



The purpose of this document is to provide you with an understanding of the AAFP's copyright and permissions standards to assist you in your creation of CME or non-CME presentation materials. The AAFP understands these guiding principles may differ from your usual preparation process; however, this process is required in order for your presentation and materials to be offered at AAFP CME meetings, as well as being repurposed into other formats for AAFP distribution and/or resale.

Q: What is copyright?

A: Copyright is a form of protection provided under the laws of the United States (Title 17, U.S. Code referred to as the "Copyright Act") to owners of "original works of authorship" including literary, dramatic, artistic and certain other intellectual works, both published and unpublished.

Q: What is copyright infringement?

A: It is the unauthorized copying, modification, or use of someone else's copyrighted material.

Q: What is fair use?

A: The Copyright Act provides that the use of copyrighted materials for purposes such as criticism, comment, news reporting, teaching, scholarship or research is not an infringement **if the use satisfies the fair use test**. This test requires the court to weigh a number of factors including the purpose and character of the use, the nature of the copyrighted materials, the amount and substantiality of the portion used in relation to the copyright materials as a whole, and the effect of the use upon the potential market or value of the copyrighted materials.

Q: Is any use at CME meetings automatically considered fair use?

A: No. Just because a work is used for educational purposes does not mean the use will be considered fair, particularly when multiple copies of a "work" are being distributed. Many CME professionals are teachers or professors in educational institutions and assume the standards they utilize in determining fair use in a classroom are the same standards to be applied to CME seminars. Non-profit educational institutions are entitled to additional statutory exceptions and are treated differently for fair use purposes from other non-profit organizations such as AAFP. A more complete discussion of fair use and its application to CME professionals is provided in the attached article entitled "Fair Use: A Primer for CME Professionals" by John D. Pent, MA, President of Center for Continuing Professional Education, reprinted with permission from the Alliance for CME.

Q: What does "Public Domain" mean?

A: Products of the human mind – such as books, inventions, computer programs, songs, movies, and other works – are often owned by the creator as "intellectual property," meaning that the creator may have control over uses of the

work such as reproduction. If a work is not legally protected as intellectual property (possibly because its protection has expired), it is said to be in the "public domain." Anyone may reproduce, sell, or otherwise use a public domain work without having to obtain permission. This includes works created before 1922, created for public use, or those works that have over the years fallen into public domain because the copyright expired. This includes documents of the United States government, unless stated otherwise.

Q: Is content posted to the World Wide Web in the "public domain"?

A: No. Many individuals believe that everything on the internet is in public domain. It is not. Only works with an expired copyright, works created by (and possibly "for") the federal government, or works specifically dedicated by the copyright holder as "public domain" are considered public domain. NEVER assume something is in public domain. It is prudent to always assume something is protected by copyright and permission is required for reuse unless it is clearly stated otherwise..

Q: If I already obtained permission for an earlier use, do I have to request permission again?

A: Probably – depending upon the scope of the permission obtained. In many cases, CME professionals request permission to use a chart, graph or other materials in a particular article or for a particular presentation. The permission they obtain is therefore limited to that particular use. If you intend to use that same chart in a new article or presentation, you need to obtain permission again. Thus, in securing permission, you should attempt to obtain the broadest permission possible, not limited to a particular use or format.

Q: Is permission necessary even if I'm only using portions, adapting, or modifying the original work?

A: Yes. Copyright owners have the exclusive right to control modifications of their "work." Permission is necessary if you add a new layer of material to a previously existing "work," or if you significantly revise the work. This would be called an adaptation or derivative work.

AAFP Copyright and Permissions FAQ, *continued*

Q: The “work” I want does not have a copyright notice, so do I need permission?

A: Yes, copyright notices are optional and not required in order to retain copyright protection.

Q: Can I use copyrighted material without permission if I give credit to the original source/copyright owner?

A: No. Merely giving credit is not a defense to copyright infringement and has legal consequences.

Q: What is the Right of Publicity?

A: These laws protect against unauthorized uses of a person’s name or image for commercial purposes. Essentially, the law provides an individual the right to control the commercial use of his/her name, likeness or identity.

