

Copyright Law Basics for the Nursing Professional



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Part 1: Using the Work of Others

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This article covers the basics of Copyright Law as applicable to the use of protected resources and the sharing of information by nurse professionals. It explores frequently cited justifications for copyright violation, including the doctrine of Fair Use and the Technology and Copyright Harmonization Act. It also discusses why those justifications may or may not apply to the nurse professional who teaches in a clinical setting or at a conference. (See CE Video, Supplemental Digital Content 1, <http://links.lww.com/JNPD/A2>)

INTRODUCTION

Of the four pillars of Intellectual Property Law (copyright, trademark, patent, and trade secret), copyright might be considered the most relevant for nursing professional development specialists (NPDSs). Whether teaching face-to-face or online or developing instructional materials, policies/procedures, or research proposals, NPDSs must be careful to respect copyright protection related to how and when to use others' works. The world of nurse educators has changed dramatically since the current version of the Copyright Act was enacted in 1976 (and amended in 2002 with the Technology and Copyright Harmonization [TEACH] Act). Nurses have seen a broadening of roles,

changes in the type and amount of media used, and sharing of information outside employing organizations, all of which can lead to frustration as rules may fail to keep pace with the professional environment.

Intellectual property is a complex issue. Although certain situations are relatively clear-cut, the answer to other questions is a maddening "It depends." Some nurse educators have not considered how they can—or cannot—legally use works created by others or even by themselves in a previous job position. Meanwhile, other nurse educators who do consider the legality of use have inadvertently based their actions on misinformation. Either way, ignorance regarding intellectual property and copyright is not a justification for misusing material and can put one at risk for litigation. This article will address how today's nurses can use and share information and enhance their educational offerings without infringing upon copyright protections.

The basic information and scenarios contained in this article are not meant to substitute for legal advice. The authors recommend that NPD educators contact a qualified attorney or knowledgeable other for specific questions related to a particular situation.

COPYRIGHT LAW BASICS

U.S. Copyright Act of 1976

Mikos-Schild (2010) noted, "Knowing what rights are protected, who owns those rights, and how rights can be obtained for copyrighted items will protect educators from being accused of infringing on owners' rights" (p. 188). The Copyright Act of 1976 states that copyright protection is granted to "original works of authorship fixed in any tangible medium of expression" (17 U.S.C. § 102). The key concepts are "protection," "original with a modicum of creativity," "authorship," and "fixed in a tangible form." Five fundamental rights—sometimes called the "bundle of rights"—are given to protect owners of works to decide who can reproduce, adapt (make a derivative work), publish (distribute), perform, and publically display their works, either with or without the owner's permission (17 U.S.C. § 106). The threshold for originality is quite low, as most works possess some creativity "no matter how crude, humble or obvious" it might be (*Feist Publications*,

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Inc. v. Rural Telephone Service Co., 1991, p. 345). Authorship refers to who created the work (although authorship is not the same as ownership, as will be discussed later). Tangible forms commonly used by NPDs are graphics, photos, journal articles, texts, learning modules, sound recordings, and audiovisuals (e.g., CD, DVD, VHS, PowerPoint, videos from YouTube or other Web sites).

Copyright protection automatically begins when the work is created in a fixed, tangible form. Since 1989, a copyright symbol is not required on works, so it would be prudent to assume that anything the educator did not create personally is in some way copyright protected until determined otherwise. Using protected works without express permission may be considered infringement of the owner's copyright. Works that are not copyright protected include ideas that are not in a fixed, tangible form; facts; and works that are in the public domain, where (a) the copyright has expired, (b) the work was never subject to copyright protection, or (c) the material was produced by the U.S. Federal Government.

Although ideas alone cannot be copyright protected, from an ethical perspective, acknowledgement should be given for ideas that are not one's own because intentional or unintentional failure to give credit is considered plagiarism (Bruce, 2013, p. 630). Similar to copyright, plagiarism is not always clear-cut. Jameson (2011) argues that "plagiarism is relative, not absolute, because it depends on context, audience expectations, and...genre" (p. 210). The authors encourage visiting copyright.gov or reading reliable sources such as Jameson or Dickens, Gruskin, and Tarantola (2011) for a more in-depth discussion on defining and addressing plagiarism.

