



Reflections

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A Review of the “Fair Use” of Textbooks Under the Copyright Law of the United States

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The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. – United States Constitution, Article I, Section 8

INTRODUCTION

From time to time, we find items online that may infringe upon the *Introductory Physical Science (IPS)* or *Force, Motion, and Energy (FM&E)* copyrights. Sometimes, teachers contact us, bringing web pages to our attention that they or their students have discovered. In each case, we vigorously pursue these possible infringements in order to protect our intellectual property rights. What we find, more often than not, is that the offense is due to a misunderstanding of the “fair use” provision of the Copyright Law of the United States.¹

So what is “fair use”? What uses are acceptable, and what are not? Is making copies of a single chapter for student use in a course acceptable? Is the digitization and publication of textbook pages online acceptable? Is it acceptable to place copyrighted test questions online for students to access from home as practice for upcoming tests or as a review of a test just taken? Each of these are situations that we have encountered.

BACKGROUND

Before I address the questions stated above, allow me to present some background about the writing and publication of our textbooks. The development of each edition of our books includes writing, revision, creating new figures, testing of new equipment and experiments, finding new photographs, obtaining permissions, piloting of new materials by teachers in real classrooms with real students, more revision, design, development of teacher materials, development of assessments, and much more. The entire project can amount to two to three years of work, on average, and that is just to revise a previous edition! Developing a new textbook can take much longer.

“...it is the combination of a strong copyright system with a right of fair use that encourages creativity, promotes innovation and respects our freedom of speech and expression.”

Danny Marti, U.S. Intellectual Property Enforcement Coordinator at the White House during the Obama administration

“The doctrine of fair use has been an essential aspect of our copyright law for nearly 175 years, but it has too often been a mystery to good faith users who seek more detail about its application.”

Maria A. Pallante, Register of Copyrights from 2011 to 2016

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FAIR USE (from page 1)

During the time that a textbook is being developed, our authors receive no compensation. It is only after the book is published that they receive royalties for their work, and the amount paid as royalties is determined by sales. Since our author team consists of five individuals, the royalties are split five ways, meaning that each author typically receives less than 1.75% of the retail cost of each textbook as compensation for those years of work! (I leave it to you to decide how many books must be sold to provide adequate compensation for those years.)

Also, before continuing, let me point out that I am not a copyright lawyer, nor am I a lawyer of any kind. This article is presented for informational purposes only, and should not, by any stretch of the imagination, be considered legal advice.

Now, as to the actions mentioned in those questions...

FAIR USE FACTORS

It may not come as a surprise that the Copyright Law, along with subsequent amendments that include the Digital Millennium Copyright Act of 1998, does not address these or any other specific acts. Rather, the law addresses four factors related to fair use. The statement of these factors in the law, along with a brief explanation of each, is quoted in the box below from a U.S. Copyright Office web page.

Factors Related to Fair Use of Copyrighted Material²

1. *Purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes:* Courts look at how the party claiming fair use is using the copyrighted work, and are more likely to find that nonprofit educational and noncommercial uses are fair. This does not mean, however, that all nonprofit education and noncommercial uses are fair and all commercial uses are not fair; instead, courts will balance the purpose and character of the use against the other factors below. Additionally, “transformative” uses are more likely to be considered fair. Transformative uses are those that add something new, with a further purpose or different character, and do not substitute for the original use of the work.
2. *Nature of the copyrighted work:* This factor analyzes the degree to which the work that was used relates to copyright’s purpose of encouraging creative expression. Thus, using a more creative or imaginative work (such as a novel, movie, or song) is less likely to support a claim of a fair use than using a factual work (such as a technical article or news item). In addition, use of an unpublished work is less likely to be considered fair.
3. *Amount and substantiality of the portion used in relation to the copyrighted work as a whole:* Under this factor, courts look at both the quantity and quality of the copyrighted material that was used. If the use includes a large portion of the copyrighted work, fair use is less likely to be found; if the use employs only a small amount of copyrighted material, fair use is more likely. That said, some courts have found use of an entire work to be fair under certain circumstances. And in other contexts, using even a small amount of a copyrighted work was determined not to be fair because the selection was an important part—or the “heart”—of the work.
4. *Effect of the use upon the potential market for or value of the copyrighted work:* Here, courts review whether, and to what extent, the unlicensed use harms the existing or future market for the copyright owner’s original work. In assessing this factor, courts consider whether the use is hurting the current market for the original work (for example, by displacing sales of the original) and/or whether the use could cause substantial harm if it were to become widespread.

