

# THE POWER OF FAIR USE FOR MEDIA LITERACY EDUCATION

**A** little animated bird lands on the windowsill of a big building in urban America, where it begins to sing: “Copyright’s for the people | Copyright is to promote creativity | Balancing rights of owners and users of intellectual property.” But a character named Big C, high up in one of the skyscrapers, argues with the little bird, singing, “I’m an owner, not a donor, copyright’s for me | Let me tell you how it’s gonna be | I’m the one who knows | Look at all the things I own | All the copyrights I hold | All under my control | Copyright’s for the folks who own.”

So begins the “Schoolhouse Rock”-style music video that we created to help learners understand the purpose of copyright in the context of twenty-first century culture, where “Users have rights too | To critique, comment, and review | First Amendment gives the right to use | Copyrighted works made by who-ever.” As the animated bird inspires various musicians, video producers, and other artists, we hear from creative people on the streets, one of whom points out, “I’m a user, and I’m making my own | Inspired by the things I hear and see | Face it Big C | Your fans are producers | Your artists are users | So balance is key.”

Developed by the Media Education Lab at Temple University as a resource for teaching about copyright and fair use policies in the context of media literacy education, the music video was written and performed by PhD student Michael Robb Grieco, with animation by Geoff Beatty of Germantown Studios. It is one of the many engaging curriculum resources created to help educators and learners actively participate in contemporary discourses about copyright law and the fair use doctrine.

It is ironic that at a time when online digital technologies are enabling educators to create and share an ever-widening array of texts, sounds, still and moving images, music, and graphic art, we are seeing a dramatic increase in the climate of fear among educators concerning the use of copyrighted materials as tools for teaching. Sadly, much of the language about “sharing” and “stealing” found in mainstream media has left educators, artists, youth media specialists (and other non-legal professionals) confused and fearful, as we found when we conducted research on educators’ conceptualizations of copyright and fair use, in a report entitled, “The Cost of Copyright Confusion for Media Literacy.” And because fear tends to prevent innovation, those of us who promote the

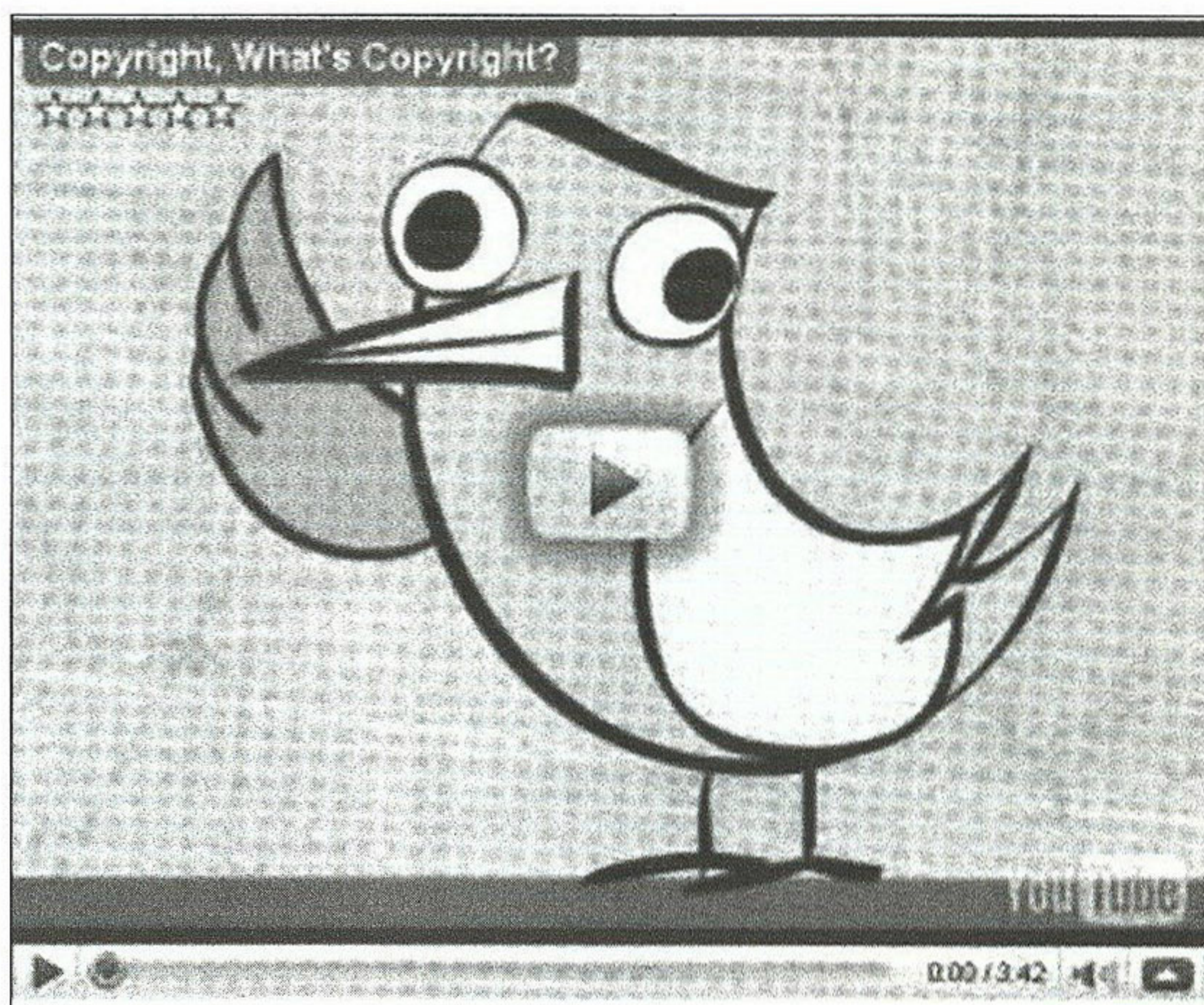
use of digital media as tools for teaching need to take notice of these developments.

