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**Fair Use Ain't What You Think It Is:
Copyright and Fair Use in the Digital Classroom**

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Every faculty member, administrator, and librarian has concerns over what is or is not acceptable under copyright, yet there are no clear answers for educators to these questions:

- Is the use of copyrighted material in an educational environment automatically “fair use”?
- Are there any educational situations that are not “fair use”?
- How much copyrighted material may I use in class?
- Can I always rely on the TEACH Act as a safe harbor?
- Does “fair use” apply to the webcast or podcast of my lecture?

FBI WARNING



Warning: The unauthorized reproduction or distribution of this copyrighted work is illegal. Criminal copyright infringement, including infringement without monetary gain, is investigated by the FBI and is punishable by up to 5 years in federal prison and a fine of \$250,000.

How many times have we all seen this before the show starts?

The balancing of these two competing interests: economic monopoly for the author versus the free transmission of ideas lies at the heart of all copyright issues.

The US Constitution Article 1, Section 8 explicitly establishes the basis for both copyright and patent protection of intellectual property:

Congress shall have the power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

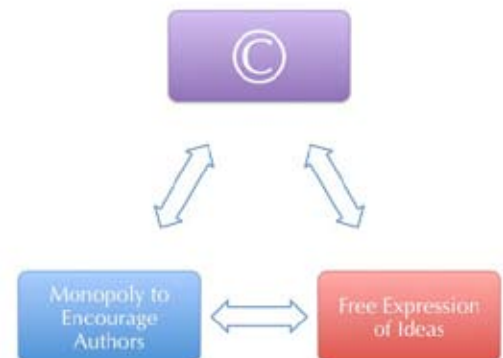
Back To Basics

To discuss copyright, infringement, and Fair Use, we must return to a basic premise: Western civilization is built upon the free transmission of ideas.

Seneca said it over 2,000 years ago: *optimus information es vulgaris substantia* (the best ideas are common property). If the best ideas are common property, why do we have FBI copyright infringement notices or even copyright?







There has to be an individual incentive for an author to create something that we value as common to all. Modern copyright's economic rationale encourages creativity of authors by granting them exclusive monopolies in the right to copy and sell their works.

Balance Competing Interests



Monopoly versus free expression

\$106 Exclusive Rights

- 1 To **reproduce** the work 
- 2 To prepare **derivative** works 
- 3 To **distribute & sell** copies 
- 4 **Public performance** 
- 5 **Public display** 
- 6 **Digital audio transmission**
(sound recordings only ©) 

Six exclusive rights

display a work. These rights are like twins. Music, drama, and dance are *performed*; paintings, sculptures, and visual arts are *displayed*. In both cases, the author has exclusive control over the performances and/or displays.

§106 (6) is applicable only to the digital transmission of sound recordings via satellite radio, cable TV, and the Internet.

What is Copyright?

American copyright law (Title 17 US Code §106) grants six exclusive rights to an author or owner of a copyright.

The first and most basic right under copyright is the right to make a copy, the exclusive right to reproduce the work. This right goes hand-in-hand with the third, which grants the author/owner the exclusive right to distribute and sell those copies.

The second exclusive right allows the owner to recast the original work into another form; that is, to adapt the original into other uses. Novels are the basis for movies and television shows. Reprints of original paintings appear on posters and postcards. Music publishers place compositions in movies or change song lyrics for advertisements.

Only the copyright owner holds the rights to publically perform and/or display a work. These rights are like twins. Music, drama, and dance are *performed*; paintings, sculptures, and visual arts are *displayed*. In both cases, the author has exclusive control over the performances and/or displays.

§106 (6) is applicable only to the digital transmission of sound recordings via satellite radio, cable TV, and the Internet.

Rights versus Limitations



Balance between rights and limitations

A Balancing Act

Just as Section 106 grants exclusive rights to copyright owners, the law also places limitations on those rights. Copyright law is a balancing act between exclusive monopolies favoring the author and limitations on those monopolies in order to promote the free exchange of information. For educators, the four most important are:

- §107 Fair Use
- §108 Reproduction by Libraries and Archives
- §110 The TEACH Act
- §300 Public Domain

§300 Public Domain

Rights of libraries and archives are complex, and beyond the scope of this paper. However, the concept of Public Domain applies across the board when discussing copyright. In short, copyrights do not last forever.

For works created on or after 1/1/1978, copyright protection lasts the life of the author plus 70 years. In cases where the author has been employed to create the material known as a work-for-hire, copyright lasts either: from the date of publication plus 95 years – OR - the date of creation plus 120 years, whichever is shorter.

