


# Open Bibliography: Fair Use, Copyright, and You



Thursday, September 5, 2019

6:30pm - 8:00pm

Loyola University  
Information Commons  
6501 N Kenmore Ave, 4th Floor

Copyright law isn't going anywhere, but artists and academics still need access to protected works for research purposes and to create new works. Is there a compromise? Fair use and other exceptions to copyright law exist to provide access to protected works under very specific conditions. The LCA Associate Board, in partnership with the Loyola University Library, has assembled a panel to discuss the tools available for accessing protected works and discuss strategies for working with existing copyright restrictions. This is an event aimed at educating artists, faculty, and the public about fair use and the use of copyrighted works, but anyone interested in the topic is welcome to attend.

## **Introduction**

**Michael Reed**

Owner, Law Office of Michael Reed

## **Moderator**

**James Conley**

Media Service Librarian, Loyola University

## **Panel**

**Pia Hunter**

Research and Instruction Librarian, University of Illinois

**Matthew Sag**

Associate Dean of Faculty Research and Development, Loyola University, School of Law

**Sandra Kaufmann**

Director of Dance, Loyola University, Department of Fine and Performing Arts

## **Sponsors:**

Lawyers for the Creative Arts, LCA Associate Board, and Loyola University Chicago Library

September 5<sup>th</sup>, 2019

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Panelists

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Sponsored by:



Lawyers for the Creative Arts



LOYOLA UNIVERSITY CHICAGO

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## Background

**The Law Office of Michael Reed is a boutique transactional law firm that exists at the nexus of business, tech, and art, sharing business strategies and providing legal services to help clients attain their entrepreneurial goals.**

### PRACTICE AREAS

- Business services (entity formation, contracts, etc...)
- Intellectual Property (trademarks, copyright, trade secrets, etc...)
- Real Estate (sale and purchase)
- I offer clients fixed fee and limited scope representation, a cost-friendly alternative to traditional hourly billing practice.
- My office serves clients in Chicago and the surrounding suburbs.

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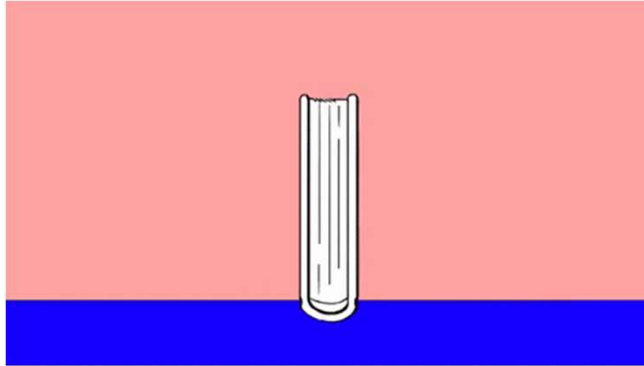
## About LCA

Lawyers for the Creative Arts is an Illinois nonprofit organization providing pro bono legal services to individuals and organizations engaged in all areas of the arts – the visual, music, performing and literary arts, as well as arts education and nonprofit organizations in general. Services are provided by LCA staff and a roster of volunteer attorneys experienced in all areas of law which affect the arts. LCA also provides mediation and facilitation services through its Patricia FelchArts Mediation Service and numerous educational outreach programs. To apply for legal help on your arts-related matters, complete the form at

[www.law-arts.org/application](http://www.law-arts.org/application).

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## Copyright law, an open book?



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## Copyright at a Glance

### Copyright law...

- Protects original works of expression;
- Protects work once it has been fixed in a tangible medium
- Rights vest at the moment of creation;
- Post-1978, term runs for life of the author, + 50 years,
- Copyright Term Extension Act of 1998 aka Mickey Mouse Protection Act, extended the term by 20 years. Current terms runs life of author + 70 years
- Once term runs, work enters the public domain.



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## Rights Under Copyright

### 17 USC 106 Exclusive rights in copyrighted works

The owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work;
- (2) to prepare derivative works ;
- (3) to distribute copies of the copyrighted work to the public;
- (4) to perform the copyrighted work publicly;
- (5) to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

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## Reproduction Rights for Librarians

### 17 U.S.C 108 Limitations on exclusive rights: Reproduction by libraries and archives

(a) Except as otherwise provided in this title, it is **not an infringement of copyright** for a **library or archives**, to reproduce **no more than one copy** or phonorecord of a work, except as provided in subsections (b) and (c), or under the conditions specified by this section, if—

- (1) the reproduction or distribution is made is not commercial in nature;
- (2) the collections is (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives; and
- (3) the reproduction or distribution of the work includes a notice of copyright.

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## Restrictions of Reproduction for Librarians

### 17 U.S.C 108 Limitations on exclusive rights: Reproduction by libraries and archives

(b) The rights of reproduction and distribution apply to three copies of an unpublished work duplicated solely for purposes of preservation and research use in another library if—

- (1) the copy reproduced is currently in the collection; and
- (2) any such copy as reproduced in digital format is not otherwise distributed to the public outside the premises of the library.

(c) The right of reproduction under this section applies to three copies of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if—

- (1) the library or archives has, determined that an unused replacement cannot be obtained at a fair price; and
- (2) any such copy that is reproduced in digital format is not made available to the public outside the premises of the library.

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## Restrictions of Reproduction for Librarians (Continued...)