The Doctrine of Fair Use

As codified in Section 107 of the Copyright Act of 1976, the doctrine of fair use is a guideline for exceptions to the owner's exclusive use of copyrighted materials; a court or jury would first need to find a case of infringement, and

then a defendant can claim fair use as an excuse to avoid liability. Courts can consider four factors when determining whether a defendant's case falls under fair use: (a) purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of portion used relative to the work as a whole, and (d) the effect of the use on the value of the work (see Table 1). The doctrine of fair use is not a substitute for purchasing a work, especially if the work is used in a manner such that it would significantly decrease the potential market or financial gain for the original (*Campbell v. Acuff-Rose Music, Inc.*, 1994). Fair use may be used as a guideline for a legal defense against copyright infringement; however, because the doctrine does not provide concrete rules, it can be interpreted in multiple ways. This flexibility and the resulting range of interpretations may be confusing for NPD specialists because the definition of fair use is decided in court on a case-by-case basis (United States Copyright Office, 2009, p. 4). An easy-to-understand discussion of fair use and ways to protect oneself also may be found in Hough and Priddy (2012).

Interpretation of Fair Use: Guidelines

According to Stim (2013):

Publishers and the academic community have established a set of educational fair use guidelines [different than laws] to provide "greater certainty and protection" for teachers. While the guidelines are not part of the federal Copyright Act, they are recognized by courts and the Copyright Office as minimum standards for fair use in education. (p. 250)

Although there are multiple circulars available from the U.S. Copyright Office attempting to clarify various aspects of Copyright Law and its exceptions, of particular interest to this discussion is Circular 21 (<http://www.copyright.gov/circs/circ21.pdf>). Stim describes the guidelines as similar to a treaty, where the copyright owners have a tacit agreement not to sue academics for use of their materials in educational settings as long as they are within certain boundaries. On Page 254, Stim

TABLE 1 Four Standards in Determining Fair Use

Standard	Less Likely to be Fair Use	More Likely to be Fair Use
Purpose and character of the use	For profit, commercial advantage, or private financial gain	Nonprofit education or as part of a scholarly activity
Nature of the work being used	Very creative or artistic	Fact-based or generic information, review, or criticism
Amount of work (proportion) and importance (substantiality) in relation to the work as a whole	"Heart" of the work, large portions, or the work as a whole	Small section
Effect of the use on potential income related to the work	Substitute for purchasing the work, repeated or long-term use, making material widely available (e.g., on a Web site)	Few copies, only used spontaneously after discovery; not a substitute for purchasing the work

Note. The four standards were obtained from Section 107 of Copyright Law of the United States of America (retrieved from copyright.gov) and Circular 21 (U.S. Copyright Office, 2009, p. 4); examples were based on Hough and Priddy (2012) and Lyons (2010).

lists a large number of examples of educational institutions, which do include hospitals; however, looking for a blanket ruling on whether hospitals are considered to be educational institutions might be difficult and depend on the hospital's charter. For instance, some hospitals are clearly for-profit and would probably not fit the doctrine of fair use or the teacher's exception. A university hospital that operates strictly on a nonprofit basis could potentially fit, to the extent that the teaching activities were not significantly subverting the income stream of the copyright holder.

Mikos-Schild (2010) stated:

When an educator uses copyrighted work for teaching, research, or scholarship, the educator has protection under Section 107 of the copyright law. Section 107 specifically allows for making copies for classroom use. Classroom use may be interpreted to include in-service education classes and other educational presentations. (p. 187)

However, Mikos-Schild's interpretation can be challenged. Likely, protection under the doctrine of fair use could only be claimed if, in addition to being used in a classroom, (a) the work was used spontaneously and (b) there was insufficient time available for the educator to make a good faith effort to obtain the copyrighted works via the appropriate channels. It does not protect one from making copies of the same article time after time.

The TEACH Act

Although the nurse authors have heard multiple anecdotes indicating that the "privileges" offered by the TEACH Act have been used as guidelines by NPDSs in healthcare facilities and other nonacademic sites, educators must be aware that it is relevant only in very specific situations. The TEACH Act of 2002 (17 U.S.C. § 110(2)) allows additional exemptions to copyright infringement but is intended to apply only to faculty in academic institutions for technology and education. Educators and institutions invoking the TEACH Act must meet specific requirements, including type of institution, accreditation, type of class session, and time frame, among others. Nurses moving from an academic setting to a business or clinical setting—such as a hospital, hospice, or long-term care facility—may not be aware of the copyright restrictions imposed by their new environments.

In addition, the TEACH Act does not supersede fair use and copyright, so it does not excuse anyone from making a good faith effort to obtain permission for use from the owner of the work. Excellent basic and detailed checklists of those requirements and a discussion of responsibilities may be viewed on the North Carolina State University (n.d.a) TEACH Act Toolkit (www.provost.ncsu.edu/copyright).

GETTING PERMISSION

When in doubt, educators should consider a work to be protected. So how does the NPDS get permission to use a work?