Q: What is the Right of Privacy?

A: These laws protect against unauthorized uses of a person’s likeness in a manner that invades his/her privacy. Essentially, the law provides an individual the right to control the commercial use of a person’s likeness in a manner that invades his/her privacy.

Q: Why do I need permission to use graphic images and photographs?

A: Graphic images such as illustrations, photographs and cartoons are protected by copyright and are typically owned by the creator/illustrator/photographer. For photographs or graphics of people, in addition to obtaining permission from the photographer/illustrator, you may need to obtain permission from the people depicted in order to avoid infringing their Right of Publicity and/or their Right of Privacy. Thus, if your CME materials include a photograph of an identifiable individual, you should secure permission from the adult individual or a child’s guardian to use their photograph in your presentation. In securing permission, be aware that if you know that your presentation will be repurposed into other formats, such as print, DVD, online, audiovisual formats (and the like), your permission request or photograph release form should specify those uses.

Q: Why is it necessary to provide full source citations of third party “works” to the AAFP?

A: Full source citations provide credit to the copyright owner. It also enhances the permission requesting process, a service that is being provided to you by the AAFP as a speaker. A permission request should contain the following details:

- Author names
- Title, edition, volume number of book/periodical
- Copyright date
- Name and contact information of copyright owners
- Page, figures/tables/illustration numbers

Q: How should I cite the use of third party material in my materials?

A: When formatting your third party material within your handout materials, please use the following credit lines underneath any third party content included within a slide or full text article:

- “Reprinted with permission [plus full citation]” means that you are directly using a table or figure from another source without any significant changes
- “Adapted with permission [plus full citation]” means that you’ve adapted [i.e., used, but in a changed form] material from one or more published sources
- “Information taken from [plus full citation]” means that you created a table or figure from data/text of another source and presented in a form quite different from that in the original source. For example, you found a series of symptoms in the text of an original source and extracted those symptoms to construct a table in the format of a list of symptoms.

Q: As a speaker of an AAFP activity, what are my responsibilities?

A: As a presenter for AAFP educational activities, you are responsible for the following:

1. A presenter is given a copy of the Permission Form (attached) and Schedule 1, and both must be fully completed and returned to AAFP before the presentation (preferably 30-60 days prior to the presentation).
2. Presenter will not be entitled to present unless the form has been completed in full and returned with Schedule 1.
3. AAFP will use reasonable efforts to request permission for any third party content identified on Schedule 1 for which permission has not already been obtained.
4. If any permissions are denied prior to presentation, that content will be removed prior to presentation.

Fair Use: A Primer for CME Professionals

John D. Pent, MA, President, Center for Continuing Professional Education

Regardless of our provider environment, most of us in continuing medical education (CME) have reproduced copyrighted materials at some point and have encountered questions of whether or not we are doing so legally. Many times, CME professionals rely on the fair use tenet of copyright law when reproducing protected materials without really understanding what fair use is, or how to determine if a given use can be considered fair. Without a clear understanding of the relevant law, we potentially put our CME units, parent organizations, and even industry as a whole, at some risk. As those of us who have been stopped for speeding on a rural interstate have probably learned, ignorance of the law is no excuse. The purpose of this article is to provide you with a better understanding of the fair use aspect of copyright law and help you develop a framework for addressing the use of copyrighted materials in your organization.

Some Background On Copyright

It comes as a surprise to many people that copyright law is provided for in the Constitution. Article I, Section 8, reads, “[Congress shall have the 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.”

It’s worth noting that the purpose of copyright law is to “promote the progress of science and useful arts.” By affording authors and creators the right to control the reproduction and distribution of their works for a fixed period of time, the founders sought to reserve for them the gains, monetary or otherwise, that may be derived from such work, and thus provide an incentive for continued creativity and discovery.