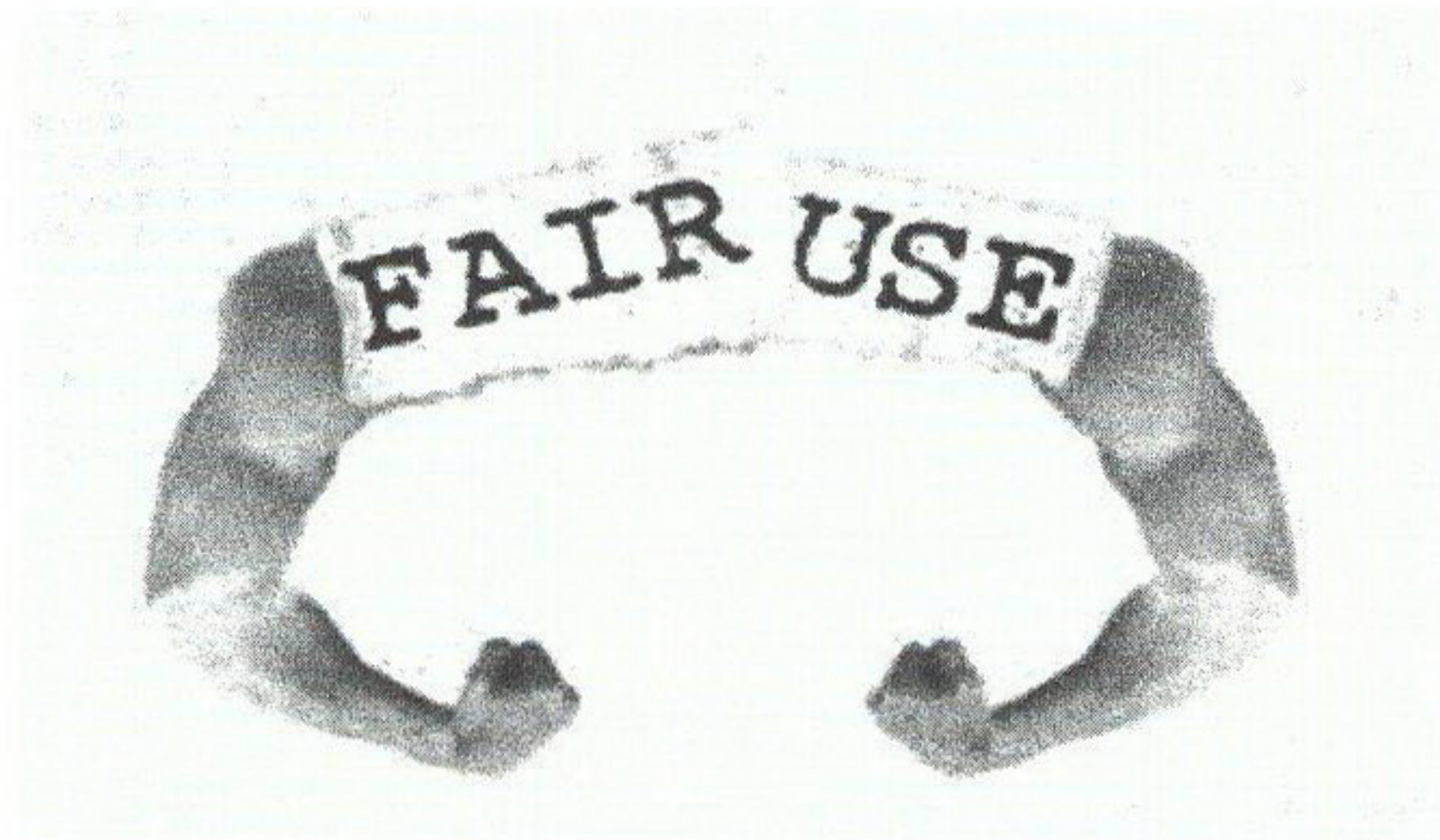
Like many media literacy educators, I use copyrighted materials under the doctrine of fair use, Section 107 of the Copyright Law of 1976. The doctrine permits consumers to use copyrighted materials without payment or permission under some circumstances, depending on the specific context and situation of the use. It is impossible for media literacy educators to do their work (building learners’ critical thinking, creativity, collaborative, and communication skills) *without* making use of copyrighted materials. In order to interrogate the economic, political, and ideological dimensions of messages and message systems, we especially need to use copyrighted materials from mass media and popular cultural images owned by Viacom, Disney, News Corporation, and others.