### 17 U.S.C 108 Limitations on exclusive rights: Reproduction by libraries and archives

For purposes of this subsection, a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

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## Fair Use and Why it Matters



Fair use is an exception to the exclusive rights of copyright, one that exists to counteract an application of copyright law that stifles the creativity that the law was designed to encourage. If a particular use of copyrighted material is fair, then there is no infringement.

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## Fair Use Statute

### 17 U.S.C 107 Limitations on exclusive rights: Fair use

Fair Use of a copyrighted work, includes reproduction in copies or phonorecords or other means, for purposes such as **criticism, news reporting, teaching** (including multiple copies for classroom use), **scholarship**, or **research**, and is not an **infringement of copyright**.

Four non-exclusive factors guide the fair use determination:

- i. The **purpose and character** of the use – e.g., commercial nature or for nonprofit educational purposes?;
- ii. The **nature** of the copyrighted work;
- iii. The **amount and substantiality** of the portion used in relation to the copyrighted work as a whole; and
- iv. The **effect of the use** upon the **potential market** for or value of the copyrighted work.

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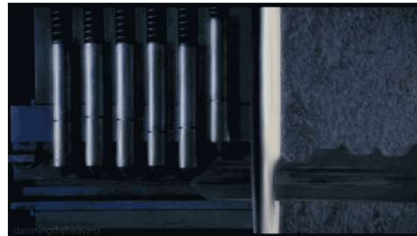
## Case Study #1: Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569 (1994)

### Fair Use often hinges on whether the use was “transformative”...

- Judge Pierre Leval coined the term “transformative use” in a 1990 law review article when he used it to describe a concept that had previously been called “productive use.”
- The Supreme Court applied the “transformative use” principle in *Campbell v. Acuff-Rose Music, Inc.*
  - Involved a rap parody of Roy Orbison’s “Pretty Woman” by Two Live Crew, where the parody was held to be transformative, due to the character of TLC’s original (albeit raunchy) lyrics.
  - The Fair Use test (purpose and character): “The central purpose ... is to see ... whether the new work merely supersede[s] the objects of the original creation, OR instead adds something new, with further purpose or different character, altering the first with new expression, meaning, or message.”

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## “Transformative Purpose” is the Key



- Courts subsequently came to focus on “transformative purpose”, which refers to a finding of Fair Use where defendant copies an entire work, without creating a new work, if the court perceives a sufficient public benefit in the appropriation
- See, e.g., *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006)
  - Defendant’s coffee-table book featuring reduced-sized images of posters from Grateful Dead concerts was held to be transformative because the images in the book were treated as historical artifacts to document facts, rather than for the poster’s original aesthetic purpose.)

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## Case Study #2: The Author's Guild, et al. v. Google, Inc.

### Background

- The Author's Guild sued in 2005, a year after Google launched its Library Project.
- A class of authors was cited, and a settlement was reached, but the Second Circuit scuttled the deal.
- The District Court concluded that the copying by Google was Fair Use, and Authors appealed.

### Second Circuit Decision

- The Second Circuit Court of Appeals, in an October 16, 2015 decision authored by Circuit Judge Leval, concluded that:
  - Google's copying is transformative within the meaning of *Campbell v. Acuff-Rose Music, Inc.*;
  - Google does not offer the public a meaningful substitute for matter protected by the plaintiffs' copyrights; and
  - Google had satisfied the statutory requirements for Fair Use

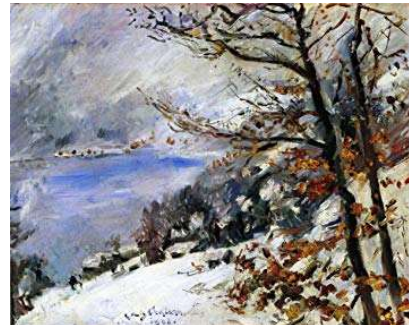
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## Copyright Thaw of 2019

### Works Now in the Public Domain

1923 was a watershed year for arts and culture

- Harlem Renaissance
- Dada
- Cubism
- Writings of Robert Frost and Virginia Woolf
- Paintings by Pablo Picasso,
- Etchings by MC Escher



Lovis Corinth, *The Walchensee in Winter* (1923)

Copyright law post-1978 did not permit for the preservation of many works created in the early part of the 20<sup>th</sup> Century. These works are now lost to time.

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Moderator  
James Conley,  
Loyola University



## Panelists



Pia Hunter,  
University of  
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Action Coalition for Media Education  
Media Education Foundation  
National Association for Media  
Literacy Education  
National Council of Teachers of English  
Visual Communication Studies Division  
of the International Communication  
Association

# Code of Best Practices in Fair Use for Media Literacy Education



Media Education Lab  
TEMPLE UNIVERSITY®

[centerforsocialmedia.org/medialiteracy](http://centerforsocialmedia.org/medialiteracy)

**WHAT THIS IS**

This document is a code of best practices that helps educators using media literacy concepts and techniques to interpret the copyright doctrine of fair use. Fair use is the right to use copyrighted material without permission or payment under some circumstances—especially when the cultural or social benefits of the use are predominant. It is a general right that applies even in situations where the law provides no specific authorization for the use in question—as it does for certain narrowly defined classroom activities.

This guide identifies five principles that represent the media literacy education community’s current consensus about acceptable practices for the fair use of copyrighted materials, wherever and however it occurs: in K–12 education, in higher education, in nonprofit organizations that offer programs for children and youth, and in adult education.

**WHAT THIS ISN’T**

This code of best practices does not tell you the limits of fair use rights. Instead, it describes how those rights should apply in certain recurrent situations. Educators’ and students’ fair use rights may, of course, extend to other situations as well.