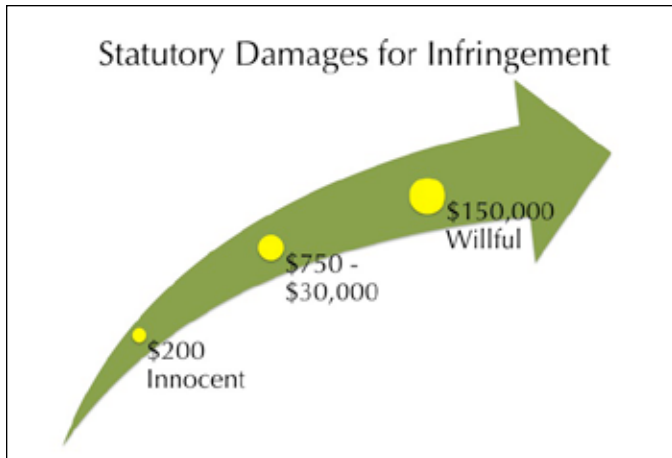
Works created on or after 1978 will not enter the public domain before 2049.

When a copyrighted work enters the public domain, there are no §106 rights, the work no longer belongs to anyone, and it is available to the public at large to use and/or change in any way they wish. There is no need for the user to obtain permission or pay a fee to alter or exploit a public domain work.

Works can fall into the public domain several ways:

- Copyright has expired
- Author has abandoned his copyright (computer freeware)
- Publication in the US before 1923
- Publication in the US before March 1, 1989 without copyright notice
- Publication in the US before 1964 without copyright renewal

Determination of whether or not a work is in the public domain is tricky and best left to copyright attorneys.



The \$150,000 hammer

Infringement: The Big Hammer

Title 17 US Code §501 et seq. outlines the penalties for copyright infringement. Anyone who violates the §106 exclusive rights of a copyright owner is an infringer.

If the author or owner properly registered his claim to ownership in the Copyright Office before the infringement (or within three months of publication), he has a choice of asking for either repayment of the actual damages suffered by the infringement or statutory damages.

Statutory money damages payable by infringers range from \$750 to \$30,000 per infringement. If an infringer proves that was not aware, or had no reason to believe that his acts constituted an infringement of copyright, the court might reduce damages payable to \$200. Although employees and agents of non-profit educational institutions can rely

on a Fair Use defense in order to claim innocent infringement, and thus the lower damages, I must caution that truly innocent infringers are rare.

Willful infringement carries with it possibility of statutory damages rising to \$150,000 per infringing act.

Fair Use Ain't What You Think It Is

A major misconception is that Fair Use of copyrighted works is a right under the Copyright Law. It is not.

Fair Use is not a right – it is an excuse.

Fair Use is a defense used in court **once you have been sued for copyright infringement.** It is not an affirmative right, but an explanation for your actions, that hopefully will sway the judge and jury that you are not liable for infringement.

Title 17 US Code §107 lists four factors for analysis of Fair Use.

“ . . . the fair use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching, 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

Fair Use is *not a right.*

It's an *excuse.*

Tell it to the judge

Fair Use **EXCUSES:**

- Purpose and character of use
- Nature of the original work
- Amount taken from the original
- Effect on market for original

Four excuses

The Four Fair Use Factors

The easiest way to analyze a possible Fair Use scenario is to break down the four components and list the pros and cons. No single factor is more important than the others are. Courts look to all the elements before deciding that an unauthorized use comes under the protection of §107.

Keep in mind that these factors are practical questions asked on a case-by-case basis. No broad generalizations can be made from a particular circumstance. The four factors also present real life situations that illustrate the functional application of copyright's balance between monopoly for the author and the importance of the free flow of information.

Purpose and Character of Use

Courts first look to the original work's use by the defendant. How do you characterize the accused infringer's use? What purpose does it serve? Is it truly for education, or entertainment? Who is profiting from the work?

Favoring Fair Use

Teaching
Research/Scholarship
Non-profit institution
Criticism/Comment/News
Original transformed to new use
Access restricted to students
Parody of the original

Opposing Fair Use

Commercial activity
Entertainment
For-profit corporation
Verbatim replay only
Reiteration of original
Wide audience
Broad parody beyond original

Nature of the Original Work

Since facts themselves are not copyrightable, anyone can publish their report of a historical event. A fair use claim based upon the use of private correspondence or unpublished fictional works is much harder to substantiate.

Favoring Fair Use

Published
Non-fiction/factual

Opposing Fair Use

Unpublished
Fiction

Amount Taken

Courts also examine the amount taken from the original. **There is no magic formula for determining what constitutes a "significant" amount taken from an original work.** Taking a few paragraphs from a 500-page book is much easier to defend than taking five words from a haiku, however five notes from a song may be its distinctive hook.