With the rise of remix culture, learners want to be able to use bits of copyrighted materials when creating their own creative multimedia productions. They want to critique or comment on excerpted media texts to illustrate their ideas; memorialize their encounters with media texts’ or use clips as a stimulus for discussions about how technology and media affect cultural participation, identity development, social power, and agency. Educators want to collect, compile, use, and save media texts that work well for teaching. We want to create curriculum materials that employ excerpts from copyrighted works, and most importantly, distribute samples of student work to inspire and motivate other educators to explore the potential of media production and media analyses inside (and outside) the classroom. These practices are crucial for media literacy. But do they qualify as fair use under the law?

**Right**

“Schoolhouse Rock”-style music videos explore the real purpose of copyright—to promote creativity and innovation.





## INTRODUCING THE CODE OF BEST PRACTICES

Myself and my colleagues, Peter Jaszi of Washington College of Law at American University and Patricia Aufderheide of the Center for Social Media at American University, worked with media literacy educators following the “best practices” model developed at American University through groundbreaking work with documentary filmmakers who also depend on the doctrine of fair use. With support from the John D. and Catherine T. MacArthur Foundation, we brought together groups of educators (from higher education, K-12 settings, and youth media organizations) in ten cities across the United States including Chicago, Austin, Philadelphia, Boston, and New York. After introducing educators to the basic concepts of copyright law, we offered them various hypothetical scenarios for discussion, inviting them to determine when educators’ or students’ use of copyrighted materials was “fair” and “unfair,” according to the fair use doctrine.

The consensus principles that emerged from these discussions are reflected in the *Code of Best Practices in Fair Use for Media Literacy Education*, which was rigorously reviewed by a team of legal experts and adopted by several national membership organizations, including the National Association for Media Literacy Education (NAMLE), the Action Coalition for Media Education (ACME), the Visual Communication Studies Division of the International Communication Association (ICA), the Media Education Foundation, and the Association of College and Research Libraries (ACRL). Significantly, the 60,000-member National Council of Teachers of English (NCTE) also adopted the *Code* as its official policy in November 2008, replacing an earlier policy from 1980.