A qualified intellectual property attorney is the best resource to find answers for specific copyright questions. In addition, the U.S. Copyright Office records or for-pay online sources (e.g., Thomson CompuMark, Corsearch by Wolters-Kluwer, Blumberg Excelsior) can be searched to determine if a copyright registration had been filed for a specific work. An excellent user-friendly reference that should be in every NPDS library is *Getting Permission: How to License & Clear Copyrighted Materials Online & Off* (5th ed.) by attorney Richard Stim (2013). In addition to overviews of obtaining permissions, academic and educational consideration, public domain, licenses and releases, fair use, and works-made-for-hire, the book contains chapters devoted to getting permission to use text, photographs, artwork (including comics, cartoons, clip art), music, and Web sites plus free updates and a blog. Stim's five-step permissions process is (a) determine if permission is needed, (b) identify the owner, (c) identify the rights needed, (d) contact the owner and negotiate whether payment is required, and (e) get your permission in writing (p. 11). The publisher usually holds the copyright to journal articles, and often, there is a contact for reprints listed near the front of the journal.

Online companies (e.g., Copyright Clearance Center, iCopyright) may be able to assist in obtaining permission to use copyrighted materials. The Copyright Clearance Center (n.d.; www.copyright.com) provides both copyright education and services with options such as "pay for use" and "annual license." At the time of publication, permission types for articles included use in electronic course materials, use in print course materials, deliver via interlibrary loan, photocopy for general business or academic use, share content electronically, and republish or display content. There are different availability options within each permission type, depending on the requestor's intended use.

Copying media can be a clear violation of the Copyright Act, but other actions can also violate owners' copyright. One must remember that purchasing a movie, CD, or video does not give permission to show it (or even a clip of it) in public—that could be considered a "public performance" and, without explicit permission, is also prohibited under the Copyright Act. In her book, *Movie Clips That Teach and Train*, Pluth (2011) emphasizes that, unless one is merely going to describe a scene in a movie, it is necessary to obtain permission to show the movie, and in that case, the legal (and ethical) route is to purchase a license. She gives detailed instructions on how to contact the Motion Picture Licensing Corporation (info@mplc.com).

Licenses may also be obtained for videos that are not movies. The excellent gorilla/basketball video from Viscog Productions, Inc. (2003) is used to show "unexpected limits on the ability to perceive the world around us" when team

members focus on discrete tasks, to the extent that many people do not recall a gorilla walking across the screen behind a basketball game. This video is licensed with a collection of other studies of visual awareness by Viscog Productions, Inc. (www.viscog.com). There are explicit conditions under which these videos may be viewed especially that the license is for an individual, is used only for in-person presentations, and cannot be shared or downloaded. Detailed answers to common questions about permitted uses are also available via links on the Viscog site.

SPECIAL APPLICATIONS: USING OTHERS' WORK

What steps should an NPDS take to protect and use others' protected, copyrightable material? In the following scenarios, it will be assumed that the questions come from an NPDS or educator and that the work meets all of the criteria to be considered copyrightable under the Copyright Act.

Scenario 1: Making Copies of Articles

Q: Can I make copies of a great article for an inservice or class? May I post one copy of an article on my unit's bulletin board?

A: Generally, unless you have written permission from the owner, you should not make copies of an article to hand out in a class. However, making one copy of an article that includes its copyright notice for a clinical bulletin board is usually considered fair use, as long as the bulletin board is not being used to avoid purchasing the original article.

Q: We have a clinical Journal Club and want participants to review the article before we meet. Can we send out the articles in advance? Is it any different if the Journal Club is online?

A: As mentioned in this article, copying is only one of the multiple rights covered by the Copyright Act (17 U.S.C. § 106). Rather than providing multiple copies (that would be considered "distribution of a copyrighted work"), many librarians will provide one copy and customarily include the copyright notice (despite not being required by the Copyright Act) or send a link to each interested party. Electronic journal clubs have presented an additional concern. A general guideline is, if a link to the article is posted on an internal (intranet) site that is limited to employees who have access to a valid subscription, copyright has not been violated. Because each employee could get it from the library, the educator is, in essence, providing only a shortcut to the valid subscription. Some Journal Clubs post the actual articles but limit the access to each article to 30 days (although length of time is rarely relevant when determining violation of owners' copyright). However, if anyone who is not a member of the organization that pays

for the journal subscription can access the site (Internet) or the article, it may be considered "distribution" and violation of copyright. A librarian is usually a good resource on what can be photocopied or shared.

Scenario 2: Incorporating Someone's Work Into a Presentation or Handout

Q: Sometimes, it seems that a cartoon or licensed character would be a perfect addition to a slide or handout. Do I need to get permission?

A: Absolutely. The creator and/or the company that owns the copyright have an interest in how their works are used, so these works are strongly protected (*Nichols v. Universal Pictures Corp.*, 1930) and using them without permission could open the NPDS to a trademark infringement claim. Common examples include Far Side cartoons, characters from Walt Disney Studios movies, and characters from Dr. Seuss books. Unless the educator has a license to use (e.g., provided with some software), he or she should not use others' works without written permission. Sharing a handout or a PowerPoint that includes others' works may be considered "distribution" of their work.