It’s not a guide to using material that people give the public permission to use, such as works covered by Creative Commons licenses. Anyone can use those works the way their owners authorize—although other uses also may also be permitted under the fair use doctrine. Likewise, it is not a guide to the use of material that has been specifically licensed (by a school, for example), which may be subject to contractual limitations.

It’s not a guide to material that is already free to use without considering copyright ([copyright.cornell.edu/public\\_domain/](http://copyright.cornell.edu/public_domain/)). For instance, all federal government works are in the public domain, as are many older works. For more information on “free use,” consult the document “Yes, You Can!” ([centerforsocialmedia.org/files/pdf/free\\_use.pdf](http://centerforsocialmedia.org/files/pdf/free_use.pdf)).

It’s not a guide to using material that someone wants to license but cannot trace back to an owner—the so-called “orphan works” problem. However, orphan works are also eligible for fair use consideration, according to the principles detailed below. And it does not address the problems created by the 1998 Digital Millennium

Copyright Act, which creates barriers to otherwise lawful fair uses of copyrighted materials that are available only in formats that incorporate technological protections measures (such as encryption).

## HOW THIS DOCUMENT WAS CREATED

This code of best practices was created by convening ten meetings with more than 150 members of leading educational associations, including signatories to this document, and other educators across the United States. The process was coordinated by Profs. Renee Hobbs (Media Education Lab, Temple University), Peter Jaszi (Program on Information Justice and Intellectual Property, Washington College of Law, American University) and Patricia Aufderheide (Center for Social Media, American University). The code was reviewed by a committee of legal scholars and lawyers expert in copyright and fair use. (Consult pages 18–19 for a complete list of signatories and members of the legal committee.)

## MEDIA LITERACY EDUCATION

Media literacy is the capacity to access, analyze, evaluate, and communicate messages in a wide variety of forms. This expanded conceptualization of literacy responds to the demands of cultural participation in the twenty-first century. Like literacy in general, media literacy includes both receptive and productive dimensions, encompassing critical analysis and communication skills, particularly in relationship to mass media, popular culture, and digital media. Like literacy in general, media literacy is applied in a wide variety of contexts—when watching television or reading newspapers, for example, or when posting commentary to a blog. Indeed, media literacy is implicated everywhere one encounters information and entertainment content. And like literacy in general, media literacy can be taught and learned.

**Media literacy education helps people of all ages to be critical thinkers, effective communicators, and active citizens.**

Media literacy education may occur as a separate program or course but often it is embedded within other subject areas, including literature, history, anthropology, sociology, public health, journalism, communication, and education. It can occur in formal educational settings in both K–12 education and at the university level, as well as in nonprofit community-based programs. Its content may vary as well—from

lessons designed to expose the mechanics of how language, images, sound, music, and graphic design operate as symbolic forms for transmitting meanings to exercises designed to reinforce these understandings through hands-on media making.

Media literacy education distinctively features the analytical attitude that teachers and learners, working together, adopt toward the media objects they study. The foundation of effective media analysis is the recognition that:

- all media messages are constructed
- each medium has different characteristics and strengths and a unique language of construction
- media messages are produced for particular purposes
- all media messages contain embedded values and points of view
- people use their individual skills, beliefs, and experiences to construct their own meanings from media messages
- media and media messages can influence beliefs, attitudes, values, behaviors, and the democratic process

Making media and sharing it with listeners, readers, and viewers is essential to the development of critical thinking and communication skills. Feedback deepens reflection on one's own editorial and creative choices and helps students grasp the power of communication.

### USE OF MEDIA IN EDUCATION VS. MEDIA LITERACY EDUCATION

Teachers have always used texts, now including audiovisual and digital material, to convey facts and information. From time to time, the school is also a venue for entertainment, as when a film is screened to reward the class. These activities, however,

**Media literacy education can flourish only with a robust understanding of fair use.**

are not media literacy education. Rather than transforming the media material in question, they use that content for essentially the same purposes for which it originally was intended—to instruct or to entertain. In many or even most cases, of course, these uses of media will not have significant copyright implications, either because the content in question has been licensed or because it is covered by one of the

specific exemptions for teachers in Sections 110(1) and (2) of the Copyright Act (for “face-to-face” in the classroom and equivalent distance practices in distance education). Teachers involved in media literacy education may, of course, sometimes make use of licensed materials or take advantage of the provisions of Section 110. But this guide addresses another set of issues: the transformative uses of copyright materials in media literacy education that can flourish only with a robust understanding of fair use.

### **COPYRIGHT: A CONTENTIOUS CLIMATE**

New norms of information sharing—file sharing, downloading, podcasting—are emerging at the very moment when copyright owners are attempting to capture new revenue streams from various sources, including the “educational market.” As documented in the report *The Cost of Copyright Confusion for Media Literacy* ([centerforsocialmedia.org/medialiteracy](http://centerforsocialmedia.org/medialiteracy)), educators involved in media literacy feel uncertain in this new environment of heightened commodification. On the one hand, they sense that copyrighted material should be available for their activities and those of their learners, and that such availability has great social and cultural utility. But on the other, they are aware of the increased vigilance with which copyright owners are enforcing their rights. And their actual understanding of the subject is incomplete or even distorted. As a result, there is a climate of increased fear and confusion about copyright, which detracts from the quality of teaching. Lack of clarity reduces learning and limits the ability to use digital tools. Some educators close their classroom doors and hide what they fear is infringement; others hyper-comply with imagined rules that are far stricter than the law requires, limiting the effectiveness of their teaching and their students’ learning.