The *Code* identifies five principles, each with limitations, representing the community’s current consensus about acceptable practices for the fair use of copyrighted materials. As stated in the *Code*, educators can, under some circumstances:

- Make copies of newspaper articles, TV shows, and other copyrighted works, and use them and keep them for educational use.
- Create curriculum materials and scholarship with copyrighted materials embedded.
- Share, sell, and distribute curriculum materials with copyrighted materials embedded.

Learners can, under some circumstances:

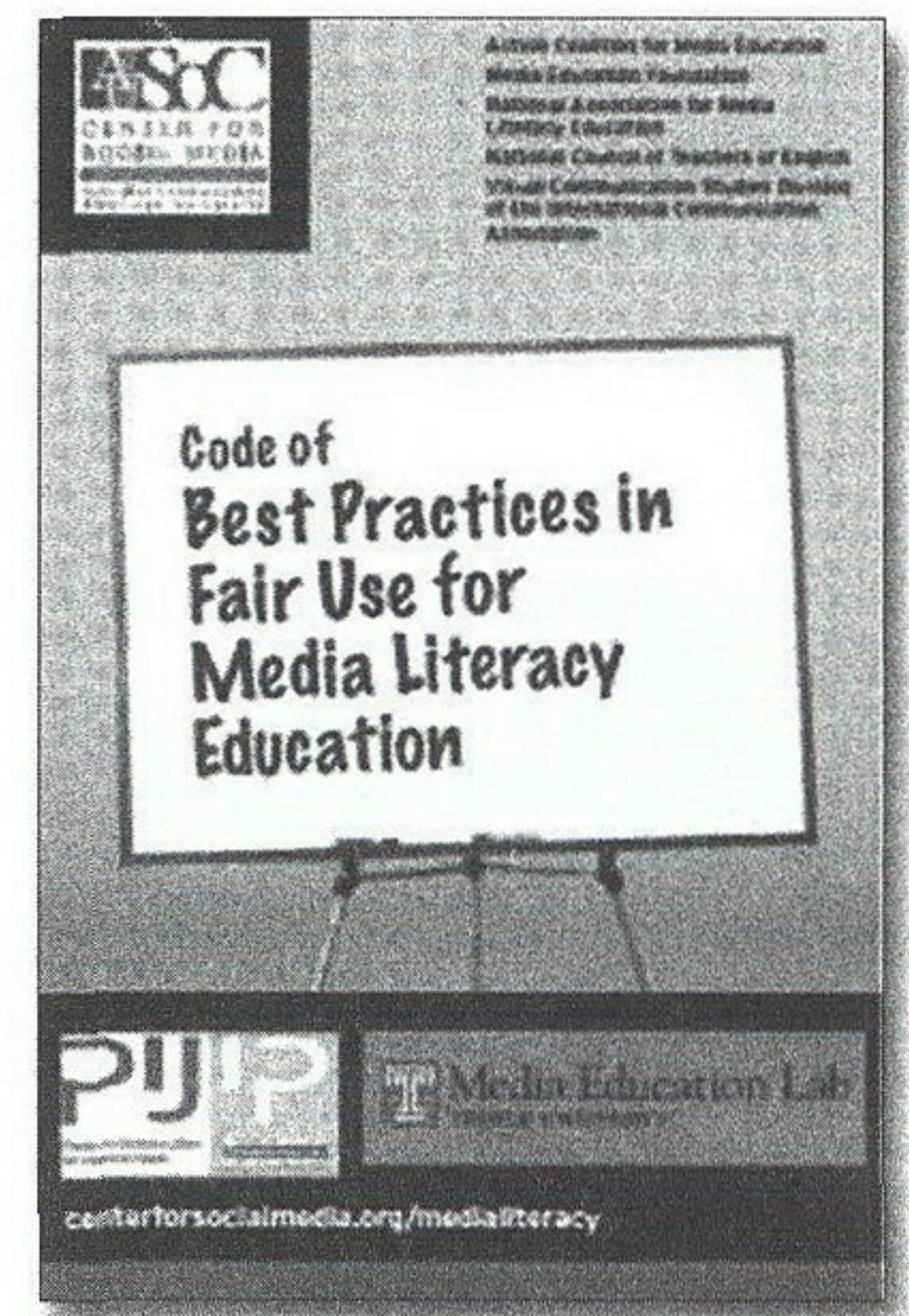
- Use copyrighted works in creating new material.
- Distribute their works digitally if they meet the transformativeness standard. When someone uses an appropriate amount of a copyrighted work and re-purposes or adds value, they are using the work transformatively.

