

FAIR USE GUIDELINES AND COPYRIGHT LAWS:
AN EDUCATOR'S POTPOURRI OF LAW WITH REAL-LIFE SCENARIOS
PRESENTED BY ANNE DALTON, ESQUIRE IN CONJUNCTION WITH THE
BOARDS OF COOPERATIVE EDUCATIONAL SERVICES OF NEW YORK STATE

BOCES SCENARIOS – MARCH, 2015

SCENARIO #S-1: ZIVA & IZZY

The black and white photograph was done first and the colorized one was done second.

1. Does the black and white photograph qualify for copyright protection?
2. Does the colorized photograph qualify for copyright protection?
3. Would your answer be different if Ernest prepared the first photograph and Yeller prepared the second photograph?

SCENARIO #S-2: PUPPIES, ETSY, FACEBOOK AND LADONNA'S HAND-OUTS

LaDonna, the new creative arts teacher, is planning a unit on banality in post-modern art. Going onto the Etsy website, she chooses a black and white photograph called "Puppies," which carries a copyright notice by Art Rogers. She researches this photograph on the Internet to see if she can find it without a copyright notice, and sees it on Facebook without the copyright. However, the Facebook photo is grainy so she goes back to the one from Etsy. She removes Rogers' copyright notice from the Etsy picture via Photoshop, colorizes the photo and adds various creative touches. She then makes twenty 2-D copies of Rogers' work and twenty 2-D copies of her work to hand out to the students.

1. Is Art Rogers' photograph able to be copyrighted? Why or why not?
2. Could LaDonna use the Facebook photograph without a problem, since it doesn't have a copyright notice?
3. Since the Facebook photograph didn't have a copyright notice, was it ok for her to remove the copyright from the Etsy photograph, since it was a better model for her to use anyway?
4. Can LaDonna legally hand out the 20 copies of the **original** Rogers photograph from Facebook or the copyrighted one from Etsy to her class?

5. Can LaDonna legally hand out the 20 copies of the **photo-shopped** Rogers photograph in her class under face-to-face teaching?
6. Can LaDonna legally show the photoshopped Rogers photograph in her class under face-to-face teaching?
7. Can LaDonna's colorized 2-D photograph be copyrighted? Why or why not?
8. Who owns the copyright in her 2-D photograph? If we don't know, what information would we need to have to answer the question?
9. Would any of your answers above change if LaDonna had downloaded the photograph from the website of the Metropolitan Museum of Art? If yes, how?

NOTE: this is loosely based on the court case, Rogers v. Koons.

**SCENARIO #S-3: JOHN PHILIP SOUSA, POCAHONTAS AND
ALEESHA, YOUR HAPPY POET**

Aleesha is writing a long-form poem for her Honors English class to celebrate musicians and cultural figures who have appeared on American postage stamps. She includes exact copies of three stamps on the first slide of her PowerPoint for this project and illustrates the poem with her own line drawings of these three stamps on later slides. The three stamps feature John Philip Sousa (died in 1932, stamp issued in 1940), Pocahontas (died in 1617, stamp issued in 1907) and the Beatles/Yellow Submarine (issued in 1999).

1. Is the Sousa stamp in the public domain?
2. How many different copyrights are involved with the Sousa stamp, and who owns them?
3. Should she research to see if the name "Sousa" is copyrighted?
4. Is the Pocahontas stamp eligible for copyright protection?
5. Does it change anything if Aleesha took the Pocahontas stamp from a screen shot on YouTube?
6. What about Aleesha's line drawing of the Pocahontas stamp?
7. What about Pocahontas' name as it appears in the poem? Any copyright concerns?
8. What about the Beatles/Yellow Submarine? Does the fact that they are/were British citizens affect the copyright of this stamp?

9. Is your answer in #8 affected by the fact that 2 of the 4 Beatles are deceased?
10. So who owns the Yellow Submarine copyright?
11. Is Aleesha's line drawing of the Yellow Submarine a copyright problem?
12. Does Aleesha have any other copyright interest here?

SCENARIO #S-4: The Legend of Snowy Hollow

Each year, your 8th grade drama class writes and presents an original musical. This year it is a parody of "The Legend of Sleepy Hollow," by Washington Irving. The students are using music from Soundzabound. You help, of course. The digital video crew tapes it for the school website and adds some original special effects and zombie music that they find on some website that isn't in English. It is such a hit that you decide to use it as part of your Master's Thesis at Fantastic U, but you do not tell anyone at your school. Unbeknownst to you, your professor puts it on Fantastic U.'s website after he edits about 5 minutes out of it.