### **FAIR USE AND EDUCATION**

Educators and learners in media literacy often make uses of copyrighted materials that stand far outside the marketplace, for instance, in the classroom, at a conference, or within a school-wide or district-wide festival. Such uses, especially when they occur within a restricted-access network, do enjoy certain copyright advantages. As a practical matter, they may be less likely to be challenged by rights holders. More important, however, if challenged they would be more likely to receive special consideration under the fair use doctrine—because they occur within an educational setting.

From the beginnings of fair use in the courts, judges have drawn the connection between this special doctrine of copyright law and the central importance of education in the

American republic. The word “education” appears prominently in the preamble to Section 107 of the current Copyright Act, where the doctrine is codified. In addition, educators who rely reasonably on fair use are insulated against statutory damages in Sec. 504(c)(2). However, there have been no important court decisions—in fact, very few decisions of any kind—that actually interpret and apply the doctrine in an educational context. This means that educators who want to claim the benefits of fair use have a rare opportunity to be open and public about asserting the appropriateness of their practices and the justifications for them. This code is intended to support such assertions. It also means that educators seeking to arrive at a reasonable and balanced understanding of the doctrine, like the authors of this code, need to reason from first principles.

## FAIR USE

Law provides copyright protection to creative works in order to foster the creation of culture. Its best known feature is protection of owners’ rights. But copying, quoting, and generally re-using existing cultural material can be, under some circumstances, a critically important part of generating new culture. In fact, the cultural value of copying is so well established that it is written into the social bargain at the heart of copyright law. The bargain is this: we as a society give limited property rights to creators to encourage them to produce culture; at the same time, we give other creators the chance to use that same copyrighted material, without permission or payment, in some circumstances. Without the second half of the bargain, we could all lose important new cultural work.

Copyright law has several features that permit quotations from copyrighted works without permission or payment, under certain conditions. Fair use is the most important of these features. It has been an important part of copyright law for more than 170 years. Where it applies, fair use is a user’s right. In fact, as the Supreme Court has pointed out, fair use keeps copyright from violating the First Amendment.

**Fair use is flexible.  
It is not uncertain and  
it is not unreliable.**

New creation inevitably incorporates existing material. As copyright protects more works for longer periods than ever before, creators face new challenges: licenses to incorporate copyrighted sources become more expensive and more difficult to obtain—and sometimes are simply unavailable. As a result, fair use is more important today than ever before.



Copyright law does not exactly specify how to apply fair use, and that gives the fair use doctrine a flexibility that works to the advantage of users. Creative needs and practices differ with the field, with technology, and with time. Rather than following a specific formula, lawyers and judges decide whether an unlicensed use of copyrighted material is “fair” according to a “rule of reason.” This means taking all the facts and circumstances into account to decide if an unlicensed use of copyrighted material generates social or cultural benefits that are greater than the costs it imposes on the copyright owner.

Fair use is flexible; it is not unreliable. In fact, for any particular field of critical or creative activity, lawyers and judges consider expectations and practice in assessing what is “fair” within that field. In weighing the balance at the heart of fair use analysis, judges refer to four types of considerations mentioned in the law: the nature of the use, the nature of the work used, the extent of the use, and its economic effect (the so-called “four factors”). This still leaves much room for interpretation, especially since the law is clear that these are not the only permissible considerations. So how have judges interpreted fair use? In reviewing the history of fair use litigation, we find that judges return again and again to two key questions:

- Did the unlicensed use “transform” the material taken from the copyrighted work by using it for a different purpose than that of the original, or did it just repeat the work for the same intent and value as the original?
- Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

If the answers to these two questions are “yes,” a court is likely to find a use fair. Because that is true, such a use is unlikely to be challenged in the first place.

Both key questions touch on, among other things, the question of whether the use will cause excessive economic harm to the copyright owner. Courts have told us that copyright owners aren’t entitled to an absolute monopoly over transformative uses of their works. By the same token, however, when a use supplants a copyright owner’s core market, it is unlikely to be fair. Thus, for example, a textbook author cannot quote large parts of a competitor’s book merely to avoid the trouble of writing her own exposition.

Another consideration underlies and influences the way in which these questions are analyzed: whether the user acted reasonably and in good faith, in light of general practice in his or her particular field. Media literacy educators' ability to rely on fair use will be enhanced by this code of best practices, which will serve as documentation of commonly held understandings drawn from the experience of educators themselves and supported by legal analysis. Thus, the code helps to show that the uses of copyrighted materials described here are reasonable and appropriate for the purposes of teaching and learning.

Fair use is in wide and vigorous use today in many professional communities. For example, historians regularly quote both other historians' writings and textual sources; filmmakers and visual artists use, reinterpret, and critique copyright material; while scholars illustrate cultural commentary with textual, visual, and musical examples. Equally important is the example of commercial news media. Fair use is healthy and vigorous in daily broadcast television news, where references to popular films, classic TV programs, archival images, and popular songs are constant and routinely unlicensed.