To help learners and teachers understand and apply their legal rights under the fair use doctrine, we created two music videos. One video, *Users’ Rights, Section 107*, introduces the doctrine, explaining that “Context and situation | Determine how fair use applies.” Through this music video, learners use questions to determine whether a particular use of copyrighted materials is fair use (or not): “So, when you quote or use a copyrighted work | Just ask yourself, ‘Did I repurpose? Did I add value?’ | Ask myself, ‘Why did I use it?’ | Is it different from why it was created? | If it was, it’s probably fair use | Did I add value | To the original in terms of the cultural | Or the money market value? | If I did, then it is fair use.” The other video explains the purpose of copyright—to promote creativity and the spread of knowledge.

We also created three short video case studies profiling the work of educators who utilize copyrighted materials in innovative ways under the fair use doctrine, in college, high school, and elementary school settings. Finally, we created a sequence of lesson plans, including readings and activities suitable for high school, college, and graduate education, in collaboration with Sandra Braman, author of *Change of State: Information, Policy, and Power* (2009), a book that examines the theoretical, conceptual, and historical foundations of U.S. information policy. These resources help educators from a variety of contexts develop the confidence to create a robust learning environment for exploring the concepts of copyright and fair use.

## AN ANTI-CIRCUMVENTION EXEMPTION FOR TEACHERS AND STUDENTS

DMCA is the acronym of the Digital Millennium Copyright Act. This 1998 law makes it illegal to use software to “rip” or circumvent the encryption codes on commercially produced DVDs. Because media literacy teachers and learners depend on film DVDs as a source of relevant quotations for use in both classrooms and student media production assignments, this law has had a negative impact on media literacy education and discouraged educators from using film as a teaching resource.



Although a very small number of educators still use VHS tapes and some use multiple DVDs when showing clips in class, both practices are inefficient and ineffective. VHS tapes of movies off-air are of poor visual and sound quality, making it difficult to do the kind of close analysis required for media literacy education. DVD players are slow to load and as teachers have learned through trial and error, some DVDs automatically play trailers for other movies every time you play them. Some DVDs don't let you cue up, which means you have to go through all the chapters to find the scene you want to use.

For all these reasons, educators should be permitted to make digital copies of the excerpts they wish to use. For example, teachers who want to sharpen their students' compare and contrast skills may want to analyze two different film adaptations of *Romeo and Juliet*. To conduct a historical analysis of media professionalism, they may want to show and discuss a series of clips representing newspaper editors from the films *All the President's Men* (1976), directed by Alan J. Pakula; *Absence of Malice* (1981), directed by Sydney Pollack; and *The Paper* (1994), directed by Ron Howard. They may want to show clips in a conference presentation to illustrate certain nuances of pedagogy and instruction concerning the use of film in education. However, DVD encryption codes effectively prevent media literacy teachers and learners from gaining access to clips for various educational purposes. Under the current law, these examples of "ripping" DVDs are illegal.

Every three years, the U.S. Copyright Office considers exemptions to the law for groups or individuals who can prove the law adversely affects their ability to make lawful, non-infringing uses of copyrighted works. These exemptions last for three years. In 2006, Professor Peter Decherney of the University of Pennsylvania and his colleagues successfully argued before the U.S. Copyright Office that film professors should be entitled to an anti-circumvention exemption.

With the help of student attorneys at American University Washington College of Law, I have submitted a petition to the U.S. Copyright Office requesting an exemption for educators (from any field or discipline, at any level, including those working in nonprofit organizations that offer youth media programs) for a similar exemption. This petition also requests an exemption for learners so they can use DVD clips for specific educational assignments, including student media productions, because media production is such an essential component of media literacy education.

Right now, digital rights management (DRM) restrictions make it impossible for educators to make a "transformative" use of copyrighted material. Transformative work uses copyrighted materials, but adds something new, with a further purpose, or a different character, altering the original by adding new expressions, meanings, or messages. Transformative uses are considered legal under the doctrine of fair use and serve the fundamental purpose of copyright, which is to promote creativity and the spread of knowledge and innovation.

