

# Fair Use in Multimedia: Digital Age Copyright

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It is torture almost. Ten percent, 30 seconds, 250 words or 1,000 words or the whole thing, or three minutes--examples and exceptions and important reminders--and then if you get all that down, there are still no guarantees. What you have just read are portion limitations from a set of recently proposed *Guidelines for Fair Use in Multimedia*.

It is no wonder that when copyright is mentioned, most people get a far away look in their eyes--far, far away. The [Copyright Act](#), and especially the application of the fair use doctrine, is confusing and ambiguous. It is not really surprising. Look up copyright in your thesaurus and you will find out that it means "control and license," "protection and privilege," "patent and concession." How many words do you know that mean both "you cannot use" *and* "you can use."

## To Use or Not to Use

Educators have long brought life to their teaching by engaging students through the use of sound, video, commentary, slides, photographs, art, and text. And by making it possible to combine different media, new technologies offer faculty many more opportunities for enhancing the texture of their teaching. But wait--while educators are free to present sounds, images, and text as separate entities, some suggest they may overstep the parameters of copyright if they compile such material into multimedia formats without first obtaining permissions from all copyright holders. The already confusing issues that have applied to paper formats are magnified and confounded when applied to multimedia.

Under [Section 106](#) of the Copyright Act, the owner of a copyright has exclusive rights to prepare derivative works. At the same time, the Act's fair use provision in [Section 107](#) may or may not protect professors-turned-multimedia-authors against lawsuits asserting infringement. It all depends on the circumstances of the use. This is the same in multimedia formats as it has been on paper; however, consider the added complications. Most books and journals contain copyright information within the first few pages, and, when it becomes necessary, tracking down permission to use portions of such works is relatively straight forward. But sound, video, and artwork are different.

Take a song for instance. Just as with books, it is not safe to assume that the author holds the copyright. In many cases, it is not the author who holds the copyright, but the publishers. With a song, tracking down copyright could mean having to contact the studio, the songwriters, the singers, and/or the musicians. Combine multiple works of multiple formats, and it can be extremely time consuming to locate all possible copyright holders to all original works. A recent article in *Multimedia Law Reporter* addresses such problems and describes how the Library of Congress recently dealt with this matter in a project to digitize unpublished 50+ year old photos from its collection. Given the problem of identifying copyright holders, the Library concluded that without clear title and authority they faced a risk of violating someone's copyright. Rather than attempting to locate all appropriate copyright holders or their heirs, they decided to modify the project by using works only from the public domain (that is, use works on which the copyright has expired, were produced by the federal government, or have been "dedicated to the public").

And what if a professor, in an effort to reach the most students, wanted to make a multimedia compilation available over a network? Some holders of the original copyright assert that once one loses

control over the distribution of a such a work (through distance learning, peer review, critiques, or collaborative projects over the networks, for example) any leeway built into fair use through the course of face-to-face teaching disappears.

## Digital Age Guidelines

As academics plunge ahead into multimedia and network arenas, the debates over what can and cannot be done has escalated and grown increasingly confusing. The copyright committee of the Consortium of College and University Media Centers (CCUMC) felt it could tackle some of the problems by compromising with copyright proprietors on guidelines for educators. CCUMC held a satellite conference this past fall to publicize their draft guidelines for fair use in multimedia. To quote the members of the committee, these draft guidelines were prepared with some degree of "bloodletting." Over 600 sites from all sides of the copyright debate downlinked the conference and were able to participate in the row by calling in and faxing questions to the panel.

[Dr. Walter Reed](#), English professor and Director of Emory's new [Center for Teaching and Curriculum](#), says, "the whole set of guidelines seem overbearing and overanxious. My reaction is to ask whose interests are being served--certainly not those of the university. The rationale of the classroom is being overridden by the logic of the marketplace." As to the specific portion limitations outlined in the guidelines, Dr. Reed believes they would "overly restrict the critical discussion of works of art." And, he adds, "the goals of teaching need to be asserted against the goals of business here."

## Rule of Reason

Because there are no hard and fast rules written into the fair use provision, there is room for legal interpretation. This has been a bane on both sides of the debate for those who would rather have rules and regulations spelled out. Fuzzy boundaries make a lot of people very uncomfortable. It takes guts on the part of educators to test the boundaries, especially in a litigious climate and so, the guidelines.