1. What 2 copyright theories apply (or could apply) to your use of the original story of "Sleepy Hollow"?
2. What is the legal effect when you change the name to "Snowy Hollow"?
3. What copyright theory or theories apply to the Soundzabound music?
4. Do the drama students have a copyright in the work? Explain why or why not.
5. If yes, how many different copyright interests do the drama students have?
6. What would you do about that? (2 answers).
7. Do you yourself have a copyright interest?
8. Does the digital camera crew have a copyright in their taping?
9. Does the drama class have a copyright interest in the digital camera crew's taping and, if so, what is that copyright interest?
10. Is there a legal issue with using the zombie music from an apparently foreign website? If yes, what is that issue and how would you handle it?
11. What rights of the content creator(s) are involved with the school's putting the digital recording on the school website?
12. Can you copyright the story by Washington Irving as part of your work?
13. Can you legally submit it for your master's thesis? After all, you worked on it!
14. What happens when your professor edits the work?

SCENARIO #S-5: The AKS Workbook and Bridget the Overzealous Copier

The District English Coordinator gave Bridget, the Social Studies Department Chair at the Snowy Owl School District, an AKS (Assessment Knowledge and Skills) Workbook. The Coordinator's intent was to provide Bridget with a resource guide for preparing AKS questions and student exercises. Bridget copied the entire workbook for each teacher in the Social Studies Department. The teachers then copied several individual pages for their students to use in class. The Publisher has sued. Does Bridget have any viable copyright defense? Do the teachers have any viable copyright defense? Use every theory of copyright usage in your answer.

1. Do the analysis.
2. Does it matter if the workbook were available electronically/digitally?

SCENARIO #S-6: Gerald Ford's Memoirs

Gerald Ford's memoirs, *A Time To Heal*, were approximately 500 pages long. His publisher distributed advance review copies with the understanding that no reviews or material from the book would be released by any reviewer prior to a specified date. The publisher then entered into an exclusive contract with *Time Magazine* to print excerpts from the book. *The Nation*, a rival magazine, violated the "gentleperson's agreement" by publishing approximately 400 words from the memoir, before *Time* ran the authorized excerpts. As a result, *Time* immediately cancelled the contract with the publisher. The publisher sued *The Nation*, which claimed a fair use defense. Was that a valid defense?

1. A. What was the purpose of the *Nation's* use?
 - [hint: weigh commercial vs. educational]
 - [hint: weigh nonprofit vs. for profit]
1. B. What was the character of the *Nation's* use?
 - [hint: weigh derivative vs. transformative]
2. What was the nature of the *Nation's* use?
 - [hint: weigh factual vs. fiction]
 - [hint: weight published vs. unpublished]
- 3.A. What was the amount of the work taken?
 - [hint: amount used vs. total amount of the work]
 - [hint: was minimum amount used vs. was more than necessary taken]
- 3.B. How substantial was the amount of the work taken?
 - [hint: was the "heart" of the work taken]
4. What was the effect on the market for the original work?
5. Holistic Analysis: which factor(s) is/are the most important?

This is the leading case regarding substantiality of use: Harper and Row v. The Nation.

SCENARIO #S-7: Silk Sandals by Gucci and Niagara Falls

Larry is teaching a senior mixed media class and has chosen Niagara Falls as the theme for this semester. He downloads a screenshot of an ad for “Silk Sandals by Gucci” from an on-line magazine, despite the copyright violation warning on the home page. There is no copyright notice on the Gucci ad but the photograph is credited to “Andrea Blanch”. He cuts out most of the ad, leaving only the legs and feet, clad in Gucci sandals. He posts the modified screenshot on the school’s internal teacher website, which can only be accessed by a user name and password provided to each student at the beginning of the semester. Larry tells the students that their final grade will involve creating a mixed media piece of appropriation art incorporating the modified Gucci screenshot. Larry prepares his own montage as a model for the students, calling it “Niagara”. One of his students believes that he has behaved unethically in ripping off the screenshot, and anonymously sends the screenshot and related materials to the magazine editor with a spiteful letter about him. Larry is asked to attend a meeting with his supervisor, the attorney, and others to discuss how to respond to the \$15,000 demand letter from the website magazine publisher’s attorney. Analyze each copyright alternative in an attempt to present his copyright defense, and explain why each one will succeed or not succeed.