Media literacy educators' appropriation of copyrighted materials is inherently transformative, because our uses of copyrighted content are not for the same intrinsic purpose as that of the copyright owner. For example, there is the scenario involving an educator who uses the clips from *All the President's Men*, *Absence of Malice*, and *The Paper*. The

### **How do educators or learners claim fair use?**

You use copyrighted works after making an assessment of the particular context and situation of the specific use of the work. There is nothing formal or official to "do" to claim fair use. You do not have to ask permission or alert the copyright holder when considering the use of materials that are protected by fair use. But, if you choose, you may inquire about permissions and still claim fair use if your request is refused or ignored. In some cases, courts have found that asking permission and then being rejected has actually enhanced fair use claims.

### **Why can't students and teachers just use materials that are under a Creative Commons license?**

Teachers and learners in many disciplines can and do use materials which are available under Creative Commons (CC) licenses. But these licenses do not substitute for, or replace, the need for the doctrine of fair use. Creative Commons is an expanded conceptualization of owners' rights, giving owners more flexibility in allowing users access. But fair use is a user right. Fair use gives us the ability to use excerpts from any copyrighted work under some conditions. It enables us to use excerpts from dominant cultural texts, protected by copyright, and produced by media conglomerates such as Disney, Viacom, and Time Warner.

In fact, fair use is the safety valve that prevents copyright law from being a form of private censorship. Without fair use, copyright law itself would probably be unconstitutional. The doctrine of fair use enables people to use all types of copyrighted materials without payment or permission when the private cost to the copyright holder is outweighed by the public benefit of the use.

### **RESOURCES FOR LEARNING MORE**

#### **Music Videos on Copyright and Fair Use**

<http://mediaeducationlab.com/news/music-videos-help-educators-and-students-conquer-copyright-confusion>

#### **Center for Social Media, American University**

<http://centerforsocialmedia.org>

#### **Media Education Lab, Temple University**

<http://mediaeducationlab.com>

#### **Lesson Plans for Teaching about Copyright and Fair Use**

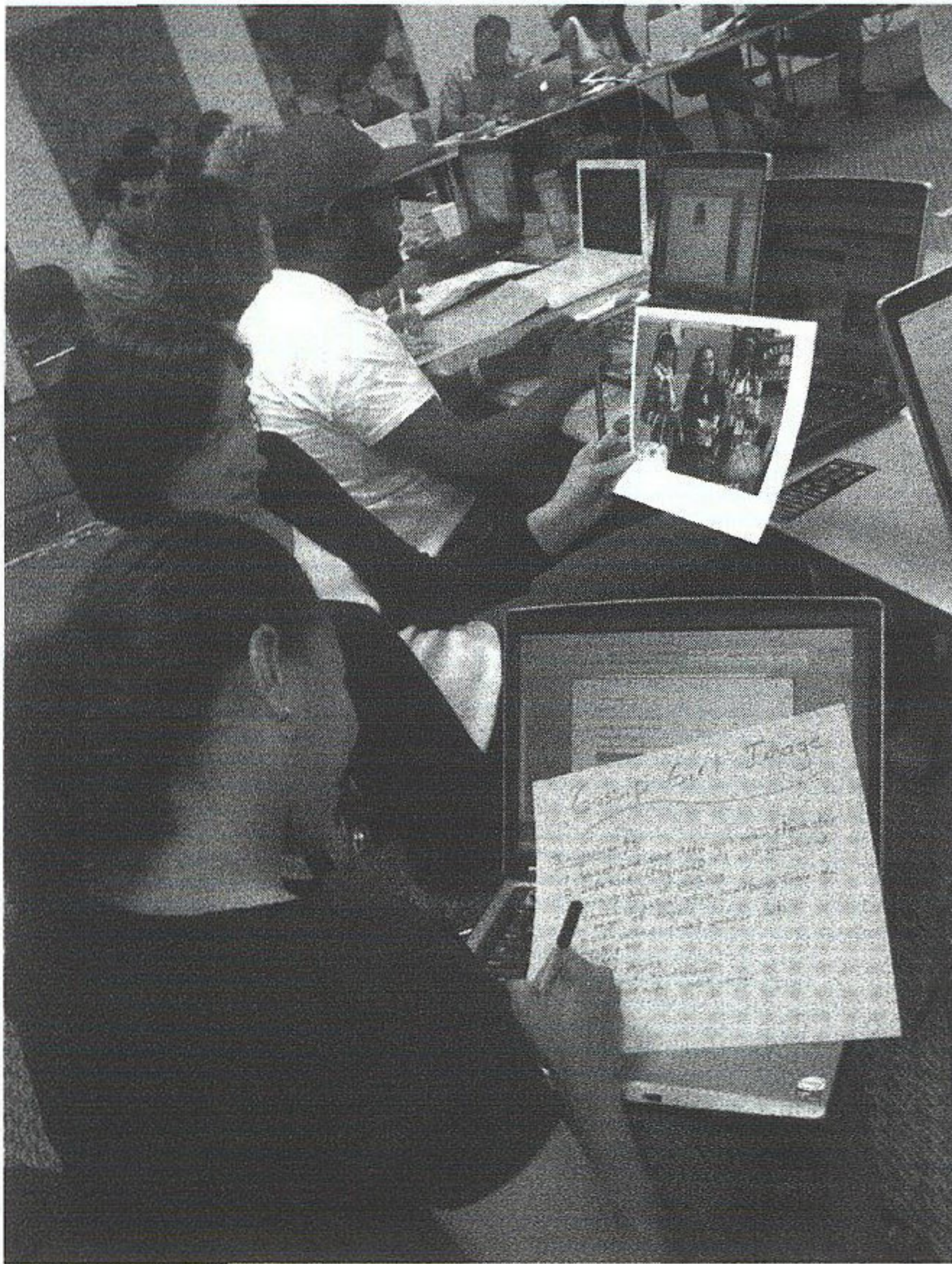
<http://mediaeducationlab.com/lesson-plans-teaching-about-copyright-and-fair-use-media-literacy-education>