In some cases professional communities have set forth their understandings in consensus documents, which may be useful to educators and learners if they are involved with these creative practices. For instance, documentary filmmakers have established their own code ([centerforsocialmedia.org/fairuse](http://centerforsocialmedia.org/fairuse)); so have film scholars, who routinely use popular films in their teaching ([dii4.com/documents/SCMSBestPracticesforFairUseinTeaching-Final.pdf](http://dii4.com/documents/SCMSBestPracticesforFairUseinTeaching-Final.pdf)); and now a code of best practices has been established for online video creators as well ([centerforsocialmedia.org/remix](http://centerforsocialmedia.org/remix)). Although professional groups create such codes, no one needs to be a member of a professional group to benefit from their interpretations. For instance, any one who does media literacy education, in any circumstances, can usefully employ this code's principles.

## THE TYRANNY OF GUIDELINES AND EXPERTS

Today, some educators mistakenly believe that the issues covered in the fair use principles below are not theirs to decide. They believe they must follow various kinds of "expert" guidance offered by others. In fact, the opposite is true. The various negotiated agreements that have emerged since passage of the Copyright Act of 1976 have never had the force of law, and in fact, the guidelines bear little

**Educational guidelines  
have often hurt more than  
they have helped.**

relationship to the actual doctrine of fair use. Sadly, as legal scholar Kenneth Crews has demonstrated in “The Law of Fair Use and the Illusion of Fair-Use Guidelines,” *The Ohio State Law Journal* 62 (2001): 602–700 (<http://moritzlaw.osu.edu/lawjournal/issues/volume62/number2/crews.pdf>), many publications for educators reproduce the guidelines uncritically, presenting them

as standards that must be adhered to in order to act lawfully. Experts (often non-lawyers) give conference workshops for K–12 teachers, technology coordinators, and library or media specialists where these guidelines and similar sets of purported rules are presented with rigid, official-looking tables and charts. At the same time, materials on copyright for the educational community tend to overstate the risk of educators being sued for copyright infringement—and in some cases convey outright misinformation about the subject. In effect, they interfere with genuine understanding of the purpose of copyright—to promote the advancement of knowledge through balancing the rights of owners and users.

In fact, this is an area in which educators themselves should be leaders rather than followers. Often, they can assert their own rights under fair use to make these decisions on their own, without approval. In rare cases where doing so would bring them into conflict with misguided institutional policies, they should assert their rights and seek to have those policies changed. More generally, educators should share their knowledge of fair use rights with library and media specialists, technology specialists, and other school leaders to assure that their fair use rights are put into institutional practice.

# CODE OF BEST PRACTICES IN FAIR USE FOR MEDIA LITERACY EDUCATION

## GENERAL POINTS ABOUT PRINCIPLES

Through its five principles, this code of best practices identifies five sets of current practices in the use of copyrighted materials in media literacy education to which the doctrine of fair use clearly applies. These practices are associated with K–12 education, higher education, and in classes given by nonprofit organizations. When students or educators use copyrighted materials in their own creative work outside of an educational context, they can rely on fair use guidelines created by other creator groups, including documentary filmmakers and online video producers.

*These principles apply to all forms of media.* Depending on the instructional goal, educators may use materials designed for entertainment and for persuasive or advocacy purposes. They may use print, images, Web sites, moving-image media, and sound media—in both analog and digital forms. In all cases, a digital copy is the same as a hard copy in terms of fair use. Veteran teachers may keep clippings from newspapers in manila file folders to use for media literacy education; younger ones may store their materials as digital files. Functionally, their practices are identical.

*The principles apply in institutional settings and to non-school-based programs.* Media literacy education may occur in university classrooms, in elementary schools, in computer labs in community technology centers, or in after-school and summer camp programs run by religious groups or nonprofit organizations. In addition to their fair use rights, teachers in conventional schools enjoy the benefit of limited educational exemptions under Section 110(1) and (2) of the Copyright Act. Educators in community-based organizations may not be covered by these exemptions, but they still can claim the right to use copyrighted materials under the doctrine of fair use.

*The principles concern the unlicensed fair use of copyrighted materials for education, not the way those materials were acquired.* When a user's copy was obtained illegally or in bad faith, that fact may affect fair use analysis. Otherwise, of course, where a use is fair, it is irrelevant whether the source of the content in question was a recorded over-the-air broadcast, a teacher's personal copy of a newspaper or a DVD, or a rented

or borrowed piece of media. Labels on commercial media products proclaiming that they are “licensed for home [or private or educational or noncommercial] use only” do not affect in any way the educator’s ability to make fair use of the contents—in fact, such legends have no legal effect whatsoever. (If a teacher is using materials subject to a license agreement negotiated by the school or school system, however, she may be bound by the terms of that license.)

*The principles are all subject to a “rule of proportionality.”* Educators’ and students’ fair use rights extend to the portions of copyrighted works that they need to accomplish their educational goals—and sometimes even to small or short works in their entirety. By the same token, the fairness of a use depends, in part, on whether the user took more than was needed to accomplish his or her legitimate purpose. That said, there are no numerical rules of thumb that can be relied upon in making this determination.

## PRINCIPLES

### ONE: EMPLOYING COPYRIGHTED MATERIAL IN MEDIA LITERACY LESSONS

**DESCRIPTION:** Educators use television news, advertising, movies, still images, newspaper and magazine articles, Web sites, video games, and other copyrighted material to build critical-thinking and communication skills. Common instructional activities include comparison-contrast analysis, deconstruction (close analysis) of the form and content of a message, illustration of key points, and examination of the historical, economic, political, or social contexts in which a particular message was produced and is received.

**PRINCIPLE:** Under fair use, educators using the concepts and techniques of media literacy can choose illustrative material from the full range of copyrighted sources and make them available to learners, in class, in workshops, in informal mentoring and teaching settings, and on school-related Web sites.