But part of the real genius of the [Copyright Act](#) is its deliberate vagueness in defining the boundaries surrounding fair use. The doctrine is "an equitable rule of reason." In other words, it depends on the situation. In determining fair use, the act says only that the following four factors must be taken into consideration: (1) purpose and character of the use, (2) the nature of the copyrighted work, (3) amount and substantiality used, and (4) market effect. So, the bane is also the beauty. Hard and fast rules can tie the hands of educators in cases where fair use would allow more freedom than guidelines.

But, says Dr. Michael Bellesiles, an Emory history professor, a lot of faculty "roll over and play dead" when it comes to learning about and understanding copyright and fair use. Dr. Bellesiles, with the advice of a lawyer, has created a core collection of digital documents in American history and has made them available over the campus network. Included are early editions of the *Federalist Papers*, Paine's *Common Sense*, Mary Jamison's 1757 *Captivity Narrative*, and Rufus King's 1819 paper *Against the Extension of Slavery*. All documents in his "American Voices Project" are copyrighted by Bellesiles himself or are within the public domain. He believes there is a "self-mystification" among faculty who convince themselves that copyright is too hard to understand.

## Updating the [Copyright Act](#)

The same week CCUMC held its satellite conference, the White House's Information Infrastructure Task Force (IITF) released a report that attempts to explain intellectual property law in the context of cyberspace. The report also makes legislative recommendations to Congress to update the Copyright Act

for the digital age, though it still urges that the interest groups involved (faculty, educators, creators, proprietors, and commercial producers) come to their own conclusions and agreements.

These proposed revisions to the Copyright Act have set off a debate and spurred the establishment of a Digital Future Coalition (DFC) of scholarly societies, library and educational groups, and corporations that share an interest in having a robust National Information Infrastructure. The DFC believes the IITF's proposed legislative changes are based on "an unbalanced analysis and an incomplete technological understanding" and that, if adopted, there will be sweeping and unintended ramifications.

Congressional hearings are underway this winter and spring. And while Congress seems prepared to recognize that digital formats exist, it would rather leave it to the players to hammer out the details as they've done in the past. CCUMC's copyright committee--made up of lawyers, educators, and proprietors--hopes that its voluntary guidelines receive "validation from Congress." That is, if they are not written into the law, they would at least be written into the record.

### **Exercising the Fair Use Doctrine**

Arnold Lutzker, an attorney representing the library and educational community, said during the CCUMC teleconference that "these [draft] guidelines are sitting down hard on the educational environment...we've got to let educators educate." He stressed that the guidelines represent a compromise and do not set the outer parameters of fair use. Mr. Lutzker attempted to assert that the guidelines represented a "safe harbor," but Judith Saffer, counsel for the Broadcast Music Industry and representing the proprietor side of the debate, cautioned that there are no guarantees, even with the guidelines. Annoying, isn't it?

Mr. Lutzker also wrote a summary of the IITF report for the library and educational community. He writes that "since the pervasive theme of the recommendations is the enhancement of the economic exploitation of copyrighted works, less heed is paid to the public interest aspects of copyright law or established exceptions to copyright rights." Non-profit institutions, such as libraries and universities, may well face increasing difficulty in securing or granting access to works for little or no cost.

As far as CCUMC's draft guidelines go, there is a fear in educational and library circles that by subscribing to such guidelines, educators would be agreeing to follow a narrow interpretation of fair use. Many in the educational and library communities would urge a much broader interpretation of the fair use doctrine to ensure that for non-profit educational purposes, the integrity of the doctrine is preserved. Further, if educators are not fully exercising the right to fair use, the strength of the fair use argument could very well erode.

A year ago, Fred Hofstetter, Director of the Instructional Technology Center at the University of Delaware, wrote in *Educom Review* that "the vagueness of the law and the fear of lawsuits have led school administrators to publish guidelines that are much more restrictive than the spirit of the law intends. Some of those guidelines are especially detrimental to the classroom use of multimedia...It must be fair for teachers to change the medium of a work, electronically combine that work with other works for didactic purposes, use the work as frequently as needed for students to master the learning objective, and, for students registered in the class, provide access from student computer labs, dorm rooms, and homes over the information superhighway."

The uninitiated might see the copyright literature to be a perfect cure for insomnia. But educators must be aware of the implications of recent activities surrounding copyright and multimedia. Ivan Bender, CCUMC's copyright attorney stressed, "it is crucial that faculty understand the law." Otherwise, they

could well be in for a rude awakening.

## Sources

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