

## What's Right and What's Copyright in Secular Law

Understanding the principle of fair use and how it applies to multimedia

by Rabbi Yitzchak Baruch Fishel

Though there seems to be a consensus among educators that the use of contemporary media materials helps them to connect new ideas to their students' existing knowledge base, many are confused as to just how to do it. "Teaching is just better when we can pull from a lot of different sources,"<sup>1</sup> is how one interviewee put it. Yet the question remains as to just how to pull it off.

Teachers who would like to incorporate mass media and multimedia techniques into their teaching program often ask: "Can I screen a movie clip at a public event or do I first need to get permission?" or "Can I include a video of an eagle flying to help explain what the Mishna in *Avos* (5:21) means when it says *kal keneshet* (light as an eagle)?" Similarly, someone might ask if he can use pictures as a background images for a sign he is making for a shul lecture, given that the picture in question is not the chief design element. And the most common question of all: "Can students use copyrighted music as background music?"

Though this brief essay cannot pretend to be a comprehensive guidebook to the complexities of international copyright law, Torah Live does hope to present the reader with some idea of where to begin.

All too often, the accepted way of dealing with the whole problem is to turn a blind eye — better not know, better not ask.

There is one documented incident in which a group of students wanted to use a 15-second clip from a speech by President George W. Bush, Jr. When they turned to the media outlet for permission, they were told that they would have to pay \$500 for the use of the tiny clip. Their teachers made an effort to intercede, causing the network to reply that they could, just this once, use it for free. But it came with a warning "never to ask us again."<sup>2</sup>

On the other hand, many teachers have begun to rely on the principal of fair use when dealing with what are essentially classroom materials. Court analysis of fair use often centers on whether the application of the copyrighted material has been transformative, meaning that it has been employed for a use other than what was originally intended, i.e. educational rather than commercial.<sup>3</sup>

We can take it for granted that media messages are produced for particular purposes and therefore contain embedded values and points of view. Given the above, the audience uses individual skills, beliefs and experience to reconstruct a personal meaning from each message.<sup>4</sup> Thus taking material out of its original context such that it now has a comic, or critical effect is not stealing because it no longer functions as it did in the original.

Interestingly enough, for many centuries borrowing material from other artists was accepted practice in the plastic and performing arts. In painting, using a figure that someone else had developed was called a quotation, and musicians commonly developed entire compositions on melodies that someone else had invented. No one took offense, as this kind of reuse was even considered a form of homage. What's

more, it is even imbedded in the heart of modern copyright law as a way of furthering and progressing culture and knowledge.<sup>5</sup>

But now that originality has become the most important aspect of art, advertising and thinking, we have become frightened to use something that is already around. As a result, arbitrary rules of thumb have been introduced into the discussion: better to use three 10-second clips than one 30-second clip, or it's OK to use four sentences of print text, 60 seconds of video but no more than 10% of a film or a song.<sup>6</sup>

There is really no need for all of this. Fair use of copyrighted material is actually a way of extending the shelf life of intellectual property and the law actually tries to encourage it.

When dealing with what is considered fair, judges often consider:

- the nature of use
- nature of the work used
- extent of use
- economic factors

Yet since all of the above are open to interpretation, courts often fall back on two basic questions:

- Has the material been transformed by using it within a context different from that of the copyrighted original such that it does not simply copy the original for the exact same purpose that it was created?
- Was the amount and kind of material borrowed from the original appropriate?

Given that the answer to both questions is in the affirmative, any court is likely to consider this fair use.<sup>7</sup>

But surely the reader is looking for something far more concrete. As there is a tendency for the educational community to overstate the likelihood of being sued, everyone would like to know exactly what are the do's and do not's. Yet the contrary is also true — many feel that educators should be leaders in asserting their rights to further their students' knowledge by putting fair use into practice.<sup>8</sup>

As such a Code of Best Practices in Fair Use has been formed and endorsed by many U.S. educators. Based on five principles, the code identifies current practices to which the term fair use clearly applies. Note that these apply to all forms of media, in both institutional as well as non-institutional settings, and address the unlicensed fair use of copyrighted materials for educational purposes without relating to how those materials were obtained.

But most important, all of the principles are relative to the second question mentioned above: Did the student or teacher really take only what was necessary from the copyrighted material or are we still dealing with forms of outright plagiarism?<sup>9</sup>

- Principle No. 1 states that educators may use copyrighted materials to build critical thinking and communication skills. The limitation here is that the material must really be essential to the education purpose. This same rule of

thumb applies to the amount taken and does not exempt the teacher from proper annotation and accreditation of material used.

- Principle No. 2 allows teachers to include copyrighted material in lesson plans and the like, given the limitations stated above.
- Principle No. 3 introduces the possibility of sharing copyrighted material that has been incorporated into curriculum material, particularly informal sharing at educational conferences and profession development programs. This also applies to curriculum materials that have been developed commercially with publishers and nonprofit organizations. However, copyrighted images or texts may not be used to promote the above mentioned materials.
- Principle No. 4 addresses student use of images, sound, music and digital media to strengthen media skills. Because juxtaposition reshapes meaning, students may reuse parts of copyrighted materials and should be free to incorporate and modify existing media objects in classroom work. But they cannot use them when merely establishing a mood. Thus popular music cannot be exploited just for its appeal and popularity. Moreover, students should be encouraged to assess their own use and taught to give proper attribution to sources.
- Principle No. 5 correctly suggests that distribution is an important part of media creation and that educators much teach their students how to make decisions as to how what they have made will reach their audience. Though in most cases student work will not reach the general marketplace, underscoring the guiding principle of transformation —having reused the media content in a way different than that for which it was originally intended — must be part of the teaching process.

In conclusion, copyright piracy concerns have to date unnecessarily limited educators' use of mass media materials. A first step out of the limitations of unwarranted fear would be for teachers to reclaim the right of fair use and communicate what they have learned to others. Becoming aware that existing copyright law entitles the correct use of existing materials will open the classroom to new images, sounds and visual effects, thereby allowing us to perfect our students' understanding of the matter at hand.

Be assured, fair use is not likely to get you sued. There are no documented instances of lawsuits brought against educators for employing media in the educational process. Typically, if there is any kind of issue, a copyright owner will opt for the inexpensive option of sending a "cease and desist" letter, but that too can be misleading. An aggressive tone does not mean that the sender has legitimate claims nor that he will ever take legal action.<sup>10</sup>

<sup>1</sup> The Cost of Copyright Confusion for Media Literacy, American University Center for Social Media, Sept. 2007, p. 4.

<sup>2</sup> *ibid*, p. 7.

<sup>3</sup> *ibid*, p. 5.

<sup>4</sup> Code of Best Practices in Fair Use for Media Literacy Education, p.3.

<sup>5</sup> *ibid*, p. 5.

<sup>6</sup> *op. cit.*, p. 8.

<sup>7</sup> *ibid*, p. 6.

<sup>8</sup> *ibid*, p. 8.

<sup>9</sup> *ibid*, p. 10.

<sup>10</sup> *ibid*, p. 17.