



Copyright in the classroom

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Many years ago, a friend asked me for advice. We had a lengthy discussion, at the end of which I recommended that they seek guidance from the government agency that regulated the area of their concern. My friend thought for a moment, then shrugged and replied, “It’s better to ask for forgiveness than permission.”

I’m not sure who coined this adage, but I’ve heard it used repeatedly since that first time. And it may make sense in certain situations. But when dealing with areas where there are specific laws that may have stringent penalties, relying on permission in advance, or at least getting more information, is always a better way to go.

One area where educators should seek advice rather than take risks is using copyrighted materials in the classroom. It’s common for teachers to use copyrighted materials in a variety of ways. Some of these uses are fine; some are not.

What is copyright law?

Copyright law is a collection of federal

statutes that protect the rights of creators of original works, including books, drama and poetry, music, art, choreography and architecture. The law grants creators — or owners of the copyright — control over whether, how and when their works are copied, performed, distributed and displayed as well as how they can be altered.

Copyright is automatic, meaning that creators in the U.S. are protected from the moment they create and fix their work in a tangible format. A tangible format is a format that is sufficiently permanent to be perceived, reproduced or communicated for more than a short time. Examples include written expressions that are published on paper, like books and magazine articles; physical artwork, like paintings and sculptures; and electronic expressions, like blog posts. Things that are not expressed in a tangible format, like ideas, are not copyrightable. Copyright also doesn’t protect titles, names, listings of ingredients or contents such as recipes, and works that are not fixed in a tangible medium, such as improvised speeches, though these may be protected by other areas of intellectual property law, such as trademark or patent law.

Creators do not have to register their work to be covered by copyright protection. For example, as soon I finish writing this article, and it is published in this magazine, it will be covered by copyright law, even though I have not registered the work. I should note that, in this case, I won’t own the copyright. More on that later. Even though registration is not required, the U.S. Copyright Office recommends registration because it will be necessary

to enforce their rights to a work under the copyright law.

Copyright owners are also not required to apply a copyright notice to a work for it to be copyrighted. Again, though, the Copyright Office suggests that applying the notice provides practical and legal benefits to the copyright owner.

Copyright notice is the copyright symbol (©), the name of the owner and the year of first publication. An example of a proper copyright notice appears on the “Who We Are” page of this publication.

A copyright is a durable protection. On works created on or after Jan. 1, 1978, copyright exists throughout the creator’s lifetime and for 70 years after the creator’s death. For works with more than one creator, the copyright exists throughout the lives of all creators and for 70 years after the last surviving author’s death. For works created before Jan. 1, 1978, and published or registered as of that date, copyright existed for 28 years from the date of publication or registration, with an option to renew for another 67 years.

Can a teacher use a copyrighted work?

The easy answer is yes and in several different ways. However, the teacher’s use isn’t without limits and regulation.

First, students use textbooks and other materials that are copyrighted and then purchased by school districts or students. Students and teachers can use these materials under the “first sale doctrine,” which allows any person who purchases a copyrighted work to lend, sell or transfer ownership of that particular copy of the work (17 United States Code 109). However, teachers cannot photocopy

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Don’t miss OSBA’s Cyberlaw Workshop on March 10. Jennifer A. Hardin will present on copyright considerations when publishing or consuming digital content. Learn the copyright rules for streaming videos, image attributions, sharing purchased curriculum and more. The cost for this virtual workshop is \$110. Register at <http://links.ohioschoolboards.org/cyberlaw2023>.

purchased textbooks or other curriculum materials under the first sale doctrine.

Second, teachers can rely on the “fair use” defense to use copyrighted materials for educational purposes.

The law provides that the fair use of a copyrighted work for teaching, including making multiple copies for classroom distribution, is not an infringement of copyright. The act lays out four factors that must be considered to determine whether a teacher’s use of copyrighted materials is a fair use:

- the purpose and character of the use, including whether for commercial or nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the whole;
- the effect of the use on the potential market for or value of the copyrighted work.