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original purpose of these films was commercial entertainment, but the professor's purpose is educational. The clips are used to heighten student awareness of how media representations of the newspaper industry have changed over time.

In general, media literacy educators use copyrighted content to illustrate key concepts of media literacy; to deconstruct and critically analyze media messages; to recognize and examine specific production techniques employed in moving image media; to explore economic, political, or social issues or the cultural values depicted in the representations; or as part of the process of building skills and knowledge through the creation of student-produced digital works to demonstrate ideas, techniques, competencies, and skills.



## EXERCISING FAIR USE RIGHTS MAKES THEM STRONGER

In his 2006 work, “Fair Use and Social Practices,” Michael Madison rejects the idea that we should think of the fair use doctrine as merely a balancing act between the author and the user. In his view, the idea of balance has contributed to the perspective that fair use is a narrow, difficult-to-apply dimension of copyright law. Instead, he argues that we

can see the doctrine of fair use as an inherent part of copyright law—it enables society to benefit both from the copyright holder’s ability to exploit his or her work in the marketplace and from the user’s ability to use the copyrighted work without payment or permission under some circumstances.

The fair use doctrine has to be understood in the context of existing patterns and particular group practices of making creative and transformative use of copyrighted work. These patterns will vary for many reasons. Art historians will make use of copyrighted materials in a different way than documentary filmmakers, who, in turn, will use materials differently from those in education or the arts. Over time, these groups will use copyrighted works in multiple ways. For example, in 1912, educators used copyrighted materials differently than contemporary educators, who explore digital media, social networking, wikis, podcasts, and videogames to engage and motivate learners. We are beginning to see that the work of media literacy educators is gradually becoming synonymous with “literacy.” Thus, the use of copyrighted materials as a resource for the practices of reading, critical analysis, and composing with digital media will become the rule rather than the exception in education.

Educators, media artists, and media professionals should not have to live with the uncertainty and fear caused by copyright confusion. Technology makes new forms of sharing possible in ways that can deepen and enrich the process of teaching critical thinking and communication skills. Educators must learn about their rights under the law. Exercising our fair use rights makes them stronger.

**RENEE HOBBS** is a professor of Communication at Temple University’s School of Communications and Theater in Philadelphia, where she founded the Media Education Lab ([www.mediaeducationlab.com](http://www.mediaeducationlab.com)).

[Ed. note: see p. 63 in this issue for a review of the *Code of Best Practices in Fair Use for Media Literacy Education*.] 