

The following document is from:

Safe and Responsible Use of the Internet: A Guide for Educators

Nancy E. Willard, M.S., J.D.

Responsible Netizen Institute
474 W 29th Avenue
Eugene, Oregon 97405
541-344-9125
541-344-1481 (fax)
Web Site: <http://responsiblenetizen.org>
E-mail: info@responsiblenetizen.org

Copyright © 2002-03 Nancy E. Willard. This document is distributed as “Honor Text.”

The purpose of the “Honor Text” approach is to allow for the wide dissemination of information, while providing financial support for continued policy research and dissemination. The following are the “honor text” guidelines:

- If you are a student or other researcher and are using one copy of this material for personal research, you are not requested to provide compensation.
- If you have established a web site or web page listing information resources for educators, you may freely link to this site or any individual document on this site and are not requested to provide compensation.
- If you are a faculty member, professional development coordinator, or the like and have assigned material on this site as readings for your students (whether provided in hard copy or linked to as an online component of course resources), you are requested to provide compensation for such use. The standard rate for the reproduction of copyrighted materials for courses is \$.10/page/student. If you are using substantial sections, please make contact to arrange for discounts.
- If you are a school or a district and have used these materials for planning and/or policy development, you are requested to provide compensation in a manner that reflects the perceived value.
- For all other uses or further information, please e-mail us at info@responsiblenetizen.org.

Although the author has made every effort to ensure the accuracy and completeness of the information contained in this book, the author assumes no responsibilities for inaccuracies or omissions. Although this book discusses legal issues, nothing contained in this book should be interpreted as the provision of legal advice to any individual, district, or other entity.

Part III. Legal Issues – Internet Use in School

9. Copyright

The Copyright Balance

The following two statements outline the rationale for copyright protection:

Congress has the right ... To Promote the Progress of Science and the Useful Arts, by Securing for limited Times to Authors and Inventors the Exclusive Right to their respective Writings and Discoveries¹.

¹ *U.S. Constitution, Sec 1, Art 8, Cl 8*

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reasons to belong to the inventors. The public good fully coincides in both cases with the claims of individuals².

Copyright laws balance two important values:

- **Personal Rights.** If a person has devoted their creativity, time, and energy into the creation of something, that person should have the right to say who can use it and how. People should have the right to compensation for their creative work if they chose to ask for it.
- **Benefit to Society.** There are two benefits to individuals and society. Ensuring that people can be compensated for their work encourages more creative works and these works are of benefit to our society and individuals. Providing copyright protection for only a limited period of time and allowing for exceptions to copyright protection that support uses that are beneficial to society ensures that the copyright protections provided to creators are not so extensive that society cannot benefit from the works.

Copyright Basics

A creative work -- text, music, picture, software, etc. -- is automatically protected by copyright from the moment it is created. It is not necessary for a work to have a copyright notice or to be registered to receive copyright protection.

A creator can place his or her work in what is called the "public domain" by clearly and specifically relinquished all copyright rights. Since a notice is not required, merely publishing a work without a notice is not a relinquishment of copyright rights. Unfortunately, there are many sites on the Internet where the developer of the site has posted material in violation of someone else's copyright. The simple fact that a work appears on a web site without a copyright notice does not mean that the work is in the public domain. A work is also considered to be in the "public domain" if the copyright has expired. Material produced by the Federal Government and state government is also generally considered to be in the public domain. However, material funded by government agencies is generally not in the public domain, unless the government contract specifies this status.

The owner of a copyright has the exclusive right to copy, modify, distribute, display/transmit, and perform the work. The owner of a copyright can grant other people permission, called a "license", to exercise any of these rights. The permission can be expansive or limited. Sometimes people include a permission statement or license on their work. For example, the creator may say: "Permission to reproduce and distribute for non-profit purposes is granted."

A copyright is not the same as a trademark. A trademark is a name, logo, or graphic that is used to identify the source of products or services. It is also possible to infringe on a trademark. Trademark infringement occurs when someone uses a trademark in a manner that is likely to

² Madison, J. *The Federalist*, Number 43

cause confusion regarding the source of particular products or services. Sometimes a particular work, generally a graphic, can serve as a trademark and also be protected by copyright.

Copyright Ownership by Students and Teachers

Students and teachers may have copyright rights in the works that they produce. It is important that districts recognize and respect these rights.