Fair use requires a balancing of all four

factors, and none of them, exclusive of the others, controls the application of the exception. In other words, a teacher cannot simply argue that the purpose for the use is educational and, therefore, protected.

Teachers have relied on fair use for years to provide photocopies of articles, short stories and poems for classroom use. A teacher also may be able to argue that the use of video clips in online instruction is fair use because it is for a nonprofit educational purpose, the teacher did not use the whole of any video and the limited use does not affect the original copyright holder’s ability to sell the works.

Fair use would not apply if a teacher made multiple copies of a film and provided the copies to students, even if the students’ use of the film is educational. However, the teacher could display a movie to students in the classroom under the Copyright Act,

which also allows for displays and performances of copyrighted materials in face-to-face teaching.

If a class is being held online, fair use doesn’t apply. To close this gap, Congress enacted the Technology, Education and Copyright Harmonization (TEACH) Act in 2002. The TEACH Act requires that teachers comply with a long list of requirements before using copyrighted materials in distance learning.

The TEACH Act applies to uses of copyrighted materials by a “government body or accredited nonprofit educational institution,” which would include school districts in Ohio. Before one of its teachers can rely on the TEACH Act, the school must:

- have a policy regarding copyright;
- provide informational materials about copyright compliance to faculty, students and relevant staff members;
- provide notice to students that the

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materials they are using are subject to copyright protection.

The act requires that any use of copyrighted materials for distance learning includes technological controls on the materials. The institution must ensure that all materials have controls that:

- Limit access to the materials to students actually enrolled in the class. A teacher could comply with this requirement by password protecting the materials and giving the password only to students in the class.
- Control retention and further dissemination of the works by students.

To use this exception, teachers should work with information technology specialists at their schools to make certain that uses of copyrighted materials in classrooms meet these requirements.

One other way for teachers to use copyrighted material is to seek permission from the author or copyright holder. To seek permission, the teacher can contact the current copyright holder and ask for permission to use the material. Typically, a publication will include instructions on the permissions necessary before a person can use copyrighted materials in the publication. Look for a “notice of rights,” such as the one at the bottom of page 1 of this magazine.

Whenever a teacher uses copyrighted

materials in the classroom, the use must be a fair use, comply with the TEACH Act, be with permission of the copyright holder or meet some other exception to the copyright law.

What about works created by employees?

Earlier in this article, I mentioned that I will not own the copyright on this article, even though I am its creator. That’s because I’m creating this work in the scope of my employment, which prompts the question: Who owns the copyright on teacher-created materials?

All teachers are required to create instructional materials, such as lesson plans. Some teachers create wonderful instructional materials, and they may want to share them with other teachers. As the creator, do they have the right to share or sell their lesson plans and other materials they create for use in the classroom?

The copyright law applies to lesson plans if they are original and fixed in a tangible medium. The copyright holder has the right to control its use. A work that is prepared by an employee within the scope of employment likely falls within the definition of a “work made for hire.” If it does, a teacher who is employed by a school district and creates instructional materials within the scope of their job duties is creating “works made for hire.” If the work made for hire doctrine applies, it is not the teacher who owns the copyright but the district that employs the teacher.

Under current law, any work created by a teacher within the scope of their employment could be a work made for hire, which would mean that the employing district owns the copyright to that work. A teacher who wants to copy these instructional materials and give or sell them to other teachers should first seek permission from the district. The district may also have a claim to any profit a teacher makes from these sales of instructional materials if they are works made for hire.

Conclusion

Copyright seems so plain and easy. If you create something original, you have the right to control its use. The application of the law and its exceptions, however, is extremely complicated. Even the simplest part of the analysis — who owns the copyright — may not be simple at all. If a district has a copyright question, either about the use of copyrighted materials or about materials created by district employees, it should consult with legal counsel who are knowledgeable about copyright law. Forgiveness after the fact won’t protect the district from a charge of copyright infringement but seeking permission (or legal advice) in advance may. ■

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