1. Do copyright alternative analysis.

SCENARIO #S-8: CULTURAL DIVERSITY, FRANCIS FORD COPPOLA AND TRAVIS

As part of your cultural diversity class, you assign each student to do a 10 minute digital project. They are to turn the project in to you on a DVD. You tell them that you will give each of them a DVD of all the projects at the end of the semester, for their personal use only. Travis wants to explore his Italian heritage as seen through old movies. He rents *The Godfather*, using his parents’ Netflix account, and downloads about 10 minutes of the film onto his computer so he can edit it down to three segments of about one minute each, which he puts into his project, including the musical theme for the movie. He also borrows an old videotape of *Serpico*, converts it to DVD format and takes clips of it for this project. He then obtains from Etsy old photographs of Italian immigrants detained in Ellis Island in 1953. These photographs are licensed by Creative Commons. Finally he downloads three segments of two minutes each of YouTube footage that is identified by the announcer (speaking in Italian) as footage of people getting on boats in Italy to come to America in the spring of 1919. It carries a footer “documentarioitalia.it” but Travis is successful in photo-shopping this off. He does not use the announcer. He gets an A on the digital project, which is put onto the class DVD for every member of the class. The school I.T. guy uploads Travis’s project onto the school website for the whole world to see. The school uses his project as a “short” to introduce “movie night” at the high school. Travis later enters a nationwide contest about cultural diversity and wins first prize, which is \$10,000.

#S-8-A: TRAVIS’S SCHOOL PROJECT: His Copyright

1. What, if anything, does Travis have a copyright in?

2. What does he NOT have a copyright in?
3. Is it a violation of **his** copyright for the teacher to put his project on a DVD for the entire class to have, and do you need additional information to answer this question?

#S-8-B: TRAVIS'S SCHOOL PROJECT: The Godfather Clips

4. Which right(s) of the copyright holder are involved with his use of *The Godfather* clips?
5. Can Travis use *The Godfather* film clips under the face-to-face teaching exemption of §110 (without using any other section)?
6. Can Travis use them under the TEACH Act (§110, subsection 2)?
7. What if Travis found these clips on a website that said everything on the website was in the public domain? Can he rely on it being public domain?
8. What if the school had rented a copy of *The Godfather* for "movie night" under a public performance rights and Travis borrowed that copy for his clips?
9. What about Fair Use – Teaching or Criticism and Comment (section 107)?
10. Is there any way that Travis can legally use these clips for his project?
11. What about the music clip?

#S-8-C: TRAVIS'S SCHOOL PROJECT: Serpico

12. What about the Serpico tape? What right(s) of the copyholder is/are involved when he takes the VHS and converts it to DVD?
13. Can Serpico be used under Section 110?
14. What about Section 107? Teaching or Criticism and Comment?
15. Is there a license issue?

#S-8-D: TRAVIS'S SCHOOL PROJECT: Etsy Pix And Creative Commons

16. Are there any issues with using these pictures through the Creative Commons License?

#S-8-E: TRAVIS'S SCHOOL PROJECT: WWI Footage In Italy

17. What was the copyright effect of removing the “documentarytube.net” footer?
18. Was that legal under the copyright law?
19. Is Travis’s use of this material covered by public domain? Why or why not?

#S-8-F: TRAVIS’S SCHOOL PROJECT: School Website

20. One of the school officials puts Travis’s project on the school website for the whole world to see. Are you still ok with your analysis or do we need to start over?
21. What if the project is downloaded in Italy?
22. Is this a violation of Travis’s copyright?

#S-8-G: TRAVIS’S SCHOOL PROJECT: “Short” on Movie Night

23. Which copyright rights of Travis’s are affected by this showing by the school?
24. Does this violate Travis’s copyright?
25. How would you fix this violation?
26. Do you have any concern about the third-party material in Travis’s work? If so, which ones?

#S-8-H: TRAVIS’S SCHOOL PROJECT: Contest with \$10,000

27. Is the contest educational?
28. What third-party content does Travis have to be concerned about?
29. What else will Travis need to be concerned about?

SCENARIO #S-9: FOOD CHAIN BARBIE

You teach a “repurposed” class. All the materials have to be from an existing source. Max shows up with “Barbie in a Blender” - a Barbie doll and a Waring Blender.

1. Do you have a copyright concern?
2. Is there a license issue?

3. What is its “purpose?”
4. What is its “character”?
5. Does it qualify for “fair use – criticism and comment” under the first prong?
6. What about the other prongs?
7. Under the holistic approach, does this qualify for fair use exemption(s)?
8. EXTRA CREDIT QUESTION: Is there another issue lurking in this scenario

The End!

Thank you.