



## COPYRIGHT LAW AND THE FAIR USE DOCTRINE

This month's Melissa Talks will cover the Fair Use Doctrine. Before we can get into fair use, we need to talk about copyright law. Copyright is the section of federal law that stipulates what control authors have over their original works. This topic is so important that the issue of author ownership of created works is specifically mentioned in the United States Constitution, which states:

*"Congress shall have the right 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"*  
(Article 1, Section 8).

### What is the purpose of copyright law?

The primary purpose of copyright law is not necessarily to protect the interests of the authors/creators, but rather to promote the progress of science and the useful arts, which basically means to promote the creation of knowledge. In order to promote the creation of knowledge, the law gives the owner or creator of a work a limited-time monopoly over the rights to use that knowledge. This monopoly is not exclusive as there are some limits to it when that monopoly conflicts with an overriding public interest in encouraging the creation of new works or where the copying of the work (single copy) is used for non-profit educational purposes. The law attempts to balance those two interests.

### What is protected by copyright?

Section 102 of U.S. copyright law grants all "original works of authorship fixed in any tangible medium of expression" copyright protection. Specific categories of works mentioned are:

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
8. architectural works

## How do you claim a copyright?

A person must first create the work, meaning it must be fixed in a physical form for the first time. Fixed in physical form means it can be perceived by others. At that point, the creator/owner can register the work for copyright protection. Registration is very helpful because it establishes a public record of the copyright claim and (if made before or within 5 years of publication) registration establishes prima facie evidence in court. Registration also allows the owner of the copyright to record the registration with the U. S. Customs Service for protection against the importation of infringing copies.

It is **not** required to post the © on a work or to register the work with the U.S. Copyright Office to ensure that it is protected by copyright, although it can still be beneficial for creators of works to do so. It is important to note that in order for a copyright owner to file a copyright infringement lawsuit in court, the copyright must be registered with the U.S. Copyright Office.

## What ISN'T protected?

"[A]ny 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."

## What are the rights of copyright holders?

Section 106 of the copyright law grants the following exclusive rights to copyright holders:

- Make copies
- Prepare derivative works
- Distribute copies
- Perform the work publicly
- Display the work publicly
- Perform the work publicly by means of a digital audio transmission

Any unpermitted use of a copyrighted work in one of the above ways may be considered a copyright infringement.

## How long does a copyright last?

For works created on or after January 1, 1978, the copyright protection lasts for the life of the author + 70 years.

For works made for hire, the copyright protection lasts for 95 years from publication or 120 years from creation of the work, whichever is shorter.

For unpublished anonymous or pseudonymous works, or unpublished works when the date of the author is unknown, the copyright protection lasts for 120 years from creation of the work.

## Who owns the copyright for joint works, collective works, and works made for hire?

As specified in the law, the authors of a joint work are co-owners of the copyright for that work; "[c]opyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole" and belongs to the creator of the specific contribution in question; and "the employer or other person for whom the work was prepared" is considered the owner of the copyright for any work made for hire, except when "the parties have expressly agreed otherwise in a written instrument signed by them."

In general, colleges and universities do not claim copyright in academic works of their faculty. Faculty routinely sign away their copyright to publishers of scholarly works. Academic authors of scholarly works write to build their reputations, not for financial gain. – Royalties on scholarly books and print runs of scholarly books are usually small. Hence, assigning copyright to a publisher is often considered the norm for scholarly books.

## What are the penalties for copyright infringement?

Penalties can take the form of injunctions; the impounding, destruction, or disposition of infringing materials; actual and statutory damages ranging from \$200 to \$150,000 per infringement; the payment of attorney's fees and court costs; and/or imprisonment.

Given the potential severity of these penalties, copyright infringement should never be taken lightly. That said, the law provides a safe harbor for employees of nonprofit educational institutions acting within the scope of their employment: *"The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use."*

## FAIR USE DOCTRINE

### The Fair Use Doctrine and Education

Fair use is described in 17 U.S.C. § 107. The law says that there's no copyright infringement if the use of the material is fair, in other words "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."

To evaluate whether a particular usage meets the criteria for fair use, a court will consider four things:

1. The purpose and character of the use, including whether it's 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.

Generally speaking if more than half of the four factors favor your use, your use is likely fair use. Educators, like everyone else in society, are subject to copyright laws. However, because of the nature of their work, educators can often make a good faith claim that their conduct falls within the doctrine of fair

use because it is for "criticism," "comment," "teaching (including multiple copies for classroom use)," "scholarship," or "research." Indeed, the language of the Copyright Act itself clearly contemplated the use of otherwise protected works in the classroom setting.

While this does provide some comfort for educators, fair use has its limitations. Classroom teachers cannot, under the law, simply photocopy entire textbooks for their students. Authors, publishers, and other copyright holders can still sue educators if their conduct does not comport with the fair use factors listed in the statute.

Many educational uses will be fair; however, nonprofit educational use alone does not automatically give you permission to copy and distribute other people's work. For this reason, you should keep any documents you use when making a fair use determination on file to demonstrate your good faith effort in determining fair use.

### **What if I determine that mine ISN'T a fair use?**

In that case, you will need to contact the copyright holder to ask for their permission to use their work.

Many educational uses will fall under fair use; however, nonprofit educational use alone does not automatically give you permission to copy and distribute other people's work. For this reason, you should always keep any documents you use when making a fair use determination on file to demonstrate your good faith effort in determining fair use, if your determination of fair use is challenged.

### **Can I use a work in the in-person classroom?**

The rules governing use of materials for face-to-face teaching provide more flexibility concerning copying, displaying, and distributing copyrighted materials in the classroom. You may display or perform a work in your class without obtaining permission or doing a fair use evaluation when your use meets all three of these criteria:

#### **The use is:**

- 1. for instructional purposes;**
- 2. in face-to-face teaching (in the classroom, not over the Internet);**
- 3. at a nonprofit educational institution.**

Typical uses allowed include: showing all or part of a movie or television show; including pictures, images, graphs, and charts in your lecture slides; playing music.

Online class use of copyrighted material will be covered in another Melissa Talks on the TEACH ACT.

## IS IT FAIR USE?

<b>MOST LIKELY FAIR USE</b>	<b>MOST LIKELY NOT FAIR USE</b>
<b>FACTOR 1:</b> <b>The purpose/character of the use</b>	
Teaching (copies for classroom use only)/restricted access to students only	Commercial activity/profit from use
Research/Scholarship	Entertainment
Nonprofit educational institution	Denying credit to the original author
Criticism/comment/parody	
News reporting	
Transformative or productive use (changes the work for a new utility)	
<b>FACTOR 2:</b> <b>The nature of the copyrighted work</b>	
Published work	Unpublished work
Factual based	Highly creative work (art, music, film, plays)
Important to educational objectives	Fiction
<b>FACTOR 3:</b> <b>The amount and substantiality of the portion used</b>	
Small quantity of work used	Large portion or whole work used
Portion used not central to entire work	Portion used is central to the work
Amount is appropriate for educational purpose	
<b>FACTOR 4:</b> <b>The effect of the use upon the potential market</b>	

User owns lawfully purchased or acquired copy of the original work	Could replace sale of copyrighted work
One or few copies made	Significantly impairs the market or potential market for copyrighted work
No significant effect on the market or potential market	Reasonable and affordable licensing/permission mechanism for use of work
No similar product marketed by the copyright holder	You made it accessible on web or on another public forum
Lack of licensing mechanism	Numerous copies made/repeated or long-term use

If you have any questions, please feel free to contact Melissa Flores or Jim Curtin.



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