**LIMITATIONS:** Educators should choose material that is germane to the project or topic, using only what is necessary for the educational goal or purpose for which it is being made. In some cases, this will mean using a clip or excerpt; in other cases, the whole work is needed. Whenever possible, educators should provide proper attribution and model citation practices that are appropriate to the form and context

of use. Where illustrative material is made available in digital formats, educators should provide reasonable protection against third-party access and downloads.

## **TWO:** EMPLOYING COPYRIGHTED MATERIAL IN PREPARING CURRICULUM MATERIALS

**DESCRIPTION:** Teachers use copyrighted materials in the creation of lesson plans, materials, tool kits, and curricula in order to apply the principles of media literacy education and use digital technologies effectively in an educational context. These materials often include clips, copies or examples of copyrighted work along with a description of instructional practices, assignments, and assessment criteria. These materials may include samples of contemporary mass media and popular culture as well as older media texts that provide historical or cultural context.

**PRINCIPLE:** Under fair use, educators using the concepts and techniques of media literacy can integrate copyrighted material into curriculum materials, including books, workbooks, podcasts, DVD compilations, videos, Web sites, and other materials designed for learning.

**LIMITATIONS:** Wherever possible, educators should provide attribution for quoted material, and of course they should use only what is necessary for the educational goal or purpose. The materials should meet professional standards for curriculum development, with clearly stated educational objectives, a description of instructional practices, assignments, and assessment criteria.

## **THREE:** SHARING MEDIA LITERACY CURRICULUM MATERIALS

**DESCRIPTION:** Media literacy curriculum materials always include copyrighted content from mass media and popular culture. Informal sharing of these materials occurs at educational conferences and through professional development programs, as well by electronic means. Media literacy curriculum materials are also developed commercially in collaboration with publishers or nonprofit organizations.

**PRINCIPLE:** Educators using concepts and techniques of media literacy should be able to share effective examples of teaching about media and meaning with one another, including lessons and resource materials. If curriculum developers are making sound

decisions on fair use when they create their materials, then their work should be able to be seen, used, and even purchased by anyone—since fair use applies to commercial materials as well as those produced outside the marketplace model.

**LIMITATIONS:** In materials they wish to share, curriculum developers should be especially careful to choose illustrations from copyrighted media that are necessary to meet the educational objectives of the lesson, using only what furthers the educational goal or purpose for which it is being made. Often this may mean using a small portion, clip or excerpt, rather than an entire work, although sometimes it may be permissible to use more—or even all. Curriculum developers should not rely on fair use when using copyrighted third-party images or texts to promote their materials. For promotional purposes, the permissions process is appropriate. In addition, if a teacher or a school has specifically agreed to a license, then (of course) its terms are likely to be binding—even if they impinge on what would otherwise be considered fair use. And, of course, illustrative material should be properly attributed wherever possible.

## **FOUR:** STUDENT USE OF COPYRIGHTED MATERIALS IN THEIR OWN ACADEMIC AND CREATIVE WORK

**DESCRIPTION:** Students strengthen media literacy skills by creating messages and using such symbolic forms as language, images, sound, music, and digital media to express and share meaning. In learning to use video editing software and in creating remix videos, students learn how juxtaposition reshapes meaning. Students include excerpts from copyrighted material in their own creative work for many purposes, including for comment and criticism, for illustration, to stimulate public discussion, or in incidental or accidental ways (for example, when they make a video capturing a scene from everyday life where copyrighted music is playing).

**PRINCIPLE:** Because media literacy education cannot thrive unless learners themselves have the opportunity to learn about how media functions at the most practical level, educators using concepts and techniques of media literacy should be free to enable learners to incorporate, modify, and re-present existing media objects in their own classroom work. Media production can foster and deepen awareness of the constructed nature of all media, one of the key concepts of media literacy. The basis for fair use here is embedded in good pedagogy.

**LIMITATIONS:** Students' use of copyrighted material should not be a substitute for creative effort. Students should be able to understand and demonstrate, in a manner appropriate to their developmental level, how their use of a copyrighted work repurposes or transforms the original. For example, students may use copyrighted music for a variety of purposes, but cannot rely on fair use when their goal is simply to establish a mood or convey an emotional tone, or when they employ popular songs simply to exploit their appeal and popularity. Again, material that is incorporated under fair use should be properly attributed wherever possible. Students should be encouraged to make their own careful assessments of fair use and should be reminded that attribution, in itself, does not convert an infringing use into a fair one.

## **FIVE: DEVELOPING AUDIENCES FOR STUDENT WORK**

**DESCRIPTION:** Students who are expected to behave responsibly as media creators and who are encouraged to reach other people outside the classroom with their work learn most deeply. Although some student media productions are simply learning exercises designed to develop knowledge and skills, media literacy educators often design assignments so that students have the opportunity to distribute their work.

**PRINCIPLE:** Educators should work with learners to make a reasoned decision about distribution that reflects sound pedagogy and ethical values. In some cases, widespread distribution of students' work (via the Internet, for example) is appropriate. If student work that incorporates, modifies, and re-presents existing media content meets the transformativeness standard, it can be distributed to wide audiences under the doctrine of fair use.

**LIMITATIONS:** Educators and learners in media literacy often make uses of copyrighted works outside the marketplace, for instance in the classroom, a conference, or within a school-wide or district-wide festival. When sharing is confined to a delimited network, such uses are more likely to receive special consideration under the fair use doctrine.