In addition to protecting the rights of the individual, however, lawmakers also realized the need to balance the interest of the public to have access to copyrighted material and make limited use of it without always having to seek permission. To satisfy this interest, they provided an exception to the rigid prohibitions of copyright called fair use, which allows for the limited reproduction of copyrighted works still under protection. While fair use is an aspect of copyright law that CME professionals are often familiar with, it is frequently a source of considerable confusion.

What Is Fair Use?

Fair use is a means by which copyright-protected works may be reproduced without permission so long as the specific use of the reproduction meets several criteria. Fair use is defined in Title 17, Chapter 1, Section 107 of the U.S. Copyright Act:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.
In general, educational, nonprofit and personal use is preferable to commercial or for-profit use. Equally important is if the use is transformative. That is, does it build upon, criticize or comment on the original in such a way that it adds something new, or does it simply serve as a substitute for the original?
2. The nature of the copyrighted work.
Is the work primarily creative (a photograph, painting or poem, for example) or primarily factual in nature? Is it an original work, or a summary of data (such as a telephone directory)? Is it visual or textual, etc. The more creative the work, the less likely it is that the use will be considered fair.
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole.
This factor addresses not only the quantity of the material being used in proportion to the whole, for example, one page from a 30-page book versus one page from a 300-page book, but also how important the section to be used is to the work as a whole. Is it an introductory paragraph or the most significant conclusion?

4. The effect of the use upon the potential market for or value of the copyrighted work.

That is, would the intended use of the material provide a reasonable substitute for the original?

Also, if the intended use were to become widespread, would it adversely affect the value of, or market for, the original?

In making determinations of fair use, we need to consider our proposed use in light of each of the four statutory factors. When deciding copyright infringement cases where the fair use defense is used, courts specifically consider each of the four factors. There is no rigid formula as to how many of these tests must be passed in order for a use to be considered fair, although failure on two or more of the factors is unlikely to result in a decision of fair use. In practice, equally intelligent and informed individuals will sometimes disagree whether a given use should be considered fair. The reason the law creates so much confusion is because it is intentionally unspecific. When Congress drafted the Copyright Act, they knew it was beyond their means to proscribe every potential type of material and use that would arise in the future. The fair use factors are intended to provide guidelines in which to view cases on an individual basis, yet are applicable in a wide variety of circumstances.

Some Misconceptions About Fair Use

Many CME professionals mistakenly assume that because CME is educational, any reasonable use of copyrighted material can be considered fair use. A cursory read of the first sentence of Section 107 may lead to the same conclusion, but a closer read demonstrates that the first sentence merely provides examples of what may be fair use depending on consideration of the four factors. Courts have consistently ruled that educational use is not necessarily fair use, especially when there are multiple copies made and a fee is charged for the material. The language in the first paragraph, "does not provide blanket immunity for 'multiple copies for classroom use.' Rather, 'whether a use referred to in the first sentence of Section 107 is a fair use in a particular case...depend[s] upon the application of the determinative factors.'"¹

Another frequent mistake is the assumption that as long as one reproduces less than several hundred words, the use is considered fair. While this may hold true sometimes, it is an anecdotal rule that has little substantive basis in law. What's important is the percentage of the material being reproduced and how critical that portion is to the work as a whole. Also, if

many small portions of a single text are being reproduced, though any one of them may be considered fair use, they must also be examined when taken together as whole. There is no fixed quantity of material that is or isn't fair use; it all depends on the individual circumstance of the use and how the use is seen relative to the other three factors.

What's A CME Professional To Do?

What this means to us as CME professionals is that we must look at each use of copyrighted material individually to determine whether or not it is fair use. If we feel that it is, we may use the material in the given manner, and if it isn't, we need to seek permission to reproduce it. Given that the fair use statutes require us to make a judgment call, however, consistent compliance might seem difficult to achieve. It may be helpful to think of various uses of copyrighted materials as points on a continuum. At one extreme (willful copyright infringement) is reproducing an entire journal article and selling the copies directly for profit without permission. At the other end is reproducing a small chart of largely factual material for the purpose of commenting on it (we need to see it to know what we're talking about) on a page which includes the related commentary. Most uses we make as CME professionals will fall somewhere between these two extremes, and making honest judgments about how we are using material is unavoidable. I hope you will find the following suggestions useful in assisting you to make such determinations, while at the same time reducing the burden on you and your CME staff.

