers and school districts avoid problems:

- Use public domain resources whenever possible. Materials created by the federal government are all in the public domain, and many public agencies have created educational materials.
- Develop collaborative efforts with other teachers to create and disseminate public domain materials for educational use.
- Ask permission, and teach students to ask permission, before using any material about which there is a question.

## EDUCATION WORLD'S COPYRIGHT SERIES

## The Educator's Guide to Copyright and Fair Use

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Editor's Note: The information contained in this article is, to the best of our knowledge, correct and up-to-date. Copyright laws and the circumstances surrounding the use of copyrighted materials can be difficult to interpret, however, and information in this article should not be construed as legal advice.

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Originally published 08/23/1999  
Updated 12/17/2004