Especially in situations where students wish to share their work more broadly (by distributing it to the public, for example, or including it as part of a personal portfolio), educators should take the opportunity to model the real-world permissions process, with explicit emphasis not only on how that process works,



but also on how it affects media making. In particular, educators should explore with students the distinction between material that should be licensed, material that is in the public domain or otherwise openly available, and copyrighted material that is subject to fair use. The ethical obligation to provide proper attribution also should be examined. And students should be encouraged to understand how their distribution of a work raises other ethical and social issues, including the privacy of the subjects involved in the media production.

## CONCLUSION

**Educators need to be leaders, not followers, in establishing best practices in fair use.**

Most “copyright education” that educators and learners have encountered has been shaped by the concerns of commercial copyright holders, whose understandable concern about large-scale copyright piracy has caused them to equate any unlicensed use of copyrighted material with stealing. The situation has been compounded by the—again understandable—risk-aversion of school system administrators

and lawyers. So-called fair use guidelines that institutional stakeholders have negotiated with some copyright holders have had similar results, intensifying fear and creating confusion among educators. These approaches have not responded directly to the actual needs of educators and learners, nor have they fully expressed or recognized the legal rights that educators and learners have.

This code of best practices, by contrast, is shaped by educators for educators and the learners they serve, with the help of legal advisors. As an important first step in reclaiming their fair use rights, educators should employ this document to inform their own practices in the classroom and beyond. The next step is for educators to communicate their own learning about copyright and fair use to others, both through practice and through education. Learners mastering the concepts and techniques of media literacy need to learn about the important rights that all new creators, including themselves, have under copyright to use existing materials. Educators also need to share their knowledge and practice with critically important institutional allies and colleagues, such as librarians and school administrators. ■

## COMMON MYTHS ABOUT FAIR USE

**MYTH:** FAIR USE IS TOO UNCLEAR AND COMPLICATED FOR ME; IT'S BETTER LEFT TO LAWYERS AND ADMINISTRATORS.

**TRUTH:** The fair use provision of the Copyright Act is written broadly—not narrowly—because it is designed to apply to a wide range of creative works and the people who use them. Fair use is a part of the law that belongs to everyone—especially to working educators. Educators know best what they need to use of existing copyrighted culture to construct their own lessons and materials. Only members of the actual community can decide what's really needed. Once they know, they can tell their lawyers and administrators.

**MYTH:** EDUCATORS CAN RELY ON “RULES OF THUMB” FOR FAIR USE GUIDANCE.

**TRUTH:** Despite longstanding myths, there are no cut-and-dried rules (such as 10 percent of the work being quoted, or 400 words of text, or two bars of music, or 10 seconds of video). Fair use is situational, and context is critical. Because it is a tool to balance the rights of users with the rights of owners, educators need to apply reason to reach a decision. The principles and limitations above are designed to guide your reasoning and to help you guide the reasoning of others.

**MYTH:** SCHOOL SYSTEM RULES ARE THE LAST WORD OF FAIR USE BY EDUCATORS.

**TRUTH:** If your school system's rules let you do everything you need to do, you certainly don't need this code. But if you need to exercise your fair use rights to get your work done well, in ways that your system's rules don't foresee, that's a different story. In that case, the code may help you to change the rules! Many school policies are based on so-called negotiated fair use guidelines, as discussed above. In their implementation of those guidelines, systems tend to confuse a limited “safe harbor” zone of absolute security with the entire range of possibility that fair use makes available.

**MYTH:** FAIR USE IS JUST FOR CRITIQUES, COMMENTARIES, OR PARODIES.

**TRUTH:** Transformativeness, a key value in fair use law, can involve modifying material or putting material in a new context, or both. Fair use applies to a wide

variety of purposes, not just critical ones. Using an appropriate excerpt from copyrighted material to illustrate a key idea in the course of teaching is likely to be a fair use, for example. Indeed, the Copyright Act itself makes it clear that educational uses will often be considered fair because they add important pedagogical value to referenced media objects.

**MYTH: IF I'M NOT MAKING ANY MONEY OFF IT, IT'S FAIR USE. (AND IF I AM MAKING MONEY OFF IT, IT'S NOT.)**

**TRUTH:** “Noncommercial use” can be a plus in fair use analysis, but its scope is hard to define. If educators or learners want to share their work only with a class (or another defined, closed group) they are in a favorable position. However, some more public uses may be unfair even if no money is exchanged. So if work is going to be shared widely, it is good to be able to rely on transformativeness. As the cases show, a transformative new work can be highly commercial in intent and effect and qualify under the fair use doctrine.

**MYTH: FAIR USE IS ONLY A DEFENSE, NOT A RIGHT.**

**TRUTH:** In court, doctrines like self-defense or freedom of speech or fair use aren't considered until after the plaintiff has proved that there may have been assault or defamation or copyright infringement. Procedurally, that makes these doctrines “affirmative defenses.” But in the real world, people are entitled to protect themselves from harm and to speak their minds; likewise, we acknowledge the right of fair use, which is specifically provided by law to people who make reasonable but unauthorized use of copyrighted works.

**MYTH: EMPLOYING FAIR USE IS TOO MUCH TROUBLE; I DON'T WANT TO FILL OUT ANY FORMS.**

**TRUTH:** Users who claim fair use simply use copyrighted works after making an assessment of the particular situation—there's nothing formal or official to “do” to claim fair use. You do not have to ask permission or alert the copyright holder when considering a use of materials that is protected by fair use. But, if you choose, you may inquire about permissions and still claim fair use if your request is refused or ignored. In some cases, courts have found that asking permission and then being rejected has actually enhanced fair use claims.

