

Reading Aloud: Fair Use Enables Translating Classroom Practices to Online Learning

A guide to translating classroom practices and taking advantages of new technologies to improve teaching and learning, reach, and equity.

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Summary:

In recent days, as many teachers have faced an abrupt shift to online teaching, there have been questions about how copyright law applies to the translation of classroom-based practices of reading aloud to students to the digital environment. While many well-intentioned commentators have warned teachers against this practice, the fact is that copyright law -- specifically fair use -- permits many read-aloud activities online. As instructors and learners adapt to new educational environments, copyright concerns about reading aloud need not be among the challenges they face.

Reading aloud engages communities in critical thinking and community-building activities that are key to learning and development. It is exactly this special utility of reading aloud in education that is the key to understanding why fair use applies to it so broadly and robustly.

As we explain below, fair use is a limit on copyright law that allows you to use a copyrighted work for a new transformative purpose that doesn't harm the core market for the original. This means that:

- 1) When teachers translate classroom practices of reading aloud to online student facing tools, such as distribution through a school website, learning management system, or live webcast, fair use enables most of the same practices online that take place in person.
- 2) In a temporary emergency involving extensive school closures, teachers and schools should feel even greater confidence in reading aloud through digital platforms, including platforms without access controls, if necessary to reliably reach students.
- 3) Fair use also provides strong legal authority for practices focused on ensuring equity of access for students with disabilities, English language learners, and other vulnerable student populations. Consistent with the principles of universal design, the ability to engage with materials read aloud should be enabled as widely as possible.

Copyright Law and the Purposes of Reading Aloud

Reading aloud is an act of sharing, a form of interpretation, and an essential part of every individual's educational experience. From the open-air academies of ancient Athens to contemporary kindergarten and seminar rooms, instructors' selection and presentation of texts has been essential to building learning communities and transmitting knowledge within them. Also, in a myriad of settings, learners develop mastery through reading prose and poetry to their peers and teachers.

Before digital networks, copyright law (which technically regulates such class-based "public performances") was shaped to acknowledge this reality; Section 110 of the 1976 United States Copyright Act didn't so much create a broad exception for face-to-face instructional activities as it reflected the fact that reading aloud was a ubiquitous and unchallenged educational practice. And although the Congressional passage of the 2002 TEACH Act didn't effectively update Section 110 of the law to cover

online instruction practices in wide use today, it did make clear that educators also could look to the general “fair use” provisions in Section 107 when extending long-standing practices into new digital settings.

Thus, the question of whether fair use justifies reading aloud when education is carried out online – is not actually novel, except in its specificity. Nor should the affirmative conclusion we reach be surprising. In practice, fair use already has been the legal foundation for the explosion of virtual learning over the last two decades.

Fair use law in the United States is codified as a four factor test that takes into consideration the purpose of the use, the nature of the underlying work, the amount used, and the effect on the market for the original work. In practice, however, these four factors have effectively been condensed down into two questions: 1) are you doing something new or different (something transformative) with the material? and, 2) are you providing a substitute for the work as originally offered?

So when you are evaluating the question of whether it is lawful to read out loud, your two questions should be:

- 1) What is the purpose for which teachers and students are reading this material to each other?
- 2) What, if any, is the harm to the core market for the original book or resource?

When we ask about the purpose of a use, the inquiry focuses on whether it is transformative -- that is, whether it adds new expression or meaning, or serves a new audience. Thus, for example, reading a popular picture book aloud to a class of pre-readers can be a transformative activity if it supports a specific lesson or is designed to reinforce group identity. The point is not whether the book in question was intended to be read aloud, but whether this reading takes on new significance in the real or virtual class setting.

Harm to the market is often evaluated as whether or not the new use substitutes for the original. It is important to note that this is not an assessment of whether a rightsholder might lose real or hypothetical licensing fees if fair use applies. (If, for example, the book’s publisher were offering a special “read-aloud license” or its equivalent.) The courts have made clear that copyright owners don’t have a monopoly over transformative uses. Thus, for the picture book mentioned in the previous paragraph, the relevant question would be whether the reading would interfere materially with the sale of physical or electronic copies. The same logic applies to chapter books, even if “performed readings” of them are commercially available. In general, as Carrie Russell of the American Library Association has pointed out: “One is not displacing a sale or serving as a substitute to the work ... An audiobook is not the same as storytime.”