Favoring Fair Use

Small amount used
Non-essential parts used

Opposing Fair Use

Substantial portion taken
Unique elements taken

Effect on Market for Original Work

This factor examines the economic considerations involved in the Fair Use defense. Is the accused infringer just claiming Fair Use so that he does not have to purchase a copy of the original work? Is the defendant's work a substitute for the original? Does it devalue the original or make it so common as to be worthless in the market?

Favoring Fair Use

No lost sales
No effect on value of original
Limited copies made
One time use

Opposing Fair Use

Substitute for purchase
Destroys value of original
Multiple copies made
Unlimited potential re-use

§110 The TEACH Act of 2002

Ambiguities in the meaning of §107's fair use factors lead Congress to amend the copyright law. The TEACH Act (The Technology, Education, and Copyright Harmonization Act of 2002, 17 US Code §110) was passed in order to clearly define Fair Use in the educational context.

As we analyze the law, keep in mind that these limitations on an author's exclusive rights only apply if the source material was a lawfully made copy, and not the result of circumvention of a digital rights management system.

Live Instruction

Classical pedagogy has not changed from the time of Socrates. A wiser, older teacher imparts knowledge to youths in a face-to-face setting, assigns coursework, and questions students on the topic.

17 US Code §110 Limitations on exclusive rights:

- Exemption of certain performances and displays
- Notwithstanding the provisions of section 106, the following are not infringements 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;

In this setting, educational use of copyrighted material is considered fair use **only if all of the following criteria are met:**

- Performance or display of work
- Non-profit educational institution
- By instructor or pupils
- Face-to-face teaching
- In a classroom setting

Performance or display of work

Teachers may perform and display audiovisual works in the classroom. They may screen their legally purchased copy of a DVD for the class, play a song from a CD, recite a poem, and tack a poster to the wall. However, **it is not Fair Use to make and distribute copies of the work.**

Non-profit educational institution

This criterion specifically excludes for-profit educational institutions such as technical and vocational schools, continuing education seminars, tutors, dance classes, exercise studios, GED/SAT/ACT review courses, etc.

Regional or national accrediting agencies for post-secondary education recognized by the Council on Higher Education Accreditation or the U.S. Department of Education determine whether the non-profit is an "educational institution." For elementary or secondary education, the school must be accredited by applicable state certification and licensing authorities.

Thus for-profit companies and un-accredited non-profits are excluded from the protection of the TEACH Act.

By instructor or pupils

Teachers and students are free to perform for each other in class, but this permission does not extend to third parties.

Face-to-face teaching

The instructor and pupils must be in the same room. Another section of the law addresses broadcasting or posting lectures to the Internet.

Classroom setting

All displays and performances must take place on campus, or lecture halls where regular classes are held.

School policies

The educational institution has a positive obligation to create and disseminate a campus wide policy on copyright. It must also provide informational materials to faculty, students, and relevant staff members that accurately describe and promote compliance with copyright law.

Copyright notice

The school and instructor must also provide notice to students that materials used in connection with the course may be subject to copyright protection. The display of the © symbol alone is insufficient.

The TEACH Act in the Digital Classroom

Copyright issues are at the forefront of education, especially since online learning is becoming a key component of the educational experience. The legal requirements for online classes and video are complex and not equivalent to what is permitted in a face-to-face classroom setting. As such, something as simple as posting videos of classes online could lead to an infringement lawsuit.

Traditional notions of Fair Use in copyright do not apply in the digital classroom. Under the latest amendments to the law, teachers, librarians, and administrators must follow strict guidelines when using copyrighted material in their classrooms. These mandates are even harsher for online and distance learning. Libraries and archives have their own set of obligations governing copying, preservation, circulation, and reserves.

If teachers do not follow these dictates, what would be a Fair Use of copyrighted work in a face-to-face classroom setting automatically becomes infringement in a digital learning environment.

17 US Code §110 Limitations on exclusive rights:

- Exemption of certain performances and displays
- Notwithstanding the provisions of section 106, the following are not infringements of copyright ...
 - (2) except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks, or a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired, the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission, if —
 - (2) (A) the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution;
 - (2) (B) the performance or display is directly related and of material assistance to the teaching content of the transmission;
 - (2) (C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to —
 - (i) students officially enrolled in the course for which the transmission is made; or
 - (ii) officers or employees of governmental bodies as a part of their official duties or employment; and
 - (2) (D) the transmitting body or institution —
 - (i) institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and provides notice to students that materials used in connection with the course may be subject to copyright protection; and
 - (ii) in the case of digital transmissions —
 - (l) applies technological measures that reasonably prevent —
 - (aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and

- (bb) unauthorized further dissemination of the work in accessible form by such recipients to others;
and
- (ll) does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination.

