

Do I Need to Ask Permission? Applying Fair Use to Educational Activities

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“Can I use a YouTube video for my internal educational presentation? I say copyright is copyright. You need to get permission from the copyright holder directly.”

—From a recent exchange on a medical librarian listserv

As graduate medical educators and scholars, we interact daily with other people’s intellectual property and apparent copyright conundrums like the one above. But is the somewhat glib and perhaps reflexive response what copyright law actually says? Do we *always* need to ask permission to bring copyrighted material into our learning environments?

In this Perspective we argue that copyright law does provide some leeway in the way copyrighted material can be used for teaching, learning, and scholarship purposes. We believe that educators should exercise the rights provided to us in copyright law. Further, we need not be lawyers to make reasoned judgements around using lawfully acquired copyrighted material in the teaching environment.¹

The primary tool copyright law gives educators for using copyrighted material (without permission) is called “fair use.” The fair use statute is embodied in Section 107 of the US Copyright Act of 1976.² The preamble to the statute states that “the fair use of a copyrighted work, including such use by reproduction in copies...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, *is not an infringement of copyright.*”³

The preamble indicates that there are indeed circumstances when one may use a copyrighted work without permission, namely, for free speech activities (criticism, comment, news reporting), teaching, and scholarship. The words “such as” signify that these explicit fair uses are not exclusive,⁴ and the statute further stipulates that we must consider 4 factors when making a fair use determination (FIGURE):

1. The purpose and character of the use, including whether such use is of commercial nature or 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

Consider the following question: “Can I share a copy of this article with my multi-institutional journal club?” We will walk through this common scenario to demonstrate how to apply each of the 4 factors.

The first factor addresses article use, which here is in multiple nonprofit educational settings for learning about a topic. To ensure that the article will be accessible only to journal club members, we recommend sharing the article in a private way versus posting it publicly. Under these conditions, the use leans in favor of fair use.

The second factor invites us to examine whether the work itself—here, a copy of the article—is factual or creative and published or unpublished. In general, fair use supports the use of highly factual, published works. In this situation the work is a published scholarly article that is mostly scientific and factual, which favors fair use.

The third factor considers the amount of copyrighted work that will be used or shared. Generally, “shorter excerpts” are more likely to be within fair use,⁵ but in this case, it is the entire work. In weighing the third factor, “courts also place great emphasis on whether the amount of the copying was reasonable in relation to the defendant’s purpose.”⁴ If the journal club discussion requires the entire article to achieve the educational objectives, then using the whole work tends to favor fair use.

The fourth factor considers whether sharing this article would undercut the potential market of the article. Most scholarly articles are published in journals whose target market is academic institutions

← Favoring Fair Use Opposing Fair Use →		
• Teaching • Research • Scholarship • Transformative use • Nonprofit educational institution • Restricted access	Purpose	• Commercial use • Profitable use • Nontransformative use • Entertainment • Denying credit to original author
• Published work • Factual or nonfiction based	Nature	• Unpublished work • Creative work (art, music, novels, movies) • Fiction
• Small quantity • Portion used is not central or significant to the entire work • Amount used is tailored to meet educational needs	Amount	• Large portion or whole work used • Portion used is central to work or “heart of the work”
• No effect on market for copyrighted work • Lack of a reasonable licensing mechanism • Few or modest number of copies made	Effect	• Portion used could interfere with market for the use or derivatives • Reasonable, available licensing mechanism • Numerous copies made

FIGURE**Tool to Determine Fair Use**

Note: The purpose of this tool is to help record the decision-making process for a fair use analysis. The tool is not meant to be used in a quantitative fashion (simply add up the columns and the one with the most produces the decision); rather it is meant to support the application of specific facts, reasonable judgement, and a good faith effort to a particular copyright scenario. Altering the facts, even slightly, may change the outcome of the analysis. Consider making copies of the tool to document individual fair use analyses.

and libraries. While individuals could purchase single article copies, the effect on the potential educational market for this journal article is likely small. Additionally, the copy of the article to be shared must be legally obtained, through a library subscription or interlibrary loan. Altogether, the minimal market effect and legal acquisition of the article weighs in favor of fair use.

It is not necessary for all 4 factors to be in favor of fair use for a use to be considered fair. Instead, the issue is “whether the 4 factors overall lean in favor of or against fair use.”⁵ In this scenario, all 4 factors weigh in favor of fair use with varying degrees of certainty. While there is always an element of risk, this is a safe and generally accepted example of fair use.

In applying the fair use statute, we suggest 2 tools to think through the 4 factors. The Fair Use Tool (FIGURE) guides users through an examination of each factor and provides printable documentation of a good faith effort in making the determination. The second tool has to do with “transformative use,” which is the idea that the material is being used “in a new manner or context, distinct from the intended uses of the original.”⁵ One can argue that, in our scenario, the original purpose of a peer-reviewed journal article is the communication of knowledge.

The use in a journal club is transformative in that the article is now being used for something new, namely, to teach critical appraisal skills. When one can make the argument that a secondary use adds value to the original “in the creation of new information, new aesthetics, new insights and understandings,” that is a good indication one is in fair use territory.⁴

Let us consider a more complex situation: residency program faculty are planning to show short clips from a commercial movie to illustrate poor communication skills in a health care setting. The source of the clips is a DVD. The setting is a program with 100 residents in-person for a large group presentation with breakout groups for discussion.