Another consideration that sometimes comes in fair use analysis generally is whether the amount of material quoted or incorporated is appropriate to the transformative purpose for which the use is made. Although this occasionally is important in assessing situations that involve reading aloud, the amount employed will more often be determined by the transformative purposes. As illustrated in the specific

practices below, there are many instances where using the full work is enabled by fair use, and, in fact, required by the educational mission of the practice.

Examining the Purposes of Reading Out Loud

If the question for evaluating fair use is whether the new use serves a transformative purpose, we have to examine the reasons that reading out loud is important for learning. There are some broad categories to help individuals think through the question of purpose. We start with those in which reading out loud is permitted by fair use in normal circumstances.

Reading out loud serves a number of established educational purposes, and provides benefits separate and distinct from the unmediated individual reading experience. It models reading skills for students, it equalizes the experience between different leveled readers, and it provides a shared jumping off point for further individual inquiry. It also allows teachers to provide inflection and emphasize context clues, and it creates the opportunities for teachers to create pauses for inquiry, explanation, and exploration of moments in the text. In addition, reading out loud also serves vital social and emotional purposes in education. It provides a shared experience, moments for self-reflection, and a cue for students to focus on learning. Complementary purposes are served by students reading out loud, modeling fluency for their peers, developing it for themselves, building their reading comprehension, or acquiring competency in foreign languages -- among others.

Reading through digital platforms extends these benefits to educational work done outside of the classroom and it connects the classroom to the work done outside it. Enabling students to use the pacing, clues, and voice of the teacher supports scaffolding independent reading and writing. It also connects the routine of working in the classroom to the routine of working outside of it, tying the practices and community from the school context to the home one.

Digital tools can enable reading out loud in inquiry-based and student-led learning - while a teacher could not previously read different texts out loud to individual students simultaneously, digital tools might allow the class to all read one section out loud, and then have students choose which section to explore next, or to hear a section "re-read" to improve their understanding. The same tools also enable the student reading activities described above. Students can also record themselves to practice reading, model fluency, represent the diversity of learners, and to explore the interpretation of text.

In addition to serving important functions in specific classroom meetings, real and virtual, emphasizing the pedagogically-driven reading by both instructors and learners represents a commitment to educational universal design. Reading aloud, through digital tools and in person, operates consistent with a vision of educational universal design. It puts students with different personal circumstances of family situation, level of preparation, language competency, disability, and health on a better footing to enjoy equitable access to educational opportunities. A balanced understanding of the fair use doctrine will help assure the benefits of reading aloud, wherever and however teachers and learners interact.

There are some virtual read-aloud activities that might not qualify as transformative uses, at least in non-emergency conditions. An obvious example would be reading extensively from commercial review (or testing) materials that are sold for classroom use. Broadly speaking, however, the fair use criteria are straightforward and commonsensical enough so that, at all times, educational authorities should feel comfortable -- in terms of risk assessment -- in leaving teaching staff to determine when and how to apply those principles.

Putting Theory Into Practice: Considerations for Educators

This approach to thinking about fair use and reading aloud has potentially broad application, both in normal times and ones of emergency. Transformative, non-substitutional use is a function not of which materials are used, but of why. It follows that:

- Both fiction and nonfiction texts (narrative and expository) are fair use-eligible, depending, as always, on the context. The same is true of texts chosen and read aloud by *students* to fulfill class assignments.
- If it is fair use to read material aloud, it is irrelevant whether the source text is found in a purchased copy, a library book, online, or elsewhere.
- Generally, where texts and illustrations (ranging from picture book art to graphs and tables in STEM materials) are integrated, the fair use rationale that justifies reading the text aloud also addresses displaying the illustrations.
- While reading aloud by teachers is a central activity, learning activities in which students participate in choosing and voicing texts in and around the virtual classroom also are covered by this fair use analysis.
- Textbooks and other commercial learning materials should be approached with more caution, but only because sometimes the intended new use may be difficult to distinguish from the one for which they were created.
- In an emergency, of course, where student access to commercial learning materials is curtailed, educators' freedom to read under fair use is enhanced.

Just as fair use decision-making is largely independent of the kind of content involved, it applies to the entire process of offering readings online (which, in copyright terms, may entail distribution, performance, and display). With that in mind:

- Where possible, making readings available on undifferentiated general-use platforms should be avoided, -- recognizing that this may be impossible under emergency conditions.
- In normal times, the "safest" choice may be a Learning Management System with technological features that limit access to enrolled students, this is not by any means a necessity.
- School-based or teacher-maintained websites are another option, as are dedicated channels on YouTube or a similar platform.
- Having made an appropriate choice, teachers and schools are not required to monitor the use of whatever content-delivery option they selected.

