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Copyright and Fair Use in the Digital Age

What If . . . ?

Perhaps you've been in this situation: you're putting together a set of readings for your course web page. You want to make various texts easily available for your students' online use. Can you simply Google such material and cut and paste it on your site without the originator's approval? Or perhaps you considered distributing photographic copies of various essays in preparation for classroom discussion. Should you have obtained the authors' consent before doing so? The answer to each question requires an understanding both of copyright law and a practice called "fair use."

Copyright Law

Copyright law, established by Congress, gives to the copyright holder (the artist or the writer or the performer) the exclusive right to the use and sale of created works for a clearly stipulated period of time. After the copyright expires, the created works enter into the "public domain" for unlimited use by all. Congress protects the right of the copyholder while respecting the public's right to have access to created work. A copyright holder's exclusive ownership of creative works has come under tremendous pressure in the digital age, as the illegal sharing of music, videos, images, and text occurs routinely on the World Wide Web, as does the "ripping" of CD's and the bootlegging of DVD's.

Fair Use

Congress had attempted to anticipate the public desire to make use of a copyholder's work before the lapse of the copyright through what is called "fair use," the legal use of copyrighted materials for precisely stipulated purposes. "Fair use is decided" according to the Electronic Frontier Foundation, "by a judge, on a case by case basis, after balancing the four factors listed in section 107 of the Copyright statute. . . :

- a. The purpose and character of the use, including whether such use is of a commercial nature or is **for nonprofit educational purposes** -- Courts are more likely to find fair use where the use is for noncommercial purposes.
- b. The nature of the copyrighted work -- A particular use is more likely to be fair where the **copied work is factual rather than creative**.
- c. The amount and substantiality of the portion used in relation to the copyrighted work as a whole -- A court will balance this factor toward a finding of fair use where the **amount taken is small or insignificant** in proportion to the overall work.
- d. The effect of the use upon the potential market for or value of the copyrighted work -- If the court finds the newly created work is **not a substitute product for the copyrighted work**, it will be more likely to weigh this factor in favor of fair use. ("Fair Use Frequently Asked Questions (and Answers)." 22 Aug. 2007. Electronic Frontier Foundation. 7 Sept. 2007<http://www.eff.org/>. Emphases mine)

The use of such copyrighted materials for educational purposes would seem to be allowed but is no "slam dunk": the extent reproduced, for example, or the nature of the copyrighted work itself ("creative" rather than "factual") may call such use into question. It may be an easy matter to Google an image and then to cut and paste it, but, in doing so, we are likely violating the copyright holder's rights under the law.