Student Copyright Ownership

Students are not employees of a school. Any work created by a student that meets the other requirements for copyright, is fully protected by copyright law. The best strategy to teach students about the need to respect the copyright rights of others is in the context of teaching them about their rights. Schools that wish to exercise copyright rights, for example, through the publication of student work on a school web site, should receive permission from the student and the student's parent/guardian. A one time request for ongoing permission to post student work should be sufficient. Students should be taught how to more fully protect their copyright rights through the use of a copyright notice. Technically, a copyright notice should include the full name of the copyright owner, This will present problems in schools because of the disinclination to post student full names. It is recommended that student work be posted with a notice that includes the student identification and the school the student attends: © 200?, jjwill Student at Adams Elementary School.

Teacher Copyright Ownership

The ownership rights of teachers presents a more complicated situation. In most cases, teachers are employed to teach, not to create curriculum. Works that are created by the teacher on his or her own time, with his or her own resources, are clearly owned by the teacher. If the district has specifically requested and supported the development of curriculum, then the district owns the copyright. The situation becomes more complicated when district resources are used in some manner but the district has not specifically requested or supported the development of the materials.

All districts should have a clear policy outlining copyright rights. The following standards are recommended:

- If the teacher creates materials solely on his/her own time, using his/her own resources, then the teacher owns the copyright and the district has no rights.
- If the teacher creates materials primarily on his/her own time, and primarily using his/her own resources, but has used some district time and/or resources, such as posting the materials on the district web site or some use of instructional preparation time, then the teacher owns the copyright, but the district should have a no-cost, nonexclusive, continuing right to use the materials for educational purposes within the district.
- If the teacher's creation of the materials has been initiated and supported by the district and designed to meet district-specified instructional needs, then the district owns the copyright.

Copyright and the Information Age

The original copyright laws emerged after the invention of the printing press. The development of new technologies for the distribution of information is causing a restructuring of existing copyright laws. This is an activity that is occurring on an international level as well as a national level. This increases the complexity because copyright laws are grounded in different philosophical perspectives throughout the world. Currently, there are many players and competing interests involved in the discussion. Educators will need to be active participants in developing new standards with respect to the fair use of copyrighted materials for educational purposes.

Underlying the restructuring of copyright law is a fundamental shift in the relationship between the creators of works and the individual. Traditionally, the work of a creator only reached the individual through a publisher. Publishers have traditionally served two roles -- ensuring quality and managing the production and dissemination of the work. Publishers have traditionally played a major role in determining copyright policy, and continue to do so today. Through the use of telecommunication technologies, creators of works have a more direct connection with the individual users of their works. The role of publisher in production and dissemination is diminishing. There are many examples emerging on the Internet that demonstrate the potential of these direct connections.

Fair Use Doctrine

The "fair use doctrine" provides a limited basis by which people can use a copyrighted work without getting permission from the creator. The fair use doctrine seeks to ensure that the benefits to society are not defeated by the limited monopoly that has been granted to the copyright owner. The fair use doctrine was established in a long line of court cases. Essentially, the courts were presented with situations where the benefit to society was considered to be greater than the potential loss to the creator. In the Copyright Act of 1976, Congress codified the legal standard for fair use that provides:

Limitations on Exclusive Rights: Fair Use. Notwithstanding the provisions of section 106, the fair use of copyrighted work, ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), 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 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;
4. The effect of the use upon the potential market for or value of the copyrighted work³.

³ 17 U.S.C. § 107

Fair Use for Teaching, Scholarship, and Research Purposes

Over the years, librarians, educators and publishers have developed voluntary guidelines to address fair use of work for teaching, scholarship, and research purposes. Although these guidelines are not statutory, they are contained in the legislative history of the Copyright Act. The current guidelines cover copying by and for teachers in the classroom context, the copying of music for educational purposes, the copying of relatively recent journal articles by one library for a patron of another, and the off-air video-taping of video broadcast materials. These fair use guidelines generally address fair uses that are non-transformative -- that is the work is being used as it was produced and essentially for the purpose for which it was used.

In 1994, the U.S. Department of Commerce established the Conference on Fair Use to bring together copyright owner and user interests to discuss fair use issues that have been raised by new technologies and to develop guidelines for fair use by librarians and educators. The CONFU participants spent over 2 1/2 years in an attempt to develop new fair use guidelines. Proposed guidelines were developed in three areas, digital images, distance learning, and educational multimedia. In the end, there was no consensus on the guidelines. In brief, the copyright owners thought that the guidelines gave too much away and the educators and librarians thought the guidelines were unworkable and overly restrictive.