We note that in the current emergency, some publishers and authors have announced that they will permit certain read-aloud activities. However, these generous actions neither expand or restrict the

scope of fair use where permission has not been extended. Likewise, a rightsholder's assent or objection to a particular fair use determination isn't directly relevant. In other words, where fair use applies it is a legally sanctioned alternative to permissions and licensing. In general, publishers often claim the greatest possible scope for their copyrights, and fail to clearly acknowledge the limits that the law imposes on them.

Finally, although this guidance is directed at schools, it has obvious relevance to library programs as well. Reading aloud is as much a part of traditional library programming in the US as it is of school-based education. Like schools, libraries feature reading aloud partly because it builds all young listeners' levels of familiarity and comfort with texts. Likewise, both institutions share a mission -- making the reading experience available to individuals of all backgrounds, abilities, and levels of privilege -- that is served by robust programs of reading aloud in both ordinary times and periods of emergency.

Examining Specific Practices

We examine a few scenarios below to model the application of these broad principles to specific cases. It is important to note that these cases are not exhaustive, but rather meant to illustrate what types of teaching and learning practices fair use does and does not enable.

Educational Practices Enabled by Fair Use

In the following cases, after thinking through the educational purpose of the use, educational communities can rely on fair use to translate in-person teaching practices to the digital context:

- 1) A teacher reads an introductory segment of a nonfiction text aloud to provide students with background material, and offers pre-recorded segments for students to choose to listen to next so that students can select their own learning paths.
- 2) A teacher who regularly begins a class session with a chapter from a novel, to orient students in the physical classroom and to get them focused for learning, adapts that practice for virtual learning:
 - a) Translating this practice to online learning by posting one chapter per day on a learning management system as an introductory exercise; and
 - b) Streaming this on a commercial platform, such as Facebook or Instagram, to prompt students to get online and start focusing on classroom work.
- 3) In an online recording posted to a LMS, a teacher reads a few introductory paragraphs from a commercial textbook and goes on to highlight (and display on video) segments of the reading (that students are going to do independently). The teacher goes on to read the textbook's first discussion question and to provide additional context and directions for the students' work.
- 4) A teacher reads and shows two picture books to a class as part of a longer 30-minute lesson including discussion questions and context:
 - a) The teacher is doing this for English language learners, interspersing reading from the book with scaffolding questions in students' home language; and
 - b) The more the readings are contextualized, the less concern there need be about the platform on which they are offered.

- 5) Teachers and students collaborate to read texts in parallel, contributing to a distributed reading project that documents both shared experiences and diverse voices.
 - a) Recordings of classmates reading aloud document students' voices and experiences.
 - b) Reading projects coordinated between schools and geographic locations create connections and learning opportunities for students to experience

In all the cases just outlined, the transformative nature of the use is clear, and the risk of market substitution is low. In each case, the activity has a distinct educational purpose that is different from the general/original purpose of the text, the use is anchored in that educational mission, and it does not substitute for normal purchases of the work. These are non-controversial examples of fair use in action.

Practices Not Clearly Enabled

Analysis of the following illustrative cases suggests that they (and others like them) should be approached more cautiously, and with close attention to the specific context of use.

- 6) A teacher establishes a free personal YouTube channel on which they read and comment on a wide range of picture books and early chapter books; although it is made available to the teacher's classes, it also is promoted as a resource for other instructors across the country, and hosts ads for educational products and services.
- 7) A school system that is economizing on purchases of educational materials suggests that teachers consider reading review questions from commercial worksheets aloud rather than acquiring copies to distribute for student use.

In the absence of special circumstances, which might include emergency conditions that make more conventional approaches temporarily impossible, these activities are problematic -- raising real questions about how transformative the uses involved actually are and, by the same token, posing real risk of market substitution. In each case, moreover, the direct commercial motives behind the use (making money in the first, and saving it in the latter) may complicate fair use analysis.

Conclusion

Digital technologies create new opportunities to extend classroom teaching and learning practices, and to expand and improve the ways students can learn. When students and teachers are learning online, it may require new inquiry about how copyright translates to this digital context. Fair use provides a powerful tool to enable teaching and learning online. Going forward, it is critical to carry on these practices to ensure that all students have full access to education. While our global emergency compels immediate response to these changing circumstances, the existing lack of equitable access for all students, particularly students with disabilities and marginalized students, remains an ongoing call to action.