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Primer on Copyright Law
and Fair Use

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Hello. This is Melissa McGann. I am an attorney with Andre, Morris & Buttery in San Luis Obispo, California, and I practice intellectual property law. Welcome to “Primer on Copyright Law and Fair Use,” a presentation in Portical’s technology planning series. Today we will discuss the basics of copyright law and their importance to the field of education. We will also discuss the “fair use” doctrine and how applying its four basic premises may make it possible to successfully defend yourself against a copyright owner’s claim of infringement.

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Definition of Copyright

- Protects original expressions of ideas that are reduced to physical form (17 U.S.C. § 102).



According to the United States Copyright Act, copyright protects “original works of authorship” that have been “fixed” in any “tangible medium of expression.” In simpler terms, copyright protects the particular way an author has expressed herself. As soon as a work has been reduced to writing or some other “fixed” form, it is afforded copyright protection – whether the work has been formally registered with the United States Copyright Office or not. However, copyright protection does not protect the ideas, procedures, concepts or factual information contained in the work.

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**Why Seek
Copyright Protection?**

- Rights afforded by copyright law:
 - Reproduction
 - Preparation of derivative works
 - Distribution
 - Display
 - Performance



The author, otherwise known as the “owner” of the copyright, is afforded five basic rights under Federal copyright law. These rights include: 1) the right to reproduce or copy the work; 2) the right to revise or create a new work based on the preexisting work (otherwise known as creating a “derivative work”); 3) the right to distribute copies of the work; 4) the right to display the work; and 5) if applicable, the right to perform the work.

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**What Does Copyright
Law Protect?**

- Literary works
- Musical works and sound recordings
- Dramatic works
- Motion pictures
- Television broadcasts
- Computer software




Among other things, protection afforded by copyright law extends to literary works such as books and periodicals, musical works and sound recordings, dramatic works such as plays, motion pictures, television broadcasts and computer software.

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Fair Use Factors

1. What is the *purpose* of the use?
2. What is the *nature* of the copyrighted work?
3. What *amount* of the copyrighted work is taken?
4. What is the *economic effect* on the work taken?




The exclusive rights afforded to a copyright owner, however, are limited by the doctrine of fair use. If a particular use of a copyrighted work is deemed “fair use,” it is not considered copyright infringement. But, there is no bright-line rule defining fair use. Rather, courts consider four factors when determining if a particular use should be considered “fair use.” First, what is the **PURPOSE** of the use? Second, what is the **NATURE** of the copyrighted work? Third, what **AMOUNT** of the copyrighted work is taken? And fourth, what is the **ECONOMIC EFFECT** on the

work taken?

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Fair Use:
1. Purpose of the Use

- Commercial purposes
- Nonprofit, educational purposes




Let's discuss the first factor - the purpose of the use. Reproduction of printed material, music and audiovisual materials are given special attention when used in the nonprofit, educational setting. For example, teachers may make one copy of a copyrighted work for purposes of research and preparation; in limited circumstances, they may make multiple copies of short works that meet certain tests for brevity, spontaneity and cumulative effects. See *Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions With Respect to Books and Periodicals*, H.R. Rep. No. 94-1476, at 5681-5685.

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Fair Use:
2. Nature of the Work

- Is the work fact or fiction?



The second factor is the nature of the work. Generally, factual compilations are afforded less copyright protection than creative, fictional works. For example, historical facts are generally not entitled to federal copyright protection, but original works of fiction are copyrightable.

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Fair Use:
3. Amount Taken

- Specific limits on amount of permitted copying




The third factor is the amount taken. Depending on the nature of the work, there are specific limits on the percentages of a work that an educator may reproduce. For example, an entire article, story or essay may be reproduced if it is 2,500 words or less. On the other hand, reproduction of a longer piece of prose by an educator is limited to the lesser of 1,000 words or ten percent (10%) of the entire work, but with a minimum of 500 words permitted.

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Fair Use:
4. Economic Effect

- Will the reproduced work compete with the original, copyrighted work?



The fourth factor is the economic effect. This factor evaluates whether it is likely that the reproduction of the copyrighted work will cause future harm to the original work. For example, if a teacher reproduces an entire novel for a class, students will not need to purchase the book from the publisher. This means the publisher will lose a sale, and the author will lose the royalty payment. This replacement of the original work creates competition in the marketplace and could be viewed as harming the copyright owner. That harm could mean that the teacher's

use of the copyrighted work would not be considered a “fair use.”

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Copyright Test

1. A student-run, nonprofit, intra-school television station uses a Top 40 song as musical background for its sports highlights segment.

 **True**

Using these factors, let’s take a brief copyright test. Consider whether the following uses are protected by the fair use doctrine or whether they are more likely violations of the authors’ copyrights. Do they support the doctrine of fair use?


1) The answer will be true or false. A student-run, nonprofit, intra-school television station uses a Top 40 song as musical background for its sports highlights segment. Does this support the doctrine of fair use? True. If the broadcast is limited to classroom viewing and is not available on the Internet, and if the students have used a small portion of the song, then this will likely be considered fair use.

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Copyright Test

2. A teacher rents a movie from Blockbuster and plays 10 minutes of it to his class.

False




2) A teacher rents a movie from Blockbuster and plays 10 minutes of it to his class. Does this support the doctrine of fair use? **False.** Read the “FBI warning” carefully. DVDs are rented for private/home use only, and this could be considered a public performance of the copyrighted work. Despite his temporal, educational use, this likely does not fall under the fair use doctrine.

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Copyright Test

3. A teacher posts recipes from Martha Stewart’s magazine on a school-maintained Web page for her class.

False




3) A teacher posts recipes from Martha Stewart’s magazine on a school-maintained Web page for her class. Does this support the doctrine of fair use? **False.** Depending on the number of the recipes and the potential impact on the market, it is likely this would be considered copyright infringement by the teacher, and possibly by the school. On the other hand, if the teacher could prove an educational purpose and she only posted one recipe, a stronger case might be made for fair use. Remember, giving credit to the original source in the context of a limited educational use could strengthen the fair use defense.

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Copyright Test

4. A teacher records an HBO Pay-Per-ViewSM program and shows it to her class.

False




4) A teacher records an HBO Pay-Per-ViewSM program and shows it to her class. Does this support the doctrine of fair use? False. Only a few premium cable channels permit the rebroadcast of their programs without either express permission or a license. Cable in the Classroom's Web site at <http://www.ciconline.org> can provide you with more information about specific cable broadcasts that may be used for classroom use.

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Fair Use Factors

1. Purpose?
2. Nature?
3. Amount?
4. Economic effect?



As you can see, although educators are provided with more latitude under copyright law, it is important to be aware of the four elements of the fair use doctrine - - purpose, nature, amount and economic effect.

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Resources

- <http://fairuse.stanford.edu/>
- <http://www.copyright.gov/fls/fl102.pdf>
- <http://www.cetus.org/fairindex.html>
- Portical
 - At the top of Portical's Web page, click "FIND" and enter keywords "copyright" or "fair use."



For additional information about copyright law and the concept of "fair use," the Internet has many focused resources. For starters, the Library of Congress hosts the United States Copyright Office's Web site, and Stanford University's Web site is very informational. The Consortium for Educational Technology in University Systems' Web site provides "Illustrative Scenarios" to test your fair use knowledge. Finally, the Portical Web site includes links to the resources mentioned in this presentation.

Always remember to give credit to the author, and be sure to contact your district's attorney before risking a copyright violation. For Portical, this is Melissa McGann.