It is unknown whether the guidelines developed represent a "safe harbor" for educators and librarians. Some educators and librarians fear that following the guidelines will result in undercutting a more expansive scope of fair use. Following CONFU members of a number of educational, scholarly, and copyright user organizations, including the National Education Association, the National School Boards Association, and the American Library Association, committed to the following:

- We will share experiences concerning: the application of new technology in library and educational environments, "fair uses" made of copyrighted works, proprietors' responses to requests for permission to use copyrighted materials, and sources of helpful information regarding fair use and other privileges under copyright law;
- We will participate in organized efforts to capture and disseminate such information;
- We will assist in the development of "User Community Principles" and educator- and librarian-generated "Best Practices" concerning fair use, distance learning, and other activities supported by current copyright law;
- We will work to extend the application of fair use into digital networked environments in libraries and educational institutions by relying on it responsibly to lawfully make creative use of information;
- We will resist relying on any proposed code of conduct which may substantially or artificially constrain the full and appropriate application of fair use; and

- We will encourage our members to reject any licensing agreement clause that implicitly or explicitly limits or abrogates fair use or any other legally conveyed user privilege⁴.

Under the fair use exception for teaching, research and scholarship, posting a copyrighted work on a publicly accessible web site would not constitute fair use. Such use would go far beyond the limited spontaneous use with a limited audience that is supported under this particular fair use exception. Posting a work on an intranet, where access would be limited to only those students in a particular class may constitute fair use, if such use also met the other traditional requirements of brevity and spontaneity.

Fair Use for Criticism and Comment

Use of copyrighted work for criticism and comment, including parody, is a transformative use of the prior work. With such uses, the owner of the copyrighted material may not be inclined to grant permission for use of the work, since such use may be for the purpose of criticizing the prior work.

This fair use exception, grounded in the First Amendment, is important for public policy reasons. When a portion of a prior work is incorporated into a new work for the purpose of expanding upon, commenting on or criticizing the prior work, the new work has significant social benefit. It is through the publication of works, and comments and criticism of those works that society gains new knowledge. Therefore, such use of the prior work for comment and criticism purposes is considered to be fair.

If use of a prior work is for comment and criticism purposes, then the new work could properly be placed on a publicly accessible web site.

Unfortunately, virtually all of the guidelines provided for educators related to fair use have been framed within the context of nontransformative use for education and research purposes. No guidelines have been developed for educators and students to follow in the context of transformative uses for comment and criticism purposes.

Liability for Copyright Infringement

In brief, the potential district liability for copyright violations on or related to the Internet and computer technology includes the following:

Material Posted on District's Public Web Site

School districts should be very careful about the copyright status of any material posted on this web site. Most companies do not want to sue school districts for copyright violations unless the unlawful practice is pervasive and such a suit would send a message to other districts. Promptly removing any material that violates copyright will generally satisfy the copyright holder. More information regarding copyright management is provided below.

⁴ URL: <http://www.ALA.org/washoff/confu.html>

However, if a copyrighted work is being used appropriately for fair use purposes, in the context of criticism or comment on the prior work, districts may need to weigh the risk of liability against the importance of supporting teachers or students in the important exercise of First Amendment free speech rights and the advancement of knowledge. Unfortunately, some copyright holders have become excessively aggressive in seeking to enforce their interests, regardless of the fair use exceptions contained in the law.

Violation of Copyright or Licensing Agreements

The Software and Information Industry Association has an Anti-Piracy Education Initiative. There are excellent recommendations for the establishment of an effective software management program in schools on their web site⁵.

Downloading Copyrighted Material

Districts must also closely evaluate their web traffic to ensure that students or staff are not using the district Internet system as a vehicle to exchange copyrighted materials such as musical files, software, and videos. Such activity would result in a significant amount of traffic and should be easily detectable by an astute system administrator.

Teachers also need to be reminded to follow the traditional fair use for education and research guidelines for any copyrighted material they download from the Internet.

Copyright Management for School Web Sites

Web Site Concerns

The following Copyright Management Plan seeks to address concerns of material placed on the district web site that may interfere with the rights of others, including copyright rights. (This issue and approach was also discussed in "District Liability Related to Copyright and Harmful Speech")

- Have provisions in the District Internet Use Policy that address copyright and other potential harmful speech liability issues.
- Place on the district web site and each school web site a "Web Site Concerns" link. This link will take the reader to a page where the district states: XYZ District seeks to ensure that all materials placed on the district or school web sites are placed in accord with copyright law and do not infringe on the rights of or harm others in any way. To accomplish this we are taking three steps:
 - We have provisions in our Internet Use Policy that address copyright, defamation, invasion of privacy, and other harmful speech. <link to policy>
 - We have established web site management procedures to review materials prior to their placement on the web site. <link to procedures>

⁵ URL: <http://www.siaa.net/piracy/policy/educate.asp>

- We will promptly respond to any issues of concern. If you have a concern about material placed on our web site, please contact us. <link to e-mail to an administrator who has the responsibility of promptly responding to any complaint>
- Establish web site management procedures to address these issues of concern.