Digital Transmission

Although the TEACH Act clarifies what is permissible in the live classroom, its focus is on the Fair Use implications of digital transmission of educational materials. Digital transmission includes but is not limited to anything that is distributed through digital networks such as uploads to the Internet, television broadcasts, radio broadcasts, distance learning programs, podcasts, webcasts, and videocasts.

As a guideline, anything that is permissible in a face-to-face classroom setting is permissible via digital transmission **if and only if all of the following criteria are met:**

Textbooks excluded

The Act does not permit digital transmission of works produced as part of mediated instructional activities like textbooks and instructional videos. This prohibition also applies to any texts, handbooks, or other media typically purchased or acquired by students. Publishers must issue licenses to schools and teachers who wish to post these materials on the Internet.

Lawfully made copy

The use of an illegal copy invalidates any Fair Use claim. The copy or phonorecord used may not circumvent digital rights management measures. The TEACH Act permits ephemeral copies as long as the works are inaccessible to non-students, and only for as short a time as possible.

Accredited non-profit educational institution

The definition of “*accredited non-profit educational institutions*” and the requirements for elementary, secondary, and post-secondary institutions were discussed previously.

Supervised by an instructor

The individual teacher must be the one who supervises the digital performance. This requirement implies a personal relationship between the instructor and the pupils, and mirrors traditional pedagogy.

Mediated instructional activities

The class must be part of the school’s regular curriculum. In order to claim the protection of the TEACH Act, the use of the material must be a regular part of a course of instruction.

Integral part of a class session

Is the digital transmission of the performance or display of copyrighted material an essential part of the lesson plan? The answers may be different for art, history, and mathematics classes.

Performance directly related to the subject

The digital transmission of copyrighted materials cannot be capricious and still be considered Fair Use. What is it that the instructor is trying to teach? Does the digital transmission of this copyrighted work aid the teacher in conveying the lesson?

Equivalent to the amount used in a live class session

Most class sessions last no more than 90 minutes. The TEACH Act does not permit an instructor to podcast an entire Wagner opera to his class when a ten minute excerpt is sufficient.

Access limited to enrolled students

For the protection Section 110 provides to teachers, digital transmissions must be limited to enrolled students. As such, posting videos to public sites like YouTube, and iTunesU violates this rule. As a practical matter, it is advisable to deny students access to the course website at the end of the semester.

Prevent retention & dissemination

The law imposes an additional burden on instructors. They must apply technological measures that prevent retention of the works and unauthorized further dissemination to others. The best method to achieve this goal changes with the advance of technology.

Conclusion

We live in a media-rich society. Education also needs to be rich in media. Teachers must communicate with students in the same media students learn to use to communicate with the world. Internet-based methods of research and pedagogy provide great benefits and even larger perils to today's educators. Unless educators create every bit of media used both in their classrooms and online, they are venturing into an intellectual property minefield.

There are no simple answers to copyright questions. It is the obligation of every user of copyrighted material to determine if their actions are Fair Use under Section 107. I hope that this presentation sets an intellectual framework that will guide and help teachers understand copyright problems they encounter on a daily basis.

Remember, when faced with a Fair Use copyright conundrum:



Well, maybe a little.

References

United States Constitution Article 1, Section 8

Copyright Law of the United States Title 17 US Code

§106 Exclusive rights in copyrighted works

§107 Limitations on exclusive rights: Fair use

§108 Limitations on exclusive rights: Reproduction by Libraries and Archives

§110 Limitations on exclusive rights: Exemption of certain performances and displays (Technology, Education, and Copyright Harmonization Act of 2002)

§300 et seq. Duration of Copyright

§501 Infringement of Copyright

§504 Remedies for infringement: Damages and profits

About the Author



Mark J. Davis, Esq., an Instructor of Music Business at Loyola University New Orleans is an attorney with over 30 years' experience in music and entertainment law. Fully 100% of his practice focuses on copyright and contract issues as they apply to musical artists, songwriters, record labels, advertising agencies, and licensors of musical works. In addition to music publishing administration, catalogue sales, and other transactional matters, Davis has represented songwriters, publishers, labels and artists in copyright infringement suits in Federal courts in Louisiana, Texas, and Mississippi. He is a recognized expert in copyright having served as an Arbitrator for the US Copyright Office. Recent publications include *The Teacher's Guide to Copyright*, and *The Complete Copyright Kit for Composers and Musicians*. He is a co-founder of BuzzGig.com, a website specializing in copyright issues for educators. Feel free to contact him at mjd@buzzgig.com.