Q: Are songs or videos any different?

A: When songs and videos are original, creative, and fixed in a tangible form of expression, they are subject to copyright protection. It may be difficult to establish ownership of some online content (e.g., YouTube). Just because it is posted and downloadable (or even purchased) does not mean that one has the copyright owner's permission to "reproduce" or "perform" it (17 U.S.C. § 106). Under the doctrine of fair use, the performance of videos or songs at meetings, conferences, or classes would likely require permission from the copyright owner.

Q: Is it violating copyright if I take photos of a poster at a conference or of the slides that accompany a face-to-face presentation?

A: To the extent that the slides contain copyrightable subject matter, taking a picture of the slides would be "copy" under the Copyright Act and, therefore, prohibited. To the extent that the material in the slides is not subject to copyright protection and is also viewable from a public space, when someone takes a photograph of the slide, he or she has created a new copyright (the picture of the slide). The copyright to the picture itself would be owned by the picture taker, not the slide producer; this is why cameras are sometimes prohibited from conferences and exhibitions. Best practice would be to explicitly state whether pictures are allowed of presenters' posters or lectures before the exhibition begins.

Q: I saw a great presentation at a conference that I would like to share it at work. I requested a copy of the presenter's PowerPoint, and she emailed it to me. What do I need to know?

A: Get written permission from the owner. The owner may be the author/presenter that you saw, but if the work was done as a part of the author's employment (work made for hire), the copyright may actually belong to his or her employer. Be specific about what you are requesting: to reproduce, distribute, and/or modify the presentation? Are you seeking exclusive permission (only you can use the work as agreed upon and no one else) or nonexclusive? How long may you use it (one-time use, 1 year, forever)?

PENALTIES FOR USING ANOTHER'S WORK WITHOUT PERMISSION

The penalties for copyright violation can vary widely from country to country and incident to incident, ranging from fines to jail time for trafficking large amounts of material (U.S. Copyright Office, 2009, p. 21). Brous (2013) noted that compensation might include "lost profits from the infringing activity or statutory damages ranging from \$250 to \$150,000 for willful infringement" (Copyright Act § 504), plus attorney's fees for each infringing copy.

CONCLUSION: SO WHAT CAN NPDS DO TO PROTECT THEIR AND OTHERS' INTELLECTUAL PROPERTY?

One of the best examples the authors found of clearly and succinctly describing the responsibility of professionals regarding intellectual property was from North Carolina University, where the Web site states:

Every course taught at NC State, without exception, uses copyrighted material, whether the material belongs to the faculty member, NC State, or most significantly, to an outside third party...it is imperative that every member of NC State involved in teaching, research, and extension activities, possesses a functional knowledge of copyright law or, at the least, be able to recognize when there may be a problem.... Ignoring the law and relying on the false sense of security provided by decades of teaching in the more tolerant and relatively anonymous cocoon of traditional classrooms by supporting infringing activities, (even unintentionally) is, for lack of a better term, indefensible North Carolina State University (n.d.b). (www.provost.ncsu.edu/copyright/use, p. 3)

The authors suggest that the same is true for every NPDS. Ignorance of the laws and copyright guidelines is not a justification for using others' work without permission. Here are a few steps to get the NPDS started:

- On their electronic document "Websites: Five ways to stay out of trouble," Standford.edu recommends "Assume it's protected" and "When in doubt, seek permission." That is good advice when using any work that is not one's own. Another excellent reference is *Getting Permission: How to License & Clear*

Copyrighted Materials Online & Off (5th ed.) by Richard Stim.

- Read and refer frequently to the intellectual property laws specific to your country (for U.S. citizens, www.copyright.gov/, Title17). NPDSs are not expected to be attorneys, but a basic understanding of intellectual property is necessary.
- Ask employer(s) for their specific guidelines on the use of intellectual property. If an employer does not have specific guidelines, review guidelines from organizations similar to yours (but be aware of the genre). If the NPDS is not working in an academic setting, the TEACH Act will generally not apply.
- Understand that the doctrine of fair use is deliberately vague and specific examples cited as "acceptable fair use" (e.g., 3 minutes of a movie or 10% of a story) are based on interpretations of the law, resulting in a spectrum of risk for litigation. Although some examples may be considered "general understanding" or "community standard," actual use of other's works may be subject to a different interpretation by a court of law.
- Librarians are good resources for general copyright information, but ask an intellectual property attorney or representative of legal counsel for your organization about your specific questions.

Although copyright and fair use terminology may be a bit daunting, knowing the basics and using available resources can help NPDSs safely navigate the issues of permission and propriety when using the works of others.

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