**MYTH: FAIR USE COULD GET ME SUED.**

**TRUTH:** That's very, very unlikely. We don't know of any lawsuit actually brought by an American media company against an educator over the use of media in the educational process. Before even considering a lawsuit, a copyright owner typically will take the cheap and easy step of sending a "cease and desist" letter, sometimes leading the recipient to think that she is being sued rather than just threatened. An aggressive tone does not necessarily mean that the claims are legitimate or that a lawsuit will be filed.

## COORDINATORS:

**The Media Education Lab**, founded by Professor Renee Hobbs, improves media literacy education through scholarship and community service. The lab is a project of the School of Communications and Theater at Temple University in Philadelphia, Pennsylvania, led by Dean Concetta Stewart.

**The Program on Information Justice and Intellectual Property**, led by Professor Peter Jaszi, promotes social justice in law governing information dissemination and intellectual property through research, scholarship, public events, advocacy, and provision of legal and consulting services. The program is a project of the Washington College of Law at American University in Washington, D.C., led by Dean Claudio Grossman.

**The Center for Social Media**, led by Professor Patricia Aufderheide, showcases and analyzes media for social justice, civil society, and democracy, and the public environment that nurtures them. The center is a project of the School of Communication, led by Dean Larry Kirkman, at American University in Washington, D.C.

## SIGNATORIES:

### **Action Coalition for Media Education**

A member-supported, independent, nonprofit educational coalition of educators, students, health professionals, journalists, media makers, parents, activists, and other citizens

### **Media Education Foundation**

Produces and distributes films, study guides, and other teaching materials that examine the impact of media on society

### **National Association for Media Literacy Education**

Formerly Alliance for a Media Literate America, a national membership organization dedicated to advancing the practice of media literacy education in the United States

### **National Council of Teachers of English**

A 60,000-member international organization devoted to improving the teaching and learning of English and the language arts at all levels of education

### **Visual Communication Studies Division of the International Communication Association**

A division examining visual representation in all its forms, within an academic association for scholars interested in the study of communication with more than 3,500 members in 65 countries

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**Funded by the John D. and Catherine T. MacArthur Foundation,  
with additional support from the Ford Foundation through the Future  
of Public Media Project.**

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## **FUNDER**

**The John D. and Catherine T. MacArthur Foundation**

## **ADDITIONAL SUPPORT FROM**

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# ILLINOIS MCLE CLE COURSE EVALUATION FORM

Course Title: Open Bibliography: Fair Use, Copyright, and You

Course Date(s): Thursday, September 5, 2019

What were your goals for participating in this course? Please rank up to two goals--use A (primary) and B (secondary)

	Acquire knowledge on a topic new to me or learn a new skill
	Expand my knowledge on a topic familiar to me or develop/expand an existing skill
	Add to my general knowledge of the law
	Hear one or more of the instructors due to their knowledge, skill and/or reputation
	Interact with other attorneys
	Meet my MCLE requirements. Jurisdictions licensed in (please list):
	Other (please explain):

Please rate this course	Strongly Agree			Strongly Disagree	
By attending this course, I accomplished my goal A above.	5	4	3	2	1
By attending this course, I accomplished my goal B above.	5	4	3	2	1
The course presented content beneficial to my work as an attorney.	5	4	3	2	1
The venue (in-person course) and/or technology used provided an acceptable learning environment.	5	4	3	2	1

Please rate the speakers	Strongly Agree			Strongly Disagree	
Speaker:	Michael Reed				
Demonstrated mastery of course content	5	4	3	2	1
Used engaging presentation methods and/or facilitation skills	5	4	3	2	1
Provided written materials that enhanced my learning experience	5	4	3	2	1

Please rate the speakers	Strongly Agree			Strongly Disagree	
Speaker:	James Conley				
Demonstrated mastery of course content	5	4	3	2	1
Used engaging presentation methods and/or facilitation skills	5	4	3	2	1
Provided written materials that enhanced my learning experience	5	4	3	2	1

Please rate the speakers	Strongly Agree			Strongly Disagree	
Speaker:	Pia Hunter				
Demonstrated mastery of course content	5	4	3	2	1
Used engaging presentation methods and/or facilitation skills	5	4	3	2	1
Provided written materials that enhanced my learning experience	5	4	3	2	1

Please rate the speakers	Strongly Agree				Strongly Disagree
Speaker/panel/simulation name:	Matthew Sag				
Demonstrated mastery of course content	5	4	3	2	1
Used engaging presentation methods and/or facilitation skills	5	4	3	2	1
Provided written materials that enhanced my learning experience	5	4	3	2	1

Please rate the speakers	Strongly Agree				Strongly Disagree
Speaker name:	Sandra Kaufmann				
Demonstrated mastery of course content	5	4	3	2	1
Used engaging presentation methods and/or facilitation skills	5	4	3	2	1
Provided written materials that enhanced my learning experience	5	4	3	2	1

Your results: The course...	Strongly Agree				Strongly Disagree
Expanded my knowledge of the law	5	4	3	2	1
Helped me develop essential skills	5	4	3	2	1
Showed me how to handle specific issues in my practice	5	4	3	2	1
Has changed how I will conduct my practice	5	4	3	2	1

Please share any other thoughts about this course (use back if needed)
Please provide your suggestions for future course topics (use back if needed)
Please return to: Lawyers for the Creative Arts