1. Have a Policy on the Use of Copyrighted Materials

This is probably the single most useful document you can have to address copyright issues in your CME unit. If you're in a university or hospital setting, your parent organization may already have some guidelines in place, or they will almost certainly have attorneys who can help you draft and review such a policy.

Your policy should include strict guidelines on the reproduction of copyrighted materials and state that any such use must have written permission from the copyright holder. Your policy should also clearly state that educational use is not necessarily fair use. Include the definition of fair use and some guidelines on how to interpret the four statutory factors. Each member of your staff, and all of your presenters, should be required to read a copy of the policy, sign it, and return a copy to you.

Your policy should state clearly that it is the responsibility of the individual presenters to obtain the necessary permissions to use the material in their presentations and whatever ancillary material

participants will receive (syllabus, CD-ROM, videotapes, etc.). The idea here is to shift the burden of making fair use determinations and obtaining permission to your faculty and away from your organization. This does not absolve you of the responsibility of making sure you are not infringing copyright, but puts the onus on the faculty to take the first steps. You may also want to ask your faculty to provide copies of permission letters that you can retain for your files.

Just because a given work does not have a copyright notice doesn't mean it isn't protected by copyright. Insist in your policy that material taken from other sources (whether you believe it is fair use or not) is always properly cited. A complete citation should include all the original publication information including title, author, publication, date and any original copyright notices.

While details of how to formally establish copyright is beyond the scope of this discussion, you may want to add a consistent policy on how your organization plans to reserve rights to material that you produce. Know, however, that even if you have permission to include a given work in your material, the copyright is still held by the original owner and it is not within your rights to use it in other situations or allow others to use it. Additional uses, including using the material in other media, requires separate and specific permission.

2. Change How You Use Copyrighted Material

Often a few simple changes to how you are using copyrighted material is all it takes to tip the balance in favor of a fair use finding. The easiest way is to try using less of the material or find an alternate source of the material that is in the public domain (not subject to copyright law). Ask yourself whether you are including an entire journal article when the citation is all that's really needed, or if the full results of a study should be included when you're only discussing one aspect.

You can also change the character of your use by making it more transformative. Add commentary to the data and only use as much material as is necessary to demonstrate or support your comments. You can also try summarizing data from multiple sources on one slide instead of directly reproducing the data summaries of various studies on separate slides.

You should also be aware that photographs, charts and graphs are usually protected by copyright, even if they simply appear to present factual data. The compilation of the data in the chart or the actual graphics used are potentially protected material and subject to the same laws.

3. When in Doubt, Seek Permission!

When in doubt about a given use, you can always seek permission from the copyright holder. Copyright holders are almost always willing to grant permission, usually for a very reasonable fee, if any. The *Journal of the American Medical Association* frequently charges \$50 or less to reprint articles or charts, and if the request comes from a physician, the fee is usually waived if they feel the use is reasonable. The *New England Journal of Medicine* also charges very nominal fees. Requests for permission to both journals for CME use are often processed within a week or two. Many journals' web sites, including those mentioned above, have detailed information on how to request permission.

Some Final Thoughts

With a clear policy on the use of copyrighted materials, you can ensure that everyone in your organization understands your position on the use of copyrighted materials, and is at least familiar with the relevant points of law. In addition, a clear policy will, by its existence, enlist each member of your organization to be on the lookout for potential copyright issues. When you feel uncomfortable about a given use of material, see if you can change the character of the use to move it further along the continuum towards a fair and reasonable use. Some positions are more defensible than others. If you're in doubt, take the time to ask for permission. Many times copyright holders will tell you if they believe a use is fair or they will simply grant permission without charging a fee. If a copyright holder feels that you have infringed their rights, you can always acknowledge that you may have overlooked the situation and offer to pay for permission now that it has been brought to your attention.

Reference

1. *Princeton University Press v Michigan Document Services*, 99 F3d 1381 (6th Cir 1996).