These factors are the principles that courts use to evaluate questions of fair use. However, as the U.S. Copyright Office webpage goes on to explain...

“In addition to the above, other factors may also be considered by a court in weighing a fair use question, depending upon the circumstances. Courts evaluate fair use claims on a case-by-case basis, and the outcome of any given case depends on a fact-specific inquiry. This means that there is no formula to ensure that a predetermined percentage or amount of a work—or a specific number of words, lines, pages, copies—may be used without permission.”³

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But if there is no “formula,” how is the distinction between fair and unfair use determined? As with any law, clarification and the extent to which the law is applied are provided by the courts.⁴

CASE OUTCOMES

A good example of how the four factors are applied is provided by *Cambridge University Press v. Patton*. In this case, the plaintiffs (Cambridge University Press and other publishing houses) sued Georgia State University because unlicensed copies of works were posted on Georgia State University systems for students to obtain electronically. After the suit was filed in the United States District Court for the Northern District of Georgia, the university adopted a copyright policy. But, after the District Court held in favor of fair use, the plaintiffs claimed that this policy “caused ongoing and continuing misuse of the fair use doctrine and resulted in infringement of plaintiff’s works.” They appealed.

In ruling on the case, the United States Court of Appeals for the Eleventh Circuit held that:

- The earlier District Court ruling in favor of Georgia State was in error because the court applied the fair use factors too “mechanistically,” providing equal weight to the four factors.
- The first factor—the purpose and character of the use—was found to weigh in favor of fair use, even though the use was non-transformative, because it was for nonprofit, educational use.
- The second factor—the nature of the copyrighted work—was held to be “neutral or even weighed against fair use.”
- With regard to the third factor—the amount of the copyrighted work used in relation to the whole work—the Appeals Court ruled that the District Court had mistakenly set a “10-percent-or-one-chapter benchmark.” More important, said the court, is whether the amount taken “was reasonable in light of the pedagogical purpose of the use and the threat of market substitution.”
- Regarding the fourth factor—the effect of this use on the market for the original work—the court held that “because Defendants’ unpaid copying was nontransformative and they used Plaintiffs’ works for one of the purposes for which they are marketed, the threat of market substitution is severe. Therefore, the District Court should have afforded the fourth fair use factor more significant weight in its overall fair use analysis.”

The Eleventh Circuit Court of Appeals reversed the district court’s decision and remanded the case to the District Court for further proceedings consistent with the opinion that this was not fair use.

Translation? Although educational institutions are given some leeway when using copyrighted works for unlicensed, non-profit, pedagogical purposes, there is no hard-and-fast 10%-or-one-chapter guideline for the amount of copying allowed. More importantly, if the use is non-transformative and affects the marketability of the original work, a finding against fair use is likely.

In another case, *Princeton University Press v. Michigan Document Services, Inc.*, the defendant (MDS, Inc.) reproduced segments of written materials that were assigned reading for University of Michigan courses. MDS, Inc. assembled the material provided by professors into “coursepacks” and offered them for sale to students, claiming that the use of portions of the copyrighted works in the coursepacks constituted fair use.

In this case, the United States Court of Appeals for the Sixth Circuit held that the commercial exploitation of the protected works did not constitute fair use (Factor 1). The court clarified that while the educational use to which students put the course packs was noncommercial in nature, the unauthorized commercial duplication of the plaintiff’s copyrighted works would cause a significant adverse impact on the potential market for the works (Factor 4). The court’s decision was based in part on its finding that, if the defendant’s conduct should become widespread, the plaintiff’s revenue stream would “shrivel.” It was also found that some of the works contained in

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the course packs were excerpts of creative material (Factor 2), that the length of most of the segments included in the course packs (in relation to entire versions) were “not insubstantial” (Factor 3), and that the qualitative value of the excerpts was high in light of the fact that it is normal practice for professors to choose the most important or significant portions of materials (Factor 3). For these reasons, the claim of fair use was denied—that is, the use of the works by MDS, Inc. was determined to be unlawful.

A similar finding resulted in *Basic Books, Inc. v. Kinko’s Graphics Corp.* The U. S. District Court for the Southern District of New York ruled that Kinko’s photocopying and sale of “course packets” was not fair use.

What if a teacher duplicates copyrighted materials to create a class booklet? In *Marcus v. Rowley*, the United States Court of Appeals for the Ninth Circuit reversed a district court’s ruling of fair use concerning a public school teacher’s copying for nonprofit educational purposes. The appeals court held that the use in this case was not fair use. The justification for the ruling included assertions that the defendant’s nonprofit, educational purpose did not automatically compel a finding of fair use since the purpose of the new booklet was the same as the original work, the defendant’s booklet contained almost 50% of the original work, and that the portion used comprised almost all of the substance of the defendant’s booklet. Although no effect on potential market and no measurable monetary damages were found, the other factors were enough to support a finding against fair use.

Some other cases bearing on the fair use of copyrighted educational materials include:

- *Education Testing Service v. Katzman* – a case of distributing copyrighted test materials – fair use was not found.
- *Blackwell Publishing, Inc. v. Excel Research Group., LLC.* – a case involving the copying of copyrighted works, with the twist that the defendant tried to defer any litigation by having students copy the materials after signing a declaration stating “I am a student in this class and am making a copy for educational purposes” – fair use was not found.
- *Robinson v. Random House, Inc.* – a case of modification of copyrighted material in which portions of original works were used either “verbatim or through close paraphrasing” – fair use was not found.

So what about the questions posed at the beginning of this article? Is making copies of a single chapter of a textbook for student use in a course acceptable? The answer is obviously “yes” if the copyright holder has granted permission to do so or if fair use requirements are met, but “no” if the use is unlicensed and the purpose is to avoid the cost of purchasing the original work.

Is the digitization and publication of textbook pages online acceptable? Since this would infringe on the copyright holder’s exclusive right to publish and would have a significant effect on the marketability of a copyrighted textbook, the answer appears to be “no,” even though the use could be argued to have an educational purpose.

Is it acceptable to post copyrighted test questions online for students to access from home as practice for upcoming tests or as a review of a test just taken? Again, this involves the exclusive right to publish that the copyright grants to the copyright holder. In addition, it impacts the validity of the test questions and their use by other schools, and it severely impacts the marketability of the test questions. Such use would not be protected under the fair use doctrine.

As you can see, aside from the general factors stated in the Copyright Law, fair use itself is primarily defined by what *is not* fair use.

HOW DOES ALL OF THIS IMPACT THE USE OF IPS AND FM&E?

In general, all rights granted under copyright law are reserved by the authors and Science Curriculum Inc. But as authors and publisher, we create educational curricula, and we want those curricula to be used. Consequently, when a school purchases our textbooks, ebooks, or supporting materials, we lean toward allowing the

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school's teachers to use those copyrighted items in ways that best meet the educational needs of their students. However, there are certain limitations to those uses, including:

1. Only noncommercial uses are acceptable.
2. Copying—electronic or otherwise—may not be done to reduce or avoid the cost of purchasing an adequate number of textbooks, ebooks, or support materials for the students and teachers involved.
3. All uses must be for the benefit of the purchasing school's teachers and students. Permission is not granted for any use that might cause copyrighted material to be broadcast to a wider audience, such as posting to the Internet—even if it is for student use from home and even if supposedly protected by a password. To do so could ultimately impact the marketability of both the hardcopy and ebook versions of the textbook and, in effect, amounts to “publishing”—a right reserved to the copyright holder.

If you have any additional questions about the fair use of our textbooks and supporting materials, please feel free to contact us at 888-501-0957 or office@sci-ips.com.

References and Notes

- ¹ United States Copyright Office (2011, December). “Circular 92: Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code” [Online] <https://www.copyright.gov/title17/> . Includes the Copyright Law of 1976 and all amendments through December 9, 2010.
- ² United States Copyright Office (2017, January). “ More Information on Fair Use” [Online] <https://www.copyright.gov/fair-use/more-info.html> .
- ³ Ibid.
- ⁴ Summaries of the issues and outcomes of cases cited in this article come from the U.S. Copyright Office's searchable Fair Use Index web page, which can be accessed at <https://www.copyright.gov/fair-use/fair-index.html> .

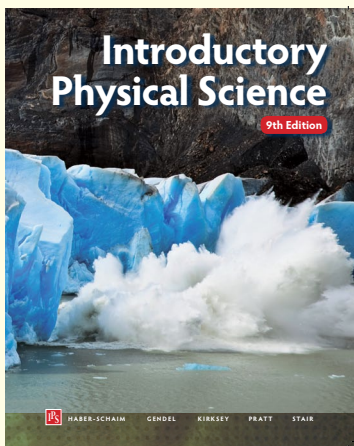
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