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Does The Fair Use Doctrine Extend To Cover For-Profit Educational Uses Of Copyrighted Works?

[Kristie Prinz](#)**Q.**

I am a kindergarten teacher and I have been using environmental print in my classroom for quite some time to help children learn to read. I have collected hundreds of images from Google image in the way of restaurants, food items, movies, cartoon characters, movie characters, snacks, drinks, storybook titles, toys, games and many other types of picture print that is familiar to emergent readers.

I understand that the use of these images for my own classroom use is perfectly legal. However, I have put these icons into cd-roms to present to other teachers for use in curriculum development. If I were to make these CD images available to sell to these educators, so that they too could use them to teach reading, is this legal or would I have to contact each owner for permission to do so? I've discussed this issue with various people and am not getting a clear answer as to whether or not I can do this.

-- pam

A. The reason you have not received a clear answer on this issue is that your intended use of the photos does not fall neatly within the scope of the Fair Use Doctrine. As you know, copyright law protects original works of authorship fixed in a tangible form of expression. Copyrightable works include each of the following categories:

- a. Literary works;
- b. Musical works, including any accompanying words;
- c. Dramatic works, including any accompanying music;
- d. Pantomimes and choreographic works pictorial, graphic, and sculptural works;
- e. Motion pictures and other audiovisual works;
- f. Sound recordings; and
- g. Architectural works.

Section 106 of the 1976 Copyright Act grants to the owner of a copyright the exclusive right to do and to

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authorize others to do the following:

- a. To reproduce the work in copies or phonorecords;
- b. To prepare derivative works based upon the work;
- c. To distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- d. To perform the work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works;
- e. To display the work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work; and
- f. In the case of sound recordings, to perform the work publicly by means of a digital audio transmission.

Permission is typically granted by the copyright owner through the express terms of a copyright license agreement.

In the case of the images you are collecting, the images clearly constitute copyrightable works, requiring a copyright license agreement to reproduce or distribute them.

The exception which has enabled you to reproduce these images in the past without a license is the Fair Use Doctrine, which states as follows:

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;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

In the fact pattern you describe, you are now seeking to use the images obtained pursuant to a non-profit educational purpose in a for-profit educational purpose, which no longer falls neatly within the boundaries of the Fair Use Doctrine. Since your new intended use exceeds the scope of the Fair Use Doctrine, your safest course of action is to obtain copyright licenses from the copyright owners of the works. My advice is to consult with a [copyright lawyer](#) in your jurisdiction, particularly one with experience in negotiating and drafting copyright licenses, for advice in obtaining licenses on each of the specific images at issue. A copyright lawyer will be able to look out the portfolio of images and work with you on getting the appropriate documentation in place, so that you can proceed with marketing and selling your product.

-- Kristie Prinz

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