Web Site Management Procedures

The following web site management procedures should be required for all teachers and students who are placing materials on the school web site. The copyright management procedures require noting the source and copyright status for all materials placed on the web site. To be included as a component of the web page or course, the material must meet one of the following criteria:

1. **Original Material.** This is material created by teacher or the student for the web page or course. This material should include a statement of copyright ownership and any permissions that may be granted. A standard notice might read: "© 200_ name. Permission to reproduce and distribute for non-profit purposes granted."
2. **Public Domain Material.** Public domain material falls into one of 3 categories:
 - a. Created by the government (does not apply to material created by someone else with federal funding).
 - b. Placed in public domain by copyright owner.
 - c. Copyright has expired. The following is information about when a work enters the public domain:
 - i. Published before 1923. In the public domain.
 - ii. Published from 1923 to 1963. Copyright term starts from time the work was published with a copyright notice. The copyright term was 28 years for first term, with ability to renew for 47 years, which was recently extended for 20 more years (total 67 years). If the copyright was not renewed, the work is in the public domain.
 - iii. Published from 1964 to 1977. Copyright term starts from time the work was published with a copyright notice. The copyright term was 28 years for first term. Now there is an automatic extension for 67 years.
 - iv. Created before 1978 but not published or published after 1978. The copyright term starts 1978 and extends for the creator's life plus 70 years or 12/31/2002, whichever is greater.
 - v. Created after 1978. The term starts when created and extends for life of the creator plus 70 years, or if created by a corporation, the shorter of 95 years from publication or 120 years from creation.
3. **Permission Granted for Use.** There are two ways in which permission could occur.
 - a. Permission for use is provided on material itself. For example, the material may contain a notice that states that reproduction for nonprofit, educational use is permitted. A copy of this notice must be supplied to.
 - b. Specific permission is obtained from copyright owner for use of the material on the web page.

4. Fair Use. The standard Fair Use Guidelines for Educators do NOT apply to material placed on school web sites. However, it is considered to be fair use to use copyrighted materials if the purpose is transformative, including review, criticism, or parody.

Web Site Management Chart

The following is a Web Site Management chart:

Material	Copyright status	Rationale or Basis
1. photos of XYZ	Teacher Original	Created by teacher
2. article about ABC	Permission granted	Permission from X attached
3. drawing of EFG	Public domain	Found in book that was published in 1909, title page attached.

Permission Request

The following is a Copyright Permission Request Template:

"Dear (name)

I am a student/staff at (name of school). I would like to use (describe the material) in the following manner (describe how you will use the material). Do you hold the copyright on this material? If you hold the copyright, may I have your permission to use your material in this way?

If you grant permission to copy this material, I will properly reference your ownership by (describe how).

I need to have your answer by (date)."

Copyright Management for Software

The following recommendations for effective copyright management for software come from the Technology Industry Association.

Nine Steps to Getting and Staying Legal

1. Appoint a software manager.
2. Create and implement a software policy and code of ethics.
3. Establish software policies and procedures.
4. Conduct internal controls analysis.
5. Conduct periodic software audits.
6. Establish and maintain a software log of licenses and registration materials.
7. Teach software compliance.
8. Enjoy the benefits of software license compliance.

9. Thank employees and students for participating⁶.

Copyright Concerns and Access to Quality Educational Materials

There are a number of positive ways that district can address copyright concerns as well as facilitate access to educational materials. These include:

- Use public domain or open systems resources whenever possible. In many cases, public domain resources are readily available to support a wide variety of educational activities.
- Develop collaborative approaches with other educators to create new public domain or inexpensive educational resources that can be used without the need to deal with the more expensive commercial publishers.
- Communicate directly with publishers about marketing and distribution practices that undermine the effective and legal use of their materials in the classroom.

⁶ Software and Information Technology Industry Association. *How Schools Can Spot, and Stop, Infringing Activity*. URL: http://www.siiia.net/piracy/policy/edu_spot.asp