In this scenario the copyrighted material is a fictional work intended for entertainment purposes. We can see from the Fair Use Tool that creative works enjoy stronger copyright protection. Second, the material is being mediated by DVD technology, which requires us to look at other aspects of copyright law beyond the fair use statute.

First, we will consider all 4 factors for a standard fair use analysis. According to the Fair Use Tool, this is a nonprofit educational setting (academic residency program) and the purpose is teaching and scholarship (Purpose). The movie clips are “restricted” to residents participating in the educational session

TABLE

Suggested Resources for Navigating Fair Use

Books	
Crews KD. <i>Copyright Law for Librarians and Educators: Creative Strategies and Practical Solutions</i> . 4th ed. Chicago, IL: ALA Editions; 2020.	This is an excellent, accessible copyright reference book to have within arm's reach.
Hobbs R. <i>Copyright Clarity: How Fair Use Supports Digital Learning</i> . Thousand Oaks, CA: CORWIN/National Council of Teachers of English; 2010.	After reading Hobbs, one will feel empowered and compelled to use fair use as a "right" to enhance and expand opportunities for resident learning.
Online Resources	
Codes of Best Practice by the Center for Media and Social Impact https://cmsimpact.org/program/fair-use/	These tools were created at American University to help educators, librarians, and authors navigate common professional scenarios with copyright issues.
Copyright and Fair Use by Stanford Libraries https://library.stanford.edu/using/copyright-reminder/copyright-law-overview/fair-use	This comprehensive resource guide provides up-to-date information on recent copyright court cases, legislation, and tools and worksheets
Fair Use Evaluator by the American Library Association https://librarycopyright.net/resources/fairuse/index.php	This tool walks you through the process of making a fair use determination and provides a summary to save showing evidence of a good faith effort.

(Purpose). Although the movie is fictional, and its original purpose is entertainment (Nature), we are "transforming" that purpose to illustrate examples of poor communication in a medical setting, for learning (Purpose). Furthermore, only small quantities of the movie tailored to specific learning objectives will be used (Amount). These short clips do not substitute for viewing the entire movie and thus will have negligible impact on the market for the movie (Effect).

Although the copyrighted material is fictional, we can say with reasonable confidence that the use is fair. However, we must also consider the DVD source of the movie. A standard DVD contains a digital rights management (DRM) system that prevents copying or otherwise restricts access to the content. The Digital Millennium Copyright Act (DMCA)⁶ prohibits the circumvention of technological measures that control access to the work. Along a spectrum of risk, the lowest risk option is for the instructor to not circumvent the DRM measures on the DVD by playing the movie clips directly from the DVD. However, it is inconvenient to locate several sections of a film on a full-length DVD during a live instructional session. Additionally, playing directly from the DVD prevents residents from reviewing the clips in the breakout sessions. A better alternative would be to play the movie clips separately from the DVD, perhaps through a learning management system. To do this, however, would require circumventing the DRM system on the DVD, which goes against DMCA law.

Fortunately, the US Congress anticipated that individuals, such as educators who often operate in a fair use environment, could be "adversely affected" by the prohibitions of the DMCA. Thus, DMCA authorized the Librarian of Congress to create rules for

circumstances under which DMCA circumvention is allowed.⁷ These exemptions center on fair use activities like comment, criticism, teaching, and scholarship.

The exemption language relevant to our scenario states that:

the prohibition against circumvention of technological measures [...] shall not apply to persons who engage in noninfringing uses" [...] "where circumvention is undertaken solely in order to make use of short portions of the motion pictures in the following instances: (A) By college and university faculty and students [...] for the purpose of criticism, comment, teaching, or scholarship..."⁸

To summarize, university faculty can use screen capture technology to create short clips of lawfully acquired movies on DVD for teaching purposes.

Here we arrive at a potential complication. The regulatory exceptions to DMCA spell out not only the "when" and "how," but also the "who," namely college and university faculty and students. The Librarian of Congress presumably considered a traditional higher education setting when drafting these rules. Does this exemption apply to graduate medical education? Possibly. In the authors' academic setting, medical educators have university faculty status, and residents, it may be argued, are students within the university. If the residency program is not attached to a university and the instructors are not faculty, then the setting may fall outside the scope of the current DMCA exceptions.

Keep in mind that the Librarian of Congress DMCA exemptions speak specifically to motion pictures acquired on DVD or Blu-ray discs. Other

mediums, such as streaming services, are currently not covered. These services have Terms of Use to which users must agree in order to use the service. Likewise, one must exercise caution with open video repositories such as YouTube. Remember that the starting point for any copyright calculation is that the source material was lawfully acquired.⁹

In summary, fair use is an underutilized tool embedded within copyright law and waiting for educators. Asking permission is not always necessary when dealing with copyrighted works, especially in the landscape of higher education. Next time you are considering whether you can use a copyrighted resource that would benefit your students, try walking through a fair use determination. You can also reach out to your institution's librarian. Although librarians are not lawyers, they can be great collaborators as you make fair use determinations.

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