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# SECTION 2:

## THE COST OF COPYRIGHT CONFUSION

### Learning Objectives

Students will understand:

- how lack of knowledge about copyright and fair use negatively affect teaching and learning
- why the many different “educational use guidelines” do not have the force of law and how they interfere with educators’ genuine understanding of fair use

### Materials

*Video: The Cost of Copyright Confusion, available at [www.mediaeducationlab.com](http://www.mediaeducationlab.com)*

*Document: The Cost of Copyright Confusion, available at [www.mediaeducationlab.com](http://www.mediaeducationlab.com)*

*Copies of the reading selection*

### Readings

#### Reading (A): Educational Use Guidelines FAQ

A summary and critique of the educational use guidelines in relation to the doctrine of fair use

#### Reading (B): The Cost of Copyright Confusion

This report explains the current state of understanding about copyright and fair use among educators – and the misinformation sometimes passed on to students.

**Reading (C): Crews, K.D. (2001). The law of fair use and the illusion of fair-use guidelines. *The Ohio State Law Journal*, 62, 602-700. Available at: <http://moritzlaw.osu.edu/lawjournal/issues/volume62/number2/crews.pdf>**

Educational use guidelines – which are negotiated agreements between media companies and educational groups - have come to be misinterpreted as law, creating problems for educators and students alike.

**Reading (C): McGeeveran, W. & Fisher, W.W. (2006, August). The digital learning challenge: Obstacles to educational uses of copyrighted material in the digital age. Berkman Center Research Publication No. 2006-09. Available at: <http://cyber.law.harvard.edu/media/files/copyrightandeducation.html>**

This white paper provides a detailed overview of the challenges of faced by digital learning and education which relate to copyright and other legal issues.

## Lesson Plan

**Engage interest.** Show the video, “The Cost of Copyright Confusion.” Discuss: How did all this confusion get started? What factors contribute to the confusion?

**Explore online.** One source of confusion is the many different interpretations of copyright and fair use that are available online. Demonstrate how easy it is to find many different (and sometimes conflicting) educational use guidelines by conducting an Internet search on the term “copyright.” Some sites to present may include:

Baruch College (uses a subway map): <http://www.baruch.cuny.edu/tutorials/copyright/>

Hall Davidson (uses a chart): <http://www.halldavidson.net/chartshort.html>

**Provide context.** Explain that each of these websites is an interpretation of fair use that has been developed by the authors of the site. They are confusing—and they are not the law. They are based on guidelines that were private negotiations between media companies and educational groups. They were intended to provide a “safe harbor” to illustrate obviously clear examples of fair use. But in recent years, they have been interpreted as the “ceiling” – the maximum amount of use required to claim fair use under the law.

**Read and discuss.** Read “Educational Use Guidelines FAQ” and “The Cost of Copyright Confusion.” To assess students’ reading comprehension, invite students to (1) explain the advantages and disadvantages of the educational use guidelines. Students should be able to explain (2) why the educational use guidelines have contributed to copyright confusion.

**Critical thinking.** Ask students to (1) offer inferences about why business leaders sought to have specific, detailed rules as presented in various educational use guidelines; and (2) why some educational leaders sought to have specific, detailed rules.

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MEDIA PRODUCTION/ TECHNOLOGY INTEGRATION ACTIVITY: Students watch short videos about how copyright can interfere with creativity and the spread of knowledge and contribute their comments on the videos using Voice Thread, a social media website for conversations about visual media.

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**Preview how to use VoiceThread.** First, demonstrate how to use Voice Thread by playing the One-Minute demonstration available online at: <http://voicethread.com/#home.b409.i848804>

**Demonstrate the process of making a comment.** Then, watch a bit of the documentary, “Eyes on the Fair Use Prize,” available at <http://voicethread.com/#q+eyes+on+the+fair+use+prize.b236551.i1230183>

Demonstrate how to make a text, voice (and video) comment. You can use the microphone on your computer or use a phone to “call-in” a comment.

**Students comment.** Encourage students to make two comments on each video: one **fact-based comment** in which they can share what they are learning about copyright and fair use, and one **opinion-based comment** in which they can share their feelings, personal experiences and reflections.

**Reflect and share.** When students have all completed their work, encourage them to review the comments made by their peers and demonstrate the project to their family members and friends. As a new form of social media, Voice Thread users re-purpose images as a stimulus to community conversation. Point out that people everywhere need to gain “copyright clarity” to understand their rights as creators and users of copyrighted materials in order to fully exercise their rights under the law.

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# EDUCATIONAL USE GUIDELINES FAQ

**What is the theory behind fair use?** The framers of the U.S. Constitution clearly intended that the law of copyright -- including fair use -- would be tailored to serve the advancement of knowledge. Fair use relies on four factors: the purpose of the use; the nature of the use; the amount of the use; and the effect of the use on the potential market.

**What are the strengths and weaknesses of fair use as it is currently written?** One important strength is that the law is flexible to meet changing and unpredictable needs. A weakness for many users is that it is also vague and does not give exact answers. Educators might find it difficult to apply the four factors in their everyday work.

**What are the educational use guidelines?** Several formal guidelines attempt to define the scope of fair use for education, research, and library purposes. These guidelines are the results of private negotiations—they are not law.

**Why were they developed?** Congress did not wish to include further details in the law but it urged stakeholders to negotiate their concerns and to reach agreement about the meaning of the law. In practice, many educators were uncomfortable with the ambiguity of the four factors, so representatives of educators, librarians, authors, and publishers met in voluntary negotiations to create the educational guidelines.

**What are the strengths of the guidelines?** The guidelines can serve a purpose for colleges universities and libraries by providing them with specific rules and preventing them from having to grapple with the fair use doctrine. The guidelines are also compelling to the courts, and they sometimes turn to them *after they have already considered the four factors of fair use*. Everyone should clearly understand that in no way are the guidelines “law.” They are at best an agreed minimum measure of fair use.

**What are the weaknesses of the guidelines?** The guidelines often miss the point about fair use. They seldom relate to the factors that really are part of the law, and they tend to eliminate the flexibility that makes fair use meaningful at a time when teaching, technology, and the law are changing. The guidelines also advance a minimalistic view of fair use, and they certainly are no protection from liability. Oddly, the guidelines are also sometimes more complicated to apply than is the actual law of fair use.

**Do the educational use guidelines have a legal status?** No, they are not the law and in some cases they may even contradict the law. The guidelines may be viewed as private compacts that have some binding quality on the named supporters and not on all educators or other vast groups.

**What is the relationship between fair use and the guidelines?** The law is actually less complex than the guidelines. The law is flexible, whereas the guidelines are rigid. The guidelines do not even address the four factors in the law, instead they make fair use depend on brevity, spontaneity, and cumulative effect. The guidelines seek to quantify a law that Congress took pains to keep flexible.

**How do the guidelines affect the status of fair use?** The guidelines do not displace the four factors of fair use. However, many people find the guidelines confusing, as they interfere with an actual understanding of the law and erode confidence in the law as created by Congress and the courts.

**Do the guidelines offer protection from copyright infringement?** No, the guidelines do not even offer a “safe harbor” – they do not have the power of law.

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Sources:

Crews, K.D. (2001). The law of fair use and the illusion of fair-use guidelines, *Ohio State Law Journal*, 62, 599-702.

<http://moritzlaw.osu.edu/lawjournal/issues/volume62/number2/crews.pdf>

Crews, K.D. Fair Use for Higher Education: Are Guidelines the Answer? *Academe* 83 (November-December